

CASE ID: ADJ1785165
{17139463-91C3-48EE-A677-27BEB8B7B63A}

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ1785165

MICHAEL BORMAN

-vs.-

ILLINOIS TOOL WORKS,
ACME STEEL;
ACE, ZURICH NORTH
AMERICA INVALID, ACE,
SENTRY PHOENIX;

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Deborah Lieberman

OPINION ON DECISION

Mr. Borman sustained cumulative trauma injury to his cervical spine, head, bilateral upper extremities and bilateral hearing loss during the period of 10/16/02 through 10/16/03, his last day worked. He was employed for many years at heavy physical labor as a Steel Worker, Occupational Group number 482. He was examined by three AMEs: Dr. Devor (orthopedics and disfigurement), Dr. Schindler (hearing loss) and Dr. Ansel (neurology). He also had a functional capacities evaluation and each party submitted reports from vocational experts. Mr. Borman had a prior award for hearing loss, after which he continued working with assistance from his co-workers, at his otherwise usual and customary job. Dr. Schindler also apportioned some of the hearing loss to non-industrial factors (age). Mr. Borman underwent two spinal fusions, has positive carpal tunnel findings, has industrially-related headaches, takes narcotic medication on a daily basis and has bilateral cochlear implants.

Mr. Borman was a very straight-forward and credible witness. He clearly had difficulty understanding questions and had to face his questioners directly in order to "lip-read" as well as listen. His cochlear implants have improved his hearing but his hearing, as he testified and was apparent, is quite limited. He has particular difficulty understanding people when more than one individual is talking, in crowded or noisy environments, and cannot function effectively on the phone. He has to nap daily due to fatigue. He has constant moderate pain levels. He can sit up to 30 minutes and types poorly for 10-20 minutes. He can write a few checks but after that needs to stop as his hand cramps.

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He testified that he has difficulty with the cochlear implant contact point becoming wet and shorting out from sweat when he exerts himself physically or when it is warm outside. Although the AME Dr. Schindler says this is impossible, this WCJ notes that the applicant is in possession of a special "dryer" mechanism designed for the implant, so that I find it difficult to believe that there is not a moisture problem with some individuals. Apparently, there was some acrimony in the applicant's exchange with Dr. Schindler regarding this matter, and I do not rely on this issue in my finding, but do wish to note that I did find Applicant's account credible.

There is an issue as to whether this case falls under the 1997 PDRS or the "new schedule". I find, per the AME permanent and stationary dates, that this is a "new schedule" case. Given that finding, the DFEC may be rebutted, and I believe that the Applicant has done so effectively, showing 100% loss of earning capacity. As there was no loss of earning capacity due to the prior award for hearing loss, and there is now a total loss, I do not find any apportionment per Labor Code section 4664, which is essentially rendered inapplicable in a reduced earning capacity scenario. Mr. Borman continued to work with the prior award for prior hearing loss. His hearing loss progressed to the point where he required implants, which while quite a miraculous technology, have severe limitations.

I found Ms. Tincher's vocational report lacking in several respects. First, she applies medical apportionment (the non-industrial portion of the hearing loss) to an earning capacity loss vocational analysis. Mr. Linder rightly points out that this is inappropriate. Further, the jobs she proposes for Mr. Borman are clearly beyond his physical capacities. She proposes that he can work as a Photo Counter Clerk, a Hotel Resort and Desk Clerk, a Switchboard Operator, or an Appointment Clerk. These all require dealing with the public (which is difficult when the applicant can only, and even so with limited success, communicate with one person at a time orally), extensive telephonic communication (and the Applicant credibly testified and told all examiners that he could not effectively use a phone), keyboarding or data entry of some sort (when he is precluded from prolonged repetitive use of his hands), and presumably a large portion of these jobs are in retail environments where there is significant background noise. Ms. Tincher also mistakenly believed that Mr. Borman had managerial experience, which he does not. She further over-estimated his IQ and while noting his sitting to 30 minutes, driving to 20 and keyboarding at 10, failed to discuss how these limitations interact with the requirements of the jobs she proposes he can perform. Ms. Tincher somewhat blithely discusses voice-activated technology and concludes that Mr. Borman could utilize same, but opines that he is simply not interested.

Mr. Linder has superior qualifications in the area of such specialized technology, as he is a Certified Ergonomic Evaluation Specialist, and has graduate certification in Rehabilitation Engineering Technology. Mr. Linder opines that it is very difficult for an individual who is not computer literate to effectively use such equipment, that with his hearing impairment it may be impossible for this applicant to do so, and that it would be "highly speculative (Ex. 4, rept. 3/2/12, page 3) to suppose that Mr. Borman would be able to maintain work to a level of production which would allow him to maintain his job". He continues, with the most cogent statement: "Perhaps Ms. Tincher was imagining a sheltered employment situation for Mr. Borman which, of course, would not constitute competitive employment in the open labor market".

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Dr. Ansel, the neurological AME, after review of the Functional Capacities Analysis found in his 12/15/2011 report, (Exhibit D) wrote that Mr. Borman is precluded from gainful employment, while noting that he is AME for the limited issues of headaches and carpal tunnel. Dr. Devor the orthopedic AME who also rendered opinion on the degree of disfigurement from the implant apparatus, found very extensive physical limitations, constant moderate pain, necessary use of narcotic medications and two fusion surgeries at several levels. Dr. Schindler found significant hearing impairment and need for the complex cochlear implants. He did not specifically discuss the limitations of the device, but these were evident in courtroom demeanor and testimony (I noted specific misinterpretation of words independently from applicant's credible testimony as to his limitations). There is no doubt that under either schedule these disabilities as noted by the AMEs are grave.

With the new schedule, however, the DFEC may be rebutted with expert vocational testimony and I find that Mr. Linder provided the most convincing of these reports. He is the more expert in relevant technologies, is thorough and detailed, and finds a complete loss of earning capacity. Ms. Tincher is less qualified to render opinions as to adaptive technologies, applies a uniquely conjured "apportionment" method, appears to come to a different conclusion than I did regarding Mr. Borman's credibility, and proposes jobs which are clearly beyond the Applicant's physical capacities. I can imagine no job in the open labor market, as notes Mr. Linder, that could possibly accommodate Mr. Borman's difficulty with oral communication, limitations with use of the upper extremities, limited mobility, need for daily narcotic medication, rests and serious headaches. Thus, I find a complete loss of earning capacity.

With the prior award for hearing loss Mr. Borman continued to work at the same job which he had been doing for decades. He testified that co-workers would face him or shout directions and that this would allow him to perform his highly physical job (lifting 100 pound coils one every few minutes). He thus had no loss of earning capacity due to the prior award. As the schedule is rebutted by vocational report and Mr. Borman's disability is now determined by loss of earning capacity, Labor Code section 4664 may not be applied in a logical fashion. This prior award would only reduce the permanent disability finding if the DFEC were not rebutted. Thus I make an unapportioned award of permanent and total disability.

DATE 10/25/12



Deborah Lieberman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

MICHAEL BORMAN

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DATE 10/25/12



Deborah Lieberman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

On: ☐ parties and lien claimants present
X all parties as shown on Official Address Record

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Pursuant to Rule 10500, you are designated to serve this/these document(s) forthwith on all parties shown on the Official Address Record.

ON: 10/30/12

BY: 

MICHAEL BORMAN

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