

State of Wisconsin



Labor and Industry Review Commission

Robert Gendrich
Applicant

City of West Allis
Employer

City of West Allis, C/O Cities and
Villages Mutual Ins. Co.
Insurer

Claim No.2024-000405

Worker's Compensation
Decision¹

Dated and Mailed:

SEP 18 2025

SEP 22 2025

gendrro_wsd.doc:103

Interlocutory Order

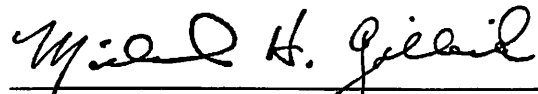
The commission **affirms** the decision of the administrative law judge. Accordingly, within 30 days of this date, City of West Allis and Cities & Villages Mutual Insurance Company shall pay all of the following:

- 1) To the applicant, Robert Gendrich, the sum of Twenty-seven thousand six hundred ninety-three dollars and seventy-seven cents (\$27,693.77) for accrued permanent partial disability;
- 2) To the applicant, Robert Gendrich, the sum of Five thousand seven hundred five dollars and zero cents (\$5,705.00) for reimbursement of out-of-pocket medical expenses; and
- 3) To the applicant's attorney of record, Jaron Mosier, the sum of Seven thousand two hundred ninety-eight dollars and forty-four cents (\$7,298.44) for attorney fees, in addition to One thousand five hundred dollars and zero cents (\$1,500.00) for reimbursement of costs.

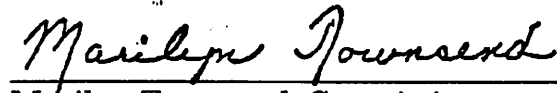
¹ **Appeal Rights:** See the yellow enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, and all other parties in the caption of this decision or order (the boxed section above). Appeal rights and answers to frequently asked questions about appealing a worker's compensation decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

Jurisdiction is reserved for such further findings and orders as may be necessary.

By the Commission:


Michael H. Gillick, Chairperson


Georgia E. Maxwell, Commissioner


Marilyn Townsend, Commissioner

Procedural Posture

On November 16, 2023, the applicant filed a hearing application claiming compensation for an occupational hearing loss with a date of injury of May 17, 2019, the date of the final termination of the employer-employee relationship. On January 11, 2024, the City of West Allis (hereinafter, "the employer") and its carrier, City of West Allis C/O CVMIC (hereinafter, collectively, "the respondents") filed an Answer in which they admitted jurisdictional facts and denied that additional parties needed to be joined for a complete resolution of the applicant's claim.

An administrative law judge (ALJ) from the Department of Administration, Division of Hearings and Appeals, Office of Worker's Compensation Hearings heard the matter on June 19, 2024. The ALJ issued his decision on September 30, 2024. The respondents filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties and has reviewed the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own, except that it makes the following:

Modifications

- 1) The following sentences shall be added to the end of the third paragraph on page 4 of the ALJ's decision:

During this period of employment, the applicant was exposed to loud noise from the gas-powered equipment that he operated at work. The applicant retired from the employer on May 17, 2019, at which point termination of the employer-employee relationship occurred.

- 2) The first sentence of the first full paragraph on page 7 of the ALJ's decision is deleted and the following sentences are substituted therefor:

The applicant was also exposed to loud noise while working in the Building and Signs Department from 1980-1986, during which time he operated a jackhammer frequently, as well as when he worked seasonally for the employer from 2016 through 2019, during which time he operated gas-powered equipment. These periods of employment also contributed to his hearing loss.

Memorandum Opinion

The applicant worked for many years in noisy environments through his several separate periods of employment with the employer. His employment also included periods of non-noisy employment with other employers. There is no evidence that the applicant was exposed to noisy environments outside of the workplace. The applicant retired in 2019 and pursued a claim for occupational hearing loss based on his final separation from employment with the respondent.

In its petition for commission review, the respondents dispute that the applicant's hearing loss was caused by occupational exposure, and also argue, for the first time,² that the applicant had two separate employer-employment relationships with the respondent, with two separate dates of injury, one in 1986 and one in 2019; that the Work Injury Supplemental Benefit Fund (hereinafter, "WISBF"), and not the respondents, should be responsible for the alleged 1986 date of injury, pursuant to Wis. Stat. § 102.17(4)(b); and that the respondent should be allowed to deduct the hearing loss reflected in a 2011 audiogram from its liability for the 2019 date of injury.

The commission rejects all of these arguments.

Factual Background

The applicant worked off and on for the employer for many years. His employment history and noise exposure is summarized in the following table:

Dates	Employer	Work	Noise exposure
1968-1986	City of West Allis	Garbage collector, incineration unit operator, and sign installer	Loud truck engine while compacting garbage, incinerator compaction noise, jackhammer use
1986-1989	Landscaping business	Landscaper	No noisy exposure.
1989	City of West Allis	Sign department and snow removal.	Jackhammer use
1995-2015	Electrical supply company	Fulfilled orders alone in a quiet room.	No noisy exposure.
2016-2019	City of West Allis	Worked seasonally, mowing grass with gas powered equipment.	Noisy lawn mowing equipment
May 17, 2019	City of West Allis	Retired	

² In their Answer to the Hearing Application in this case, the respondents admitted all jurisdictional facts. In response to question 11, "Do you contend that additional parties must be joined for a complete resolution of applicant's claim?" the respondents answered, "Deny." At hearing in this case, the ALJ stated, "at issue for hearing today is whether the applicant's duties for the respondent, employer were a material contributory causative factor in the onset or progression of his hearing loss" and asked, "Is that an accurate and complete statement of the matters conceded and the issues in dispute at this hearing," to which the attorney for the respondents replied, "Yes." The respondents did not raise any dispute as to the alleged date of injury or that WISBIF should be added as a party, until the ALJ had issued his decision adverse to the respondents and the matter was on appeal to the commission. The applicant argues that the respondent waived any argument that WISBIF was instead responsible when it failed to plead that defense prior to hearing. The commission agrees that the respondent's arguments regarding the appropriate date of injury and the responsible party are untimely, but has nonetheless considered those arguments raised by the respondent and rejects them on the merits.

The applicant and others around him first noticed his hearing difficulties in 1970, two years after he began employment with the City of West Allis. He did not seek treatment, however, until 2011. At that time, his first audiogram showed 55 percent binaural loss. He continued working, treating, and wearing hearing aids thereafter and retired in 2019.

Medical Causation

The applicant submitted a 16B from Matthew Ubell, M.D., who opined credibly that the applicant had mixed loss in the low frequencies and sensorineural loss in the high frequencies. He stated that "there is something causing the conductive component of his overall mixed hearing loss that is not due to noise exposure, but the sensorineural component of his hearing loss is consistent with noise exposure." Dr. Ubell rated the applicant's work-related sensorineural loss at a 46 percent permanent partial disability.

An independent medical examiner for the respondent, Steven Dankle, M.D., agreed that the applicant had mixed hearing loss but asserted that occupational noise exposure had no contribution to either the onset or progression of the loss. Dr. Dankle theorized that the applicant's hearing loss was caused by a middle ear pathology and offered his opinion that otosclerosis was the most likely cause. Dr. Dankle stated that the applicant's large air bone gaps were likely caused by otosclerosis and that the air bone gaps would have offered protection from hearing damage from noise exposure. However, the record contains no audiograms showing air bone gaps until 2011. By then, the applicant had experienced many years of occupational noise exposure.

Dr. Ubell reviewed Dr. Dankle's opinion and countered that otosclerosis is rare in people under 30 years old and that, because the applicant began working for the employer at 19 years old, even if he did eventually get otosclerosis, the applicant most likely would have had exposure to loud occupational noise for at least a decade prior to onset of the otosclerosis and the consequent air bone gap which could have protected against damage from the occupational exposure,³ and that even if the applicant does have otosclerosis, the hearing exposure was also a material contributory factor.

The ALJ found that the applicant's duties with the employer, and not the early onset of otosclerosis, caused or contributed to his hearing loss, and awarded 46 percent permanent partial disability. The commission agrees. The commission finds the opinion of Dr. Ubell credible. Dr. Ubell provided a clear rationale, assessing a portion of hearing loss to occupational exposure, while attributing a different component of loss to non-occupational causes. He addressed the theories raised by Dr. Dankle and rationally explained why otosclerosis was not a likely cause of the applicant's hearing

³ The respondent argues that Dr. Ubell's report should be disregarded because it does not specifically mention the applicant's report that he started experiencing hearing loss in 1970, two years after he began working for the employer. However, Dr. Ubell's report does not state that the applicant suffered no hearing loss early on, and in fact his report notes that it is likely that the applicant was experiencing unprotected noise exposure during that time, given that it is unlikely that the applicant had otosclerosis at such a young age.

loss, and certainly not to the exclusion of occupational exposure as at least a contributory factor. Dr. Dankle never credibly explained how the noisy work environment could be totally excluded, even if other causes also contributed to the hearing loss, as acknowledged by Dr. Ubell.

Date of Injury

The respondents in this case attempt to circumvent their liability for the occupational hearing loss by asserting that the applicant's termination of employment with the employer in 1986 constituted a date of injury for his hearing loss. They are mistaken because, as the respondents acknowledge, it is the employee who gets to choose the date of injury for occupational hearing loss claims. Chapter 102 provides that the date of injury for an occupational hearing loss claim:

shall, at the option of the employee, be the date of occurrence of any of the following events to an employee:

- (a) Transfer to non-noisy employment by an employer whose employment has caused occupational deafness;
- (b) The last day actually worked before retiring, regardless of vacation pay or time, sick leave or any other benefit to which the employee is entitled;
- (c) Termination of the employer-employee relationship; or
- (d) Layoff, provided the layoff is complete and continuous for 6 months.

Wis. Stat. § 102.555(4). The applicant in this case elected as his date of injury the date of the termination of the employer-employee relationship, May 17, 2019. The applicant did not claim a 1986 date of injury and did not file his claim until 2019. The commission is not at liberty to select a different occurrence as the date of injury for this claim.

The last employer whose employment contributed to the disability is responsible for the entire occupational claim. *North River Ins. Co. v. Manpower Temp. Services*, 212 Wis. 2d 63, 71, 568 N.W.2d 15 (Ct. App. 1997). This includes claims for occupational hearing loss. It is irrelevant that the applicant left employment for a period of time because, even in the case of multiple separate employers, the final employer is the responsible party. In this case, the applicant was exposed to a noisy environment in each of his periods of employment with this employer. He was not exposed to noisy environments at other employers or in non-occupational settings. Thus, his only noise exposure was while working for this employer.

The respondent argues that *Bradley v. DaimlerChrysler*, WC Claim No. 2002-044843 (LIRC Aug. 3, 2006) stands for the proposition that an employee can have separate periods of employment with the same employer and those periods should be evaluated as if they were with separate employers. The respondent misreads that case. In

DaimlerChrysler, there was a business ownership change from Jeep Eagle to DaimlerChrysler that took place in January of 1989. At that point, Jeep Eagle conceded and paid the applicant compensation for 9.1 percent binaural occupational hearing loss attributable to his employment with it. The applicant thereupon continued to work in a noisy environment in the same plant, albeit under DaimlerChrysler's business ownership. When he chose to retire and file his occupational hearing loss claim in February of 2002, the applicant had sustained additional hearing loss attributable to his employment with Daimler Chrysler since January of 1989. The department and the commission calculated his entire occupational hearing loss, including the 9.1 percent he had in 1989, but gave Daimler Chrysler a dollar amount credit for the previous payment of that 9.1 percent compensation. *DaimlerChrysler* is not analogous to the applicant's case, in which there was no previous award of compensation for occupational hearing loss.

The commission finds that the applicant properly elected the date of the final termination of the employer-employee relationship in 2019 as his date of injury and denies the request to disturb that date of injury on appeal. Because there is no second date of injury for the same employer, the 1986 date proposed by the respondent is rejected and the request to shift liability to WISBIF is denied.

Credit for Previous Hearing Loss

The respondent also argues that, because a hearing exam in 2011 documented hearing loss, the respondent cannot be liable for hearing loss prior to that date, citing the statutory provision that:

(8) An employer is liable for the entire occupational deafness to which his or her employment has contributed; *but if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to noise within the 2 months preceding such test, the employer is not liable for previous loss so established nor is the employer liable for any loss for which compensation has previously been paid or awarded.*

Wis. Stat. § 102.555(8). (Emphasis added). Such an interpretation would allow an employer to avoid liability any time it conducted a hearing test during the pendency of employment. Because the respondent was the only source of noise exposure in this case, the hearing test simply established hearing loss during the course of the applicant's various periods of employment with the employer. It did not establish "previous deafness" that occurred prior to any employment with the respondent. The commission rejects the respondent's illogical interpretation of this section.

For the foregoing reasons, the decision of the ALJ, as modified, is affirmed.

cc: Atty. Jaron Mosier
Atty. Christopher Behrens

Appeal Rights

Appealing a Worker's Compensation Decision of the Labor and Industry Review Commission to a Wisconsin circuit court

You may appeal the commission decision to a Wisconsin circuit court. Read the decision carefully.
If you need this information translated to another language, please contact us at (608) 266-9850.
The commission has translation services available to respond to telephone calls.

Commencing Legal Review of a Commission Decision

Any party aggrieved by the commission decision may begin a legal action for review of the commission decision in circuit court. The action must be commenced within 30 calendar days from the date of the commission decision. **Such action is commenced only by filing a summons and complaint with the circuit court and serving an authenticated copy of the summons and of the complaint upon the commission, all within 30 calendar days from the date of the commission decision.**

- Service must be made upon a commissioner of the Labor and Industry Review Commission or an agent authorized by the commission to accept service.
- The commissioners and authorized agents are located only in Madison at the address listed below. **Service upon the commission shall be deemed complete service on all parties but there shall be left with the commissioner or authorized agent so served as many copies of the summons and complaint as there are defendants.** Wis. Stat. § 102.23(1)(a). **The pleadings may be mailed to the commission, but the service will only be effective if the pleadings are actually received by the commission within the appeal period.** Service by facsimile (FAX) transmission is *not* sufficient to commence a court action.

For delivery by private carrier or service in person:

Labor and Industry Review Commission
3319 West Beltline Highway, 2 West
Madison, WI 53713
Phone: (608) 266-9850

For delivery by U.S. Postal Service:

Labor and Industry Review Commission
P.O. Box 8126
Madison, WI 53708
Phone: (608) 266-9850

- The complaint shall state the grounds upon which review is sought.
- Any aggrieved party or parties appealing the commission decision must be named as the plaintiff or plaintiffs.
- The action must name as defendants: (1) the commission, and (2) all persons identified as a person who must be made a party to the action in the commission decision for which review is sought.

The proceedings shall be in the circuit court of the county where the plaintiff resides. Exceptions:

- If the plaintiff is a state agency, the proceedings shall be in the circuit court of the county where the defendant resides.
- For other circumstances, including the situation where the plaintiff is a nonresident of Wisconsin, venue shall be as set forth in Wis. Stat. § 801.50, *et seq.*

The proceedings may be brought in any circuit court if all parties stipulate and that court agrees.

The judicial review provisions in Wis. Stat. ch. 227 (Administrative Procedure), § 801.02 (Civil Procedure) and ch. 799 (Small Claims) do not apply.

It is the responsibility of the appealing party to arrange for preparation of the necessary legal documents since neither the commission nor its representatives can assist in such preparation. A copy of these appeal rights and answers to frequently asked questions (FAQs) are available at <http://lirc.wisconsin.gov/wchowtoappeal.htm>.

Derechos de apelación

APPEAL RIGHTS

**Apelación de una decisión de compensación del trabajador de la
Comisión de Revisión de Trabajo e Industria ante un Tribunal de Circuito de Wisconsin
APPEALING A WORKER'S COMPENSATION DECISION OF THE LABOR AND INDUSTRY REVIEW COMMISSION
TO A WISCONSIN CIRCUIT COURT**

Puede apelar la decisión de la Comisión a un tribunal de circuito de Wisconsin. Lea la decisión con detenimiento.
Si necesita esta información traducida a otro idioma, sírvase comunicarse con nosotros al (608) 266-9850.
La comisión posee servicios de traducción disponibles para responder a llamados telefónicos.

Inicio de la revisión legal de una decisión de la comisión

Toda parte agraviada por la decisión de la comisión puede iniciar una acción legal para la revisión de la decisión de la comisión en un tribunal de circuito. La acción debe iniciarse dentro de los 30 días calendario desde la fecha de la decisión de la comisión. **Dicha acción se inicia únicamente presentando una citación y denuncia ante el tribunal de circuito y entregando una copia autenticada de la citación y de la denuncia a la comisión, todo dentro de los 30 días calendario desde la fecha de la decisión de la comisión.**

- La entrega debe realizarse a un comisionado de la Comisión de Revisión de Trabajo e Industria (Labor and Industry Review Commission) o a un representante autorizado por la comisión para aceptar la entrega.
- Los comisionados y los representantes autorizados están ubicados únicamente en Madison en la dirección indicada abajo. **La entrega a la comisión se considerará realizada a todas las partes, pero se deberán entregar al comisionado o al representante autorizado tantas copias de la citación y de la denuncia como demandados haya.** Wis. Stat. § 102.23(1)(a). **Los alegatos pueden ser enviados por correo a la comisión, pero la entrega sólo será efectiva si estos alegatos son recibidos por la comisión dentro del periodo de apelación.** La entrega por transmisión por facsímil (FAX) *no* es suficiente para iniciar una acción judicial.

Para entrega por empresa de correo privado o en persona:

Labor and Industry Review Commission
3319 West Beltline Highway, 2 West
Madison, WI 53713
Teléfono: (608) 266-9850

Para entrega por U.S. Postal Service:

Labor and Industry Review Commission
P.O. Box 8126
Madison, WI 53708
Teléfono: (608) 266-9850

- La denuncia debe indicar los fundamentos sobre los que se busca una revisión.
- Toda parte o partes agraviadas que apelen la decisión de la comisión deben ser designadas como la demandante o demandantes.
- La acción debe designar como demandados a: (1) la comisión y (2) todas las personas identificadas como una persona que se debe convertir en parte de la acción en la decisión de la comisión que se busca revisar.

El procedimiento debe hacerse en el tribunal de circuito del condado en el que reside la parte demandante. Excepciones:

- Si la parte demandante es una agencia estatal, los procedimientos se llevarán a cabo en el tribunal de circuito del condado en el que reside el acusado.
- En otras circunstancias, incluida la situación en la que la parte actora no es residente de Wisconsin, la jurisdicción se establecerá según lo indicado en Wis. Stat. § 801.50, *et seq.*

Los procedimientos pueden ser presentados en cualquier tribunal de circuito si todas las partes están de acuerdo y el tribunal acepta.

Las disposiciones de revisión judicial en Wis. Stat. ch. 227 (Procedimiento administrativo), § 801.02 (Procedimiento civil) y ch. 799 (Menor cuantía) no rigen.

Es responsabilidad de la parte apelante arreglar la preparación de los documentos legales necesarios ya que ni la comisión ni sus representantes pueden asistir en tal preparación. Una copia de estos derechos de apelación y respuestas a las preguntas frecuentes (FAQs) están disponibles en <http://lirc.wisconsin.gov/wchowtoappeal.htm>.