

**U.S. Department of Labor**

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**Issue Date: 17 October 2008**

CASE NO: 2007-LHC-01595

OWCP NO: 08-127190

In the Matter of

J.W.<sup>1</sup>

Claimant,

v.

JEFFBOAT, INCORPORATED,  
Employer,

and

SIGNAL MUTUAL INDEMNITY ASSN., LTD.,  
Carrier

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-In-Interest.

**APPEARANCES:**

Melissa Olson, Esq.  
For the claimant

Douglas P. Matthews, Esq.  
For the employer/carrier

**BEFORE: DONALD W. MOSSER**  
Administrative Law Judge

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<sup>1</sup> References to ALJX, CX and EX pertain to the exhibits of the administrative law judge, claimant and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

## ***DECISION AND ORDER – DENYING BENEFITS***

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, hereinafter referred to as the Act. Claimant alleges that he was exposed to noise while employed by Jeffboat, Incorporated (Jeffboat), and, as a result, is suffering from an occupational noise-induced hearing loss.

This case was referred to the Office of Administrative Law Judges on June 8, 2007. (ALJX 1).<sup>2</sup> Following proper notice to all parties, a formal hearing was held on December 11, 2007 in Louisville, Kentucky. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to submit evidence and post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered.

### ***ISSUES***

The following matters remain for resolution: (1) whether the claimant's injury arose out of and in the course of employment; and, (2) the nature and extent of the claimant's disability resulting from his work-related injuries. (Tr. 79).

### ***FINDINGS OF FACT***

#### ***Claimant's Testimony***

The claimant is a sixty-seven year old male who began working for the employer, Jeffboat, in 1966 and retired in 2006. (Tr. 22). He was hired as a third-class welder, but was eventually promoted to first-class welder. He then worked approximately thirty-four years as a crane operator. (Tr. 28). As a welder, claimant was required to work on board Jeffboat's vessels along with other welders. The work being performed by all the welders simultaneously created a very noisy environment. (Tr. 31). To construct the barge, the steel fitters banged together the side boxes. The fitters repeatedly beat the metal into place with eight pound sledgehammers. (Tr. 34). Claimant was exposed to a variety of noise-producing tools as a welder, including air gougers, slag knockers, chipping hammers and cutting torches. He also described additional noise coming from the work of sandblasters as well as trades people gouging metal. He worked on board the vessels for eight to twelve hours per day. (Tr. 36). Overall, claimant's work as a welder was "just a noisy atmosphere..." He was unable to understand a yelling co-worker if they were standing only three feet away; he used hand signals to communicate. (Tr. 42).

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<sup>2</sup> References to ALJX, CX, and EX pertain to the exhibits of the administrative law judge, claimant, and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

Claimant spent the majority of his time at Jeffboat working as a crane operator. He worked on a floating crane located on a barge in the river. This crane ran on a diesel engine and a generator that ran at least 80% of claimant's eight to sixteen hour days. (Tr. 46). He compared the sound of this engine to "an airplane taking off at Standiford Field." (Tr. 48). Radio communication in the cab of the crane was very difficult. Claimant used hand signals to communicate because he could barely hear the radio over the noise of the engine and generator. (Tr. 50). He used ear plugs in an unsuccessful attempt to block out some of the noise from the engine. (Tr. 53).

Claimant first noticed his hearing loss sometime in the late 1970s, when he began failing the employer's physical exams due to hearing. He currently has difficulty hearing during normal activities. He has to turn the volume on the television to higher than normal levels. He cannot understand telephone conversations unless the other party speaks very loudly into the phone. (Tr. 60). In face-to-face conversations, claimant has difficulty discriminating words and speech. He indicated that he would like to use hearing aids to improve his hearing. (Tr. 60). On cross-examination, claimant testified that he had been to see two separate physicians to have his hearing tested, but he had never received any audiogram from these visits.

### ***Audiological Records***

Claimant was seen by Ian Windmill, Ph.D. for an audiologic evaluation on July 17, 2006. (CX 1). Dr. Windmill is board-certified in audiology. During the visit, claimant reported a forty-one year history of noise exposure while working for Jeffboat. He denied any family history of hearing loss, prior injury or surgeries to the ear, tinnitus, or dizziness. He also reported no treatment for hearing loss.

After performing the audiologic evaluation, Dr. Windmill opined that the claimant suffers from a bilateral moderate flat hearing loss. According to Dr. Windmill, noise-induced hearing loss typically results in a high frequency loss, rather than a flat loss. However, he also noted that over time, noise-induced hearing loss will progress to flat configuration. Since the claimant has a 41-year history of noise exposure, Dr. Windmill opined that this was sufficient time to allow the hearing loss to progress to this configuration. The physician listed claimant's discrimination scores as 80 percent bilaterally in a noisy environment.

Dr. Windmill further summarized that claimant has a right monaural impairment of 48.75% and a left monaural impairment of 39.37%, for a total binaural hearing impairment of 40.93%. According to this physician, it is unlikely that medical or surgical treatment will provide benefit for claimant's hearing loss. He opined that the primary treatment would be amplification. (CX 1).

A deposition of Dr. Windmill's testimony was taken on February 20, 2008, where he further reiterated his findings as stated in his medical report. (CX 5). He also expanded upon his diagnosis of bilateral flat sensory loss. Initially, he again noted that noise exposure typically does not cause the flat hearing loss as seen in the claimant. He testified that when noise exposure starts, it causes a hearing loss in the high frequencies. (CX 5, p. 32). However, over time the

hearing loss progresses down to the lower frequencies and eventually “the lows and middle pitches begin to catch up to the highs.” (CX 5, p. 32). Dr. Windmill opined that the claimant’s pattern of hearing loss is consistent with his long-term noise exposure of at least 40 years. He summarized several studies he knew of that supported this conclusion. (CX 5, p. 34 – 38). In addition, Dr. Windmill noted that there were no other factors that he knew of that contributed to claimant’s hearing loss besides claimant’s noise exposure work history. (CX 5, p. 33). Based on these findings, Dr. Windmill summarized that claimant’s bilateral flat sensory hearing impairment of 40.93% was caused or contributed to by his long-term noise exposure. (CX 5, p. 42, 43).

Upon cross-examination, Dr. Windmill discussed other possible causes for claimant’s flat configuration on audiogram besides noise exposure. He testified that Meniere’s disease can cause flat configuration, but this disease is typically associated with dizziness or vertigo. He also noted that age could be a factor in claimant’s flat hearing loss. According to Dr. Windmill, exposure to age-related changes and long-term exposure to noise can contribute together to worsen overall hearing loss. (CX 5, p. 94).

Andrew S. Mickler, M.D., F.A.C.S., examined claimant on November 8, 2007, and provided an initial medical report dated November 21, 2007. The physician, who is board-certified in otolaryngology, notes that claimant worked for employer until 2006, and he wore ear plugs since the 1980s. During claimant’s visit with Dr. Mickler, an audiogram was performed by Dr. Jeff Brown. The audiogram was interpreted as showing bilateral flat sensorineural hearing loss in both ears and a conductive component in the right ear. Dr. Mickler also indicated that claimant’s audiogram does not demonstrate a “noise notch” at 3000 to 6000 Hz, which is the area of the inner ear most affected by noise exposure.<sup>3</sup> (EX 1).

The physician provided a second report dated November 28, 2007, which is a replica of his earlier report. (EX 2). In a report dated November 30, 2007, Dr. Mickler noted that he reviewed Dr. Windmill’s report and did not agree with his conclusions that flattening on an audiogram can be associated with noise-induced hearing loss. (EX 3). Dr. Mickler also stated that he read older audiograms dated from 1984 to 2007 and did not find them to be indicative of any noise-induced hearing loss. Based on his review of these audiograms, he opined that claimant’s hearing loss was not noise-related.

After the completion of the November 30, 2007 report, employer’s counsel apparently informed Dr. Mickler that the older audiograms he reviewed would be inadmissible in this claim. In response to this information, Dr. Mickler provided a declaration dated January 9, 2008, wherein he opined that claimant does not have noise-induced hearing loss. He states that he bases this diagnosis primarily on information provided in claimant’s most recent audiograms admitted in this claim. He also admits that this opinion is “supported, secondarily” by his review of inadmissible audiograms. (EX 9).

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<sup>3</sup> In an Order dated April 7, 2008, I excluded from evidence previous audiograms and documents contained in EX 5 because they were not produced in accordance with claimant’s interrogatories and requests for production of documents. Dr. Mickler admits that he reviewed the inadmissible audiograms in forming his opinion regarding the causation of claimant’s hearing loss. The portions of Dr. Mickler’s opinion that are based on these inadmissible audiograms are therefore afforded diminished weight .

## **CONCLUSIONS OF LAW**

### ***Causation of Injury***

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and the employment condition existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

In order to invoke the Section 20(a) presumption, a claimant must first prove his *prima facie* case. A claimant proves his *prima facie* claim for compensation by establishing two elements: (1) the claimant sustained physical harm or pain (which can include the aggravation or acceleration of a pre-existing injury) and (2) an accident occurred in the course of employment or conditions existed at work that could have caused the harm or pain of claimant. *See United States Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608, 615; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 331(1981).

In hearing loss cases, a claimant's burden is met if there is medical evidence that establishes that the claimant suffers from noise-induced hearing loss, and the claimant testifies that he works or worked around loud machinery. *See Damiano v. Global Terminal & Container Service*, 32 BRBS 251 (1998). *See also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206, 210 (CRT) (9<sup>th</sup> Cir. 1998) (holding that claimant's uncontradicted testimony that conditions existed at his work that could have caused the harm was sufficient to invoke the presumption).

In the instant case, claimant and employer have introduced two separate audiograms showing similar amounts of hearing loss. After reviewing the audiogram dated July 17, 2006, Dr. Windmill opined that claimant had 40.93% binaural hearing loss due, in part, to noise. Dr. Mickler interpreted the November 8, 2007 audiogram as showing a 41.9% binaural hearing handicap. Claimant also testified that he has trouble hearing. He noted that he has difficulty discriminating words and understanding phone conversations. (Tr. 60). Therefore, I find that claimant has submitted substantial evidence to establish that he has sustained hearing loss.

Claimant must also prove that there were working conditions which could have caused his hearing loss. Claimant provided substantial testimony regarding the noisy conditions of his position with Jeffboat. I find his testimony, as summarized above, to be very credible. This testimony is sufficient, under the standard set forth in *Damiano*, to prove that working conditions existed which could have caused or contributed to claimant's hearing loss. Accordingly, I find

that claimant has shown both an injury and working conditions which could cause or aggravate that injury, thus invoking the Section 20(a) causal presumption. It is presumed, therefore, pursuant to Section 20(a) of the Act, that claimant's hearing loss was caused or aggravated by his exposure to injurious stimuli throughout his employment with the employer.

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951); *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938); *Richardson v. Perales*, 402 U.S. 389 (1971).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). An employer need only introduce medical testimony or other evidence that controverts the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption. *O'Kelley v. Department of the Army/NAF*, 34 BRBS 29 (2000); *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982), *aff'd mem.*, 722 F.2d 747 (9<sup>th</sup> Cir. 1983).

Jeffboat does not dispute that claimant sustained hearing loss; rather it argues that claimant's loss was not caused or aggravated by his employment with the employer. In support of this argument, Jeffboat relies on the medical opinion of board-certified otolaryngologist Dr. Mickler. After examining the claimant, Dr. Mickler opined that claimant's hearing loss is not noise-induced. He noted that claimant's hearing loss was not the type typically seen in noise-induced hearing loss patients because there was no "noise notch" in the higher frequencies. Both Drs. Mickler and Windmill agree that the audiograms admitted in this claim show evidence of a flat configuration. The experts also agree that a flat configuration indicates the hearing loss is typically not a result of noise exposure.

After evaluating these medical opinions, I find that employer has met its burden of rebuttal as it has presented medical evidence that claimant's hearing loss was not caused by industrial noise exposure. Dr. Mickler's opinion is based primarily on the audiogram and testing he performed while examining the claimant on November 8, 2007. Although Dr. Mickler cannot explain the actual cause of claimant's hearing loss, he did opine he was certain that the condition was not a result of exposure to deleterious noise levels.

Having found that the Section 20(a) presumption has been rebutted, I must now determine whether claimant has fulfilled his burden to show that his hearing loss has been aggravated or caused by his employment with Jeffboat. I must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corporation*, 14 BRBS 927 (1982). The ultimate burden of proof rests upon the claimant. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); *see also Holmes v. Universal Maritime Services Corporation*, 29 BRBS 18, 21 (1995).

Dr. Windmill admits that claimant's audiograms do not show the high frequency noise notches most commonly associated with noise-induced hearing loss. He suggests that this flat configuration is due to claimant's long-term noise exposure, opining that exposure to noise can lower frequency responses and flatten the configurations overtime. I am not persuaded by his argument. He offers no medical evidence to support this conclusion. He has no evidence that claimant's hearing loss has flattened over time. Dr. Windmill merely suggests that prolonged noise exposure can *possibly* cause a flat configuration, and then opines that this is what has occurred in the current claim.

Dr. Mickler's opinion is supported by the objective evidence of record. The two audiograms of record show a flat configuration with no high frequency hearing loss. Both physicians opine that this typically is not indicative of a noise-induced hearing loss. Without reference to claimant's older audiograms, it is difficult for Dr. Windmill to support his opinion that claimant's hearing has flattened over time.<sup>4</sup> Therefore, I assign controlling weight to the opinion of Dr. Mickler, as it is better supported by the medical evidence of record.<sup>5</sup> I conclude that the claimant has not proved by a preponderance of the evidence that he has a hearing loss that is causally related to his employment at Jeffboat.

### **ORDER**

Since the claimant has failed to establish that he has a hearing loss that arose out of and in the course of his employment at Jeffboat, Incorporated, IT IS HEREBY ORDERED his claim for benefits under the Longshore and Harbor Workers' Compensation Act is DENIED.

**A**

DONALD W. MOSSER  
Administrative Law Judge

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<sup>4</sup> It should be noted that, even if I were to consider the excluded audiograms, the results in this claim would be the same. Dr. Windmill has admitted that the older audiograms do not support his assumptions that the claimant's audiograms were flattening out over the course of his exposure to industrial noise. (CX 5, p. 66). He also admits that the older audiograms are inconsistent with noise exposure. *Id.*

<sup>5</sup> I assign controlling weight to the opinion of Dr. Mickler even in light of the fact that he had the opportunity to review inadmissible evidence. It appears from his opinion that his findings are adequately supported by the evidence of record, without any weight being given to the older audiograms.

