



Issue Date: 23 March 2009

OALJ CASE NO.: 2004-LHC-02255

OWCP NO.: 15-46221

In the Matter of:

G.K.,

Claimant,

v.

MATSON TERMINALS, INC.,

Employer,

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,

Carrier.

**DECISION AND ORDER AWARDING SPECIAL FUND RELIEF
AFTER 4/18/08 BRB REMAND**

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). This case was heard on January 24, 2005, in Honolulu, Hawaii and I approved stipulations for a compensation order and attorney fees. The lone litigated issue—whether subsection 8(f) Special Fund relief should be granted—has been decided and twice remanded by the Benefits Review Board ("BRB"), the last time by a Decision and Order issued 4/18/08 (the "4/18/08 Remand").¹

In the 4/18/08 Remand, the BRB affirmed my earlier decision on all points except my interpretation that Employer's failure to provide Claimant with copies of his audiograms and reports barred the use of those documents to establish Employer's entitlement to subsection 8(f) relief. The Board explained that, although the failure to provide copies shields a claimant from section 12 and 13 filing limitations, it is not relevant in a subsection 8(f) analysis. Therefore, the BRB vacated my denial of subsection 8(f) relief and remanded the case to me to evaluate the audiograms from 1978 through 2002 to determine the extent of Claimant's manifest pre-existing hearing loss to determine if Claimant's ultimate hearing loss is materially and substantially

¹ On September 29, 2008, the BRB also issued an Order on Reconsideration in response to the Director's timely motion for reconsideration of the 4/18/08 BRB Decision.

greater as a result of his pre-existing loss than it would be from the second injury alone as evidenced in the January 20, 2003, audiogram. *See* 4/18/08 Remand at 9-11.

Before me is the entire record from the earlier decisions, including Claimant's and Employer's approved stipulations, which were marked as ALJX 1 through 7, with Employer's trial exhibits ("EX") A through O. Further, Employer submitted EX's 1 and 2 attached to a deposition transcript marked EX M, and the Director previously filed Director's exhibits ("DX") A and B. Claimant submitted relevant Claimant's exhibits ("CX") 1 through 6.

Also, the following items have been admitted into evidence without objection: (1) Employer's closing brief, filed December 22, 2006 (ALJX 10); (2) a letter dated December 13, 2006, from John W. House, M.D. to Employer's counsel (EX P); and (3) the Director's closing brief filed December 14, 2006 (ALJX 11).

The Director's additional exhibits DX C through E were also admitted into evidence and described as: (1) a November 16, 2006, medical report from David N. Schindler, M.D., addressed to the Director and concerning Claimant's binaural hearing loss (DX C); (2) Dr. Schindler's five-page *curriculum vitae* (DX D); and (3) Employer's Response to Director's Interrogatories and Request for Production, dated November 22, 2006 (DX E).

Finally, I take administrative notice of, and admit as ALJX 12, Employer's 34-page petition for review filed with the BRB on August 29, 2007. Similarly, I take administrative notice of, and admit as ALJX 13, the Director's 29-page response filed with the BRB on September 28, 2007.

Summary of Decision

Employer established that Claimant had a manifest, pre-existing permanent partial disability, and that the current disability is not due solely to the second injury and is materially and substantially greater than that which resulted from the subsequent injury alone. Therefore, Employer is entitled to Special Fund relief. Because the second injury accounts for 14.7 percent of Claimant's hearing loss at retirement, Employer is only liable for 15.6 weeks of the awarded 106.2 weeks of compensation. The Special Fund is liable for the remainder.

Summary of Facts

Claimant worked for Employer for approximately 38 or 39 years, from 1964 to 2002. CX 1 at 1; EX K at 1. From 1964 to 1995, Claimant worked as a container maintenance repairman, or sheet metal worker, repairing shipping containers at Employer's shipping facilities in Waipachu, Hawaii. EX K at 1; CX 6 at 37. In that position, Claimant was exposed to noise from "grinders, table saws, and staple guns," as well as "noise generated from a trailer repair facility which was next to the [container repair] shop." EX K at 1. In 1995, Claimant changed jobs and began working as a security guard at the gates of the facility where he was exposed to the "sounds of loud trucks as they traveled close to him." EX K at 2.

Dr. Pang-Ching administered yearly audiograms to Claimant from 1978 to 2002, documenting a gradual worsening of Claimant's hearing from 19.1 to 48.4 percent impairment over that period.² EX M, at EX's 1 and 2 attached thereto.

On January 24, 2000, Dr. Pang-Ching diagnosed Claimant as having a 47.5 percent binaural hearing loss. EX M, ex. 2.

On January 26, 2001, Dr. Pang-Ching diagnosed Claimant as having a 45.3 percent binaural hearing loss. EX M, ex. 2.

On February 14, 2002, Dr. Pang-Ching diagnosed Claimant as having a 48.4 percent binaural hearing loss. EX M, ex. 2.

On November 1, 2002, Claimant retired. ALJX 2 at 2-3. *But see*, EX E at 2.

On January 20, 2003, Dr. Kenneal Chun diagnosed Claimant as having a 53.1 percent binaural hearing loss per the *AMA Guides*. EX K at 2-3. Dr. Chun opined that Claimant's hearing loss was due to "noise exposure having worked in what appears to be a very noisy working environment and therefore was at risk of having sustained noise induced hearing loss." *Id* at 2. Dr. Chun further explained that Claimant's hearing loss, as measured on January 20, 2003, occurred prior to his November 1, 2002, retirement "since subsequent to that, he has had no noise exposure and it is accepted that hearing loss related to noise does not progress for any extended period after exposure has ceased." *Id*.

Neither party has questioned the validity of any audiogram or the methodology employed by Dr. Chun or Dr. Pang-Ching.

Employer accepted liability for Claimant's hearing loss and voluntarily paid him permanent partial disability compensation for 106.2 weeks at \$966.08 per week for a 53.1 percent binaural hearing loss under subsection 8(c)(13)(B) of the Act. *See* CX 5; 33 U.S.C. § 908(c)(13)(B). The Director denied Employer's application for subsection 8(f) relief and the claim is here again on that issue. *See* 33 U.S.C. § 908(f).

Discussion

Pursuant to subsection 8(f), an employer is entitled to relief from liability for awarded permanent partial disability benefits if it establishes that 1) the claimant had a manifest, pre-existing permanent partial disability, 2) that the current disability is not due solely to the subsequent injury, and 3) that the current disability is materially and substantially greater than that which resulted from the subsequent injury alone. 33 U.S.C. § 908(f)(1) (2006); *see Dir., OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993). If these requirements are met in a hearing loss case, the

² As I discussed in my previous decision, the audiograms have a plus or minus five decibel margin of error or test/re-test variability. D&O2 at 5-6. Since 1978, Claimant's hearing deteriorated at an average rate of less than 1.5 percent per year. EX M, ex. 2. Therefore, it is not surprising that there were a few years in which the audiogram showed a slight improvement in Claimant's hearing, which is attributable to the test/re-test variability.

employer's liability is limited to the lesser of 104 weeks or the extent of the hearing loss attributable to the subsequent injury. 33 U.S.C. § 908(f)(1) (2006).

Under the first prong of subsection 8(f) an employer must establish that the claimant had a manifest, pre-existing permanent partial disability. 33 U.S.C. § 908(f)(1) (2006). In *Risch v. General Dynamics Corp.*, the Board rejected the Director's argument that hearing loss must be manifested by an audiogram administered prior to a claimant's hiring in order to qualify for subsection 8(f) relief and held that audiograms taken during the course of employment may be considered if thereafter the claimant continues to be exposed to injurious levels of noise and the employer establishes that the claimant's continued exposure to noise aggravated the claimant's hearing loss. 22 BRBS 251, 255 (1989); *see also, Fucci v. Gen. Dynamic Corp.*, 23 BRBS 161, 165 (1990). The Board explained that an employer risks increased compensation liability when it retains an employee after discovering that the employee has a permanent partial disability, and that were it not for this shifting of increased compensation liability from the employer to the Special Fund, the Act would discourage employers from retaining disabled workers. *Risch*, 22 BRBS at 255.

Here, Employer has clearly established a manifest, pre-existing, permanent partial disability. The January 2003 audiogram shows that Claimant had a 53.1 percent binaural hearing loss at retirement. EX K at 2-3. The BRB affirmed my previous rejection of the February 2002 audiogram on grounds that the 4.7 percent difference from the January 2003 audiogram is less than the test/re-test variability. 4/18/08 Remand at 3-9. Therefore, the February 2002 audiogram does not establish a manifest, pre-existing permanent partial disability. However, all of Claimant's prior audiograms demonstrate a significant pre-existing permanent partial hearing impairment that is not within the test/re-test variability of the January 2003 audiogram. Therefore, Employer has clearly established a manifest, permanent partial hearing disability that preceded Claimant's "second injury." 4/18/08 Remand at 7 n.4.

Employer puts forth that *any* of the pre-2002 audiograms can be used as evidence of Claimant's pre-existing disability. However, Employer argues that I use the January 2000 audiogram without any explanation why the January 2001 audiogram should not take the place of the February 2002 audiogram for subsection 8(f) purposes. Employer's Section 22 modification motion. Employer's motivation is obvious. The 2000 audiogram shows 2.2 percent more hearing loss than the 2001 audiogram and thus would shift more liability to the Special Fund. However, I decline to let Employer "cherry pick" the audiogram in which the margin of error is most favorable. Employer, although retaining Claimant, continued to expose him to injurious noise as evidenced by Claimant's worsening hearing loss. *See* EX M at Ex's 1 and 2. The purpose of retaining workers who become handicapped during their employment favors using the latest evidence of a pre-existing injury. Therefore, I find that the January 26, 2001, audiogram is the best evidence of Employer retaining a disabled worker and Claimant's pre-existing injury because it is the most recent audiogram evidencing Claimant's manifest, pre-existing, permanent partial hearing loss. *See* EX M at 9-26; EX M exs. 1-2; *see also Risch*, *supra* at 255.

In response to Employer's argument, the Director argued that none of the pre-2002 audiograms establish the extent of Claimant's pre-existing hearing loss because Claimant was not provided with the audiogram and accompanying report within 30 days as required by 20 C.F.R. §§ 702.321 and 702.441(b)(2). As stated above, the Board rejected this argument. *See* 4/18/08 Remand at 9-11.

If an employer establishes that the claimant had a manifest, pre-existing permanent partial disability, it then must show that the current disability is 1) not due solely to the subsequent injury and 2) is materially and substantially greater than that which resulted from the subsequent injury alone. *See* 33 U.S.C. § 908(f)(1) (2006); *Luccitelli*, 964 F.2d 1303; *Skelton*, 27 BRBS 28.

Here, Claimant's second injury is the difference between the January 2003 and January 2001 impairments—7.8 percent.³ Thus, Claimant's second injury only accounts for 14.7 percent of his hearing impairment.⁴ Therefore, Employer has presented sufficient evidence to demonstrate that Claimant's current disability is not due solely to the second injury. Moreover, current 53.1 percent impairment is "materially and substantially greater than" his 7.8 percent second injury. 33 U.S.C. § 908(f)(1) (2006). Therefore, Employer has satisfied the requirements of subsection 8(f) and is entitled to Special Fund relief.

Under subsection 8(f), a qualifying employer's disability compensation liability is limited to the lesser of 104 weeks or the extent of the hearing loss attributable to the subsequent injury. *Id.* Here, the second injury accounts for 14.7 percent of Claimant's hearing loss at retirement, therefore Employer is only liable for 15.6 weeks of the 106.2 weeks of permanent partial disability compensation awarded for Claimant's impairment.⁵ I find the Special Fund liable for the remaining 90.6 weeks, representing the portion attributable to the pre-existing binaural hearing loss impairment.

For the foregoing reasons, Employer's motion for modification and application for 8(f) relief are **GRANTED**.

ORDER

1. Employer's request for subsection 8(f) Special Fund relief is **GRANTED**.
2. The Employer shall pay to the Claimant compensation for a 7.8% (15.6 weeks) binaural hearing loss pursuant to subsection 8(c)(13)(B) of the Act at a rate of \$966.08 a week beginning on November 1, 2002. Employer also shall pay Claimant's medical expenses in connection with his binaural hearing loss as previously stipulated. Credit shall be given Employer for all previous payments of compensation and medical benefits.

³ 53.1 percent minus 45.3 percent equals 7.8 percent.

⁴ 7.8 percent divided by 53.1 percent equals 14.7 percent.

⁵ 106.2 weeks multiplied by 14.7 percent equals 15.61 weeks.

3. The Special Fund shall pay to the Claimant compensation for a 45.3% (90.6 weeks) binaural hearing loss pursuant to subsection 8(c)(13)(B) of the Act at a rate of \$966.08 a week. If Employer has previously paid this amount to Claimant, the Special Fund shall reimburse any such excess payments to the Employer with interest at rates determined pursuant to 28 U.S.C. § 1961 within 30 days after receipt of a final form LS-208 showing the Employer's payments to the Claimant.
4. The District Director shall make all calculations necessary to carry out this order.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California