U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 December 2008

Case No.: 2007-LHC-1706

OWCP No.: 07-177030

In the Matter of:

N.P.,
Claimant,

v.

CERES GULF, INC.
Employer

APPEARANCES:

EDWARD S. RAPIER, JR., ESQ.
On Behalf of the Claimant

LAWRENCE P. POSTOL, ESQ.
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act)[1] brought by Claimant against Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 25 Jun 07. All parties were represented by counsel. On 4 Mar 08, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs. Although his

[1] 33 U.S.C. §§901-950.

counsel was present at the hearing, Claimant failed to appear. The parties subsequently agreed that Claimant's credibility was not an issue, they could adequate try the case on the record without calling any live witnesses, and they would waive any further formal hearing.

My decision is based upon the entire record, which consists of the following:[2]

Exhibits[3]

Joint Exhibit (JX) 1
Claimant's Exhibits (CX) 1-34
Employer's Exhibits (EX) 1-32

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[4]

1. If Claimant was injured as alleged, it would be in the course and scope of employment, during an employer/employee relationship with Employer, and within the jurisdiction and coverage of the Act.

2. There was timely notice of the injury.

3. There was timely controversion.

4. Claimant's average weekly wage (AWW) was $334.19.

FACTUAL BACKGROUND

Claimant began working as a longshoreman in the 1950's and worked in that capacity for over 40 years. His last work was for Employer. Claimant first began to notice a problem with his hearing in the 1970's. He had a hearing test and although he

[2] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

[3] Claimant's objections to EX-33 and EX-34 were sustained based on relevance and timeliness. Some exhibits appeared to be *en globo* collections of records. Counsel were cautioned that in the case of any exhibit in excess of 30 pages (CX-22; EX-27, 30) only those pages specifically cited to would be considered a part of the record upon which the decision would be based. Tr 11. CX-31-32 and EX-9 were admitted for the limited purpose of showing the communication was made or conference occurred and not the truth of the matter asserted or the recommendation made. Tr.8.

[4] JX-1; Tr. 20.

never received a copy of the results, he was prescribed a hearing aid that he wore intermittently. Sometime around 2000, Claimant's hearing aid broke. He had another hearing test and got another hearing aid but again did not obtain any paperwork on his results.

On 26 Apr 05, Claimant had a hearing test using air scores that determined he had a 90 percent binaural hearing impairment. Before he could get a new hearing aid, he was told to see an otolaryngologist because of his mixed conductive and sensorineural hearing loss. Employer sent Claimant for another examination, which was based on bone scores and showed approximately 8 percent binaural hearing impairment.

A third examination done as an IME then showed that air scores indicated a 76.9 percent binaural impairment and bone scores indicated an 8.4 percent binaural impairment. Employer paid Claimant based on the bone scores, but did not authorize hearing aids.

ISSUES & POSITIONS OF THE PARTIES

Claimant maintains that his impairment and compensation should be based on the air scores and that he is entitled to a digital hearing aid.

Employer responds that the noise in the workplace was insufficient to cause hearing loss. It submits that the AMA Guides do not require air conduction testing. It also argues that Claimant has otosclerosis (bone growth into his ear canal) that is responsible for 91.6 percent of Claimant's hearing loss and is correctable by surgery. Employer notes that in the absence of a hearing test from 1988, the record does not show what was pre-existing and what was an intervening cause. Therefore Employer suggests that it has no liability at all, or at least is limited to that portion of hearing loss not due to the bone growth.

LAW

While the Act is construed liberally in favor of the claimant,[5] the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[6] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[7]

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[5] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[6] 5 U.S.C. § 556(d).
[7] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).

In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[8] The presumption takes effect once the claimant establishes a *prima facie* case by proving he suffered some harm or pain and a work related condition or accident which could have caused the harm.[9] Once the presumption applies, the burden is on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment.[10] Once an employer offers sufficient evidence to rebut the presumption, it is overcome and it no longer controls the result.[11] If the presumption of compensability is successfully rebutted, the presumption no longer affects the outcome of the case. The fact-finder must then weigh all the evidence in the record and resolve the fact at issue based on the evidence.[12] In making that determination more weight may be given to one medical opinion over another.[13]

However, the presumption does not apply to the issue of whether a physical harm or injury occurred[14] and does not aid the claimant in establishing the nature and extent of disability.[15]

The Act has specific rules for cases of hearing loss. A hearing loss is a scheduled injury with a specific compensation scheme allowing for 52 weeks of compensation for loss of hearing in one ear and 200 weeks for loss in both ears.[16] The Act provides that an "audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, …"[17] It also requires that "[D]eterminations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association."[18]

The regulations implementing the Act are more specific.

> (b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:

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[8] 33 U.S.C. § 920(a).
[9] *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).
[10] *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976).
[11] *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).
[12] *Id.*
[13] *Coffy v. Marine Terminals Corp.*, 34 BRBS 85 (2000).
[14] *Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15 (1990).
[15] *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157, 159 (1991) (more than 14 years between last employment and audiogram held insufficient); *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).
[16] 33 U.S.C. §908(c)(13) A-B.
[17] 33 U.S.C. §908(c)(13)C.
[18] 33 U.S.C. §908(c)(13)E.

(1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 CFR 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

…

(d) In determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the Guides to the Evaluation of Permanent Impairment, using the most currently revised edition of this publication. …[19]

It is clearly established through the "aggravation doctrine" that the employer takes the employee as it finds him or her. Thus, the employer is responsible for the totality of the injury, even if some of it was pre-existing and the workplace simply aggravated it or supplemented it.[20] The aggravation rule applies in the cases of hearing loss,[21] including losses due to aging (presbycusis)[22] and birth defects.[23]

The rule has its origins, in part, in recognition of "the difficulty in apportioning the degree of disability between pre-employment (or non-employment) causes and employment cause…[.]"[24] However the purpose of the aggravation rule is not simply to avoid difficult issues of proof. It is also based in the humanitarian nature of the act.[25] Even if the evidence is such that there is no real issue as to the allocation of disability, the

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[19] 702 C.F.R. §702.441.

[20] *See, e.g., Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003) (heart attack with prior condition); *Conoco, Inc. v. Director, Office of Worker's Compensation Programs, U.S. Dept of Labor*, 194 F.3d 684 (5th Cir. 1999) (shoulder/neck with prior car accident); *Louis Dreyfus Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 125 F.3d 884 (5th Cir. 1997) (back injury with prior injury).

[21] *Epps v. Newport News Shipbuilding & Dry Dock Co.*,19 BRBS 1 (1986).

[22] *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344, 348 (1989) *aff'd in pertinent part and rev'd on other grounds sub nom Port of Portland v. Director, OWCP*, 932 F.2d 836 (9th Cir. 1991).

[23] *Worthington v. Newport News Shpbuilding & Dry Dock Co.*, 18 BRBS 200 (1986).

[24] *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 694 F.2d 327,329 (4th Cir. 1982).

[25] *Id.*

rule still holds the employer liable.[26] "The fact that some pre-employment injuries, such as hearing loss, are measurable while others are not is not enough to prevent a given employee from collecting full compensation."[27] A suggestion to the contrary was offered, but refused, in the process of drafting the Act.[28]

EVIDENCE

Claimant testified at deposition in pertinent part that:[29]

> He was in the Navy from 1943 to 1950. He was exposed to occasional gun fire at practice and ran a landing barge. When he left the service he had good hearing.
>
> Claimant worked on the wharf. He worked the shed, barges, and ro-ro ships. He worked for Employer from 1982 on. There was quite a bit of noise where he worked. Inside of ro-ro ships, there were trucks running in and out. The noise hit the steel deck above and he could not even hear himself talk. He would have to scream for someone to hear him. When trucks would roll in with containers and the lift machines were taking those containers off those trucks and putting them down, there was all kinds of noises. He had to scream at people so that they could hear him.
>
> The warehouse was all tin and trucks ran back and forth through it. The only loud noise would be while working the warehouse, working the ro-ro, and working under the barges. The noise came from the forklifts in the hole. The shed was steel and the noise bounced off of it.
>
> In 1976, he noticed he was unable to hear at union meetings. He went to a Beltone hearing aid store and they put him in a booth and tested his hearing. They did not give him a copy of the report. Those hearing aids did not work very well and he stopped using them.
>
> He stopped working on the river in 1988. Sometime after he retired from the river, but before Hurricane Katrina, he went to an Audibel store and bought another hearing aid. He did not get any test results. He is still using that hearing aid.
>
> Later, he was referred to Mr. Bode by his lawyer and bought a hearing aid from him for about a thousand dollars.

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[26] *Id.*
[27] *Id.*,at 330.
[28] *Id.* ,at 330, fn.3.
[29] EX-28.

He had trouble hearing people speak in 1988. He has more trouble hearing now than he did in 1988. He has been told he has a bone growth in his ear. No one has mentioned having surgery to correct it.

Daniel Bode testified at deposition and his reports show in pertinent part that:[30]

He is a certified audiologist and sees patients on a regular daily basis. Litigation is 30% of his practice and he has testified as an expert. He has tested a number of people for Claimant's current attorney. He tested well over a hundred for Claimant's previous attorney.

There are two types of hearing loss, conductive and sensorineural. A conductive loss effects the mechanical aspects of hearing, interfering with the transmission of waves to the nerve fibers. A sensorineural loss is associated with the nerve fibers and is a failure of the sound being transmitted to the brain. A mixed loss is when a conductive problem combines with a nerve problem. The causes of sensorineural hearing loss include hereditary, noise-induced or acoustic traumas, or medical-based loss. The normal treatment for sensorineural hearing loss is hearing aids.

He first saw Claimant on 26 Apr 05. Claimant gave a history of working as a longshoreman for 40 years and being exposed to noise. He performed a four-part audiological exam consisting of tympanometry, otoacoustics, pure tone, and speech audiometry. The pure tone was both air and bone tests. He was unable to bone test both ears because of masking.

The testing revealed a mixed loss. Claimant had a severe to moderate loss in air conduction and mild to moderate loss in bone conduction. Claimant has mixed bilateral profound hearing loss. Based on the configuration of Claimant's sensoneural hearing loss, he believes that it is more likely than not attributable to noise exposure. He also believes that given Claimant's age, his best treatment is amplification with hearing aids. Claimant may have been a candidate for a surgical treatment in 1976. He believes a digital behind the ear aid would work best for Claimant. He never sold a hearing aid to Claimant.

He noted at the time of his examination that an examination by an ENT would help in making a better judgment as to whether Claimant has a true noise induced hearing loss. He included that note just to cover himself and see if there were any other hearing related medical issues.

He is familiar with the 5th and 6th editions of the AMA Guidelines[31] and uses them in his practice. According to the examples in the guidelines, air conduction, not

[30] CX-35; EX-12.

bone conduction, is used for calculating impairment percentages. Dr. Seidemann used bone conduction, not air conduction. If he scores Dr. Seidermann's reports with air condcution, he arrives at a binaural impairment of 76.5%.

The guide instructions actually say only to use pure tone audiometry. The instructions do not say bone or air. Pure tone can be bone or air. However, the three examples they give use air conduction. An example in the 5th edition[32] does not say either was used, but gives examples of both. The 6th edition[33] does not give examples of both. You could say that the in the 6th edition, it is not clear from the examples whether to use air or bone. He cannot assume that the examples used air scores because bone scores were not available. The guides never specifically say to not use bone conduction. He just follows the examples and uses air scores.

Dr. Seidemenn used the Kurtzrock method to solve the masking problem associated with bone conduction. He had never heard of that method until he researched it. The experts in New York he contacted also had not heard of the method. He does not know any thing about the particulars of the method.

Given Claimant's prolonged exposure to noise, his hearing was probably affected. The conductive portion increased over time and protected him from more loss by blocking the transmission of sound. He agrees that noice exposure is not the reason for Claimant's conductive loss. The pattern of Claimant's sensineural loss indicates noice induced loss.

Claimant fits into the majority, if not all, of the seven general characteristics for occupational hearing loss. The majority of his loss is not sensineural. Based on Claimant's history, he was exposed to noise sufficient to cause his loss. He does not know if Claimant's loss was gradual or if it was during his first 8-10 years of exposure. He does not know if the loss initially started at higher frequencies and Claimant reported worsening after the exposure ended. Thus, he really only is sure of one of the seven factors.

Dr. Michael Seidemann testified at deposition and his reports show in pertinent part that:[34]

He has a Ph.D. in audiology and Certificate of Clinical Competence in Audiology from the Speech-Language-Hearing Association and state licenses in audiology in Louisiana, Texas, Mississippi, Arkansas, and Alabama. He has been licensed as

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[31] CX-27, 28.
[32] CX-27.
[33] CX-28.
[34] EX-7, 14, 18, 22, 26, 30, 31; CX-4-9, 23.

an audiologist since 1973. He was full-time faculty at Tulane and LSU Medical Schools for 14 years.

He has been involved in industrial noise measurements since about 1974. He consults with a lot of industries regularly on their hearing conservation programs, and noise measurements are part of that consultation. A sound-level meter is used for brief measurements, generally referred to as area measurements. Noise dosimeters are instruments that are affixed to workers so that they wear the instrument all day long. The microphone of the dosimeter is clipped to their shoulder or their collar so that whatever noise is reaching their ear is also getting into the noise dosimeter. The noise dosimeters generally sample the noise environment 32 times per second during the course of an entire workday. In its simplest form, it measures a day long time-weighted average noise level. In the more sophisticated forms, it provides information minute by minute about the noise exposures in the job.

He has reviewed Claimant's and Dr. Irwin's deposition testimony, the audiogram reports of Mr. Bode and Dr. Irwin, and the report of Dr. Marks.

He saw Claimant on 19 May 06 and wrote a report with an audiogram attached to it on 24 May 06. Claimant provided a history of having problems with his hearing for more than 20 years. He felt that his hearing loss had a gradual onset. He provided a negative history of ear disease, ear surgery, and other issues that would suggest ear disease in general. His medical history was essentially negative for those particular issues of ear disease or medical problems related to his hearing. However, his hearing tests indicated hearing loss. He thinks Claimant was unaware that he had medical problems related to his hearing.

Claimant reported that he was experiencing difficulty in all listening situations with his hearing. He wore a hearing aid in his right ear, and he was readily responsive to all the questioning and answers. Claimant said he had retired in 1987 from being a longshoreman since 1950. He said he had not used any type of hearing protection on the job. Claimant gave a negative history of recreational or non-occupational exposure to loud noise except that he had been in the Navy and the Marines for seven years. During that time, he was in the infantry and had combat service.

In terms of his hearing tests by air conduction -- the use of headphones – Claimant had a severe to profound hearing loss in both ears. With bone conduction testing -- placing a bone conduction vibrator on the bone behind his ears – Claimant had normal hearing in the low frequencies up to 1000 hertz, and had a mild sensorineural hearing loss above 1000 hertz. Combining those two types of testing essentially says that Claimant has a mixed-type hearing loss. A mixed-type

hearing loss is one that has both conductive and sensorineural components. For the conductive portion of his hearing loss, there was no obvious occlusion or blockage in his ear canals. One would have to surmise that there was pathology behind his ear drum preventing a lot of sound from reaching his inner ear. His inner ear was normal at some frequencies and showed mild hearing loss at other frequencies.

A number of speech audiometric tests that were done were essentially consistent with the pure-tone tests indicating that mixed type of hearing loss. The sideways Vs on the audiogram from 20 to 40 decibels are the bone conduction result. The circles and Xs at 70 and below are the air conduction studies.

The bone conduction test is done by putting a vibrator on the bone behind the ear. The air conduction test is done with headphones and tests the outer ear, the middle ear, and the inner ear all together. Bone conduction tests essentially bypass the outer and middle ear and go directly to the inner ear. A result that shows better hearing by bone conduction than by air conduction shows that there is some type of blockage or obstruction or other pathology that is in either the outer ear or the middle ear preventing sound from reaching the inner ear as well as it should.

He looked in Claimant’s ear canals with an otoscope, and it was obvious that there was no blockage. That narrowed down the site of the conductive pathology to his middle ear. That conclusion was supported by Dr. Marks' report and Dr. Irwin's report and deposition. Dr. Irwin thought the problem was otosclerosis, an excessive growth of bone around one of the small ossicles in the middle ear.

He does not believe Claimant’s hearing loss is due to noise from working as a longshoreman because it is not possible for workplace noise exposure to cause a conductive hearing loss. Noise exposure causes a hearing loss in the inner ear. A conductive hearing loss is not in the inner ear. Pathology such as otosclerosis in the middle ear serves as a built-in earplug and blocks sound from reaching the inner ear in much the same way as an earplug would. That pathology serves as a hearing protector for Claimant

From 2000 hertz to 4000 hertz, Claimant has a mild sensorineural hearing loss, which can be caused by noise exposure or lots of other problems or pathologies. Claimant was 80 years old at the time of this testing and the normal hearing for an 80-year-old would be worse than his, based on aging alone.

The AMA Guides establish a fence at 25 dB to separate out normals from abnormals. For 25 dB and less there's a 0 percent AMA calculated impairment.

Mr. Bode only did a bone conduction test in one ear, whereas he did it in both ears. For patients with as severe a conductive hearing loss as Claimant's, testing both ears by bone conduction is a very difficult, complicated, and frequently inaccurate proposition. He does not fault Mr. Bode for only testing one ear by bone conduction. He did both because Claimant had a compensation claim. He used a clinical procedure that happened to work. It is the Kurtzrock ear-choice method.[35]

The Kurtzrock method involves putting the bone conduction oscillator on the patient's mastoid process, presenting pure tones to the patient, and asking the patient to report whether they hear that signal in the right ear, the left ear, or both ears. When a bone conduction oscillator is put on a patient's mastoid process, one has to assume that since the signal goes through the skull, and stimulates both ears equally. It does not lose a lot of its intensity in crossing over to the opposite side of the head. If the patient has better hearing in one ear than in the other, they will perceive that tone as being only in the ear that hears it better. The method is used largely in cases with this degree of difference between air conduction and bone conduction.

Claimant has a severe to profound hearing loss by air conduction. Once that much energy is sent to the ear by air conduction, it also causes bone conduction stimulation and masking.

He did some noise measurements in other longshore environments similar to what Claimant described and those measurements have also indicated that his hearing loss would not stem from that exposure. Claimant said in his deposition that he worked as a hook-on man inside the barges and in ro-ro, container, and small ships.

He did a noise study for Employer in 1992.[36] He took measurements of forklifts, including in the holds of the ships and in a warehouse. All the measurements were under 85 dB for the forklift measurement. He has done other noise studies for other longshore employers.

ANSI S 3.44, from the American National Standards Institute is the "Determination of Occupational Noise Exposure and Estimation of Noise-Induced Hearing Impairment."[37] Table F-2 is the hearing levels resulting from workplace exposures of 90 dBA time-weighted average. F-3 is from 95dBa, F-4 is from 100 dBA, and F-5 is sort of a meaningless one because it averages all four of those together. Each of those tables is divided into four decades of workplace exposure.

[35] EX-26.
[36] EX-22
[37] EX-30.

Within each of those decades, there are three columns. The column designated 0.9 represents the hearing levels of the 10 percent of the population least susceptible to damage from excessive noise. Column 0.5 represents the individual in the middle of the population in terms of susceptibility to noise damage. Column 0.1 represents the 10 percent of the individuals most susceptible to noise damage. Table F1 shows that for 85 dBA time-weighted average for 40 years, and the 10 percent of the population most susceptible to noise damage, the hearing levels at each frequency on the audiogram go from 0 dB in the low frequencies to a maximum of 9 dB at 4000 hertz. By the AMA guides hearing levels between 0 and 9 dB do not represent hearing loss. That suggests that 85 dBA time-weighted average does not result in hearing loss over a period of 40 years for individuals in the 10 percent of the population most susceptible to noise damage.

F2 shows that with a 90 dBA time-weighted average with 40 years of exposure, the 10 percent of the population most susceptible to noise damage has hearing levels that range again from 0 dB to a maximum of 20 dB at 4000 hertz. Those hearing levels are still all within normal limits. F3 shows that with a 95 dBA time-weighted average with 40 years of exposure, the 10 percent of the population most susceptible to noise damage had loss at 3000 hertz.

When noise levels reach this 95 dBA time-weighted average, the table shows those individuals have some noise-induced hearing loss whereas the tables for 85 and 90 dBA time-weighted average say otherwise. In sum, the table says that 90 dB or below does not result in hearing loss. The OSHA standard for hearing protection is 90 dBA for eight hours a day.

CX-11 is a position statement from the American Academy of Audiology showing 85 dBA time-weighted average as a threshold for causation and that one-quarter of those exposed to that intensity and duration will develop hearing loss. It refers to Dr. Alice Suter as the proponent of that philosophy. He cannot find any data that supports that proposition. The ANSI S 3.44, which is also ISO 1999, used as its database those studies that have been the best recognized and the most highly controlled relating occupational noise exposure to hearing loss. Its sources include Johnson, Burns and Robinson, Passchier-Vermeer, Pore, and several others that he can't recall. They are the studies that are the most well recognized that relate various levels of occupational noise exposure and durations to causation of hearing loss.

CX-12 is a publication by the American Industrial Hygiene Association referencing 85 dBA time-weighted average as a level for causation. However, that association is composed of individuals having no experience or qualifications in diagnosing hearing loss, particularly occupational hearing loss. Industrial hygienists may be qualified to measure noise exposure but not to relate that noise

exposure to the causation of hearing loss. They are not qualified to give an opinion on causation.

CX-13 is a journal article from the American Academy of Otolaryngology-Head and Neck Surgery. It discusses the use of a certain type of hearing testing that is inappropriate for the adjudication of a claim that has evoked potential audiometry. It is not specific enough regarding magnitude of pathology. It uses dB instead of dBA, which is the universally accepted measurement method for occupational noise exposure. That suggests that the authors may not have understood occupational noise exposures.

CX-14 is a publication from American Speech-Language-Hearing Association that suggests that levels over 80 and 85 decibels are potentially hazardous. That suggestion cannot be supported by the research. They also talk about extra-auditory effects of noise, such as affecting blood pressure and blood sugar. The recent research evidence has been very tenuous with regard to that. It suggests sounds louder than 80 decibels are considered potentially hazardous. That would suggest that anybody using a lawn mower is going to go deaf, since most lawn mowers are about 90 dBA.

CX-15 (EX-27) is a publication from the American Academy of Otolaryngology. It describes a percent risk of developing hearing impairment at 80, 85, and 90 dBA. He thinks the percentages are excessive, particularly in light of all the data from ANSI S 3.44/ISO 1999. The percentages also contradict his experience over the past 39 years.

EX-27 is the 2003 version. If it is referring to ANSI S 3.44, they must be considering anything above 0 dB to represent hearing loss when, in fact, the same AMA considers only hearing levels above 25 dB to represent hearing loss.

CX-16 is a presentation that was made to an OSHA Planning Committee by Dr. Alice Suter. Dr. Suter was the primary author of the current OSHA regulation. She wrote the majority of the 1971 OSHA standard while she was employed by OSHA. Dr. Suter was the primary proponent of the 90 dBA for eight hours a day criterion level that was promulgated by OSHA in 1971 and is still the fundamental basis for the OSHA regulation today. Since that time, Dr. Suter has left OSHA. She has modified her feelings on the issue of causation and has suggested reducing the criterion level from 90 dBA to 85 dBA. She has even made suggestions that even 75 dBA and 80 dBA can cause hearing loss. He believes those opinions to be renegade opinions not supported by any of the research that is widely accepted. Basically, Dr. Suter changed her own earlier opinion and OSHA did not go along with the change.

CX-17 is a publication from the National Institute on Deafness and Other Communication Disorders. They reference 85 dB. He believes that they do that out of an overabundance of caution.

CX-19 is a manual written by Dr. Alice Suter. It concerns different types of hearing aids. It is not peer reviewed, but is a trade magazine. The article was written by the vice president of one of the largest hearing aid manufacturers. His claim is that the study favors their hearing aids.

CX-20 is the same trade magazine, but a different author. This author is the senior researcher for a hearing aid manufacturer, and his conclusion was that noise reduction circuitry in hearing aids helps patients. Even though that's not a peer-reviewed publication, he would agree with that conclusion. However, it did not make a distinction between digital and analog hearing aids.

CX-21 is an article by an audiologist at Vanderbilt University stating that "[t]he effectiveness of digital hearing aids is largely unknown."

He believes with a reasonable degree of audiological certainty that Claimant has no hearing loss due to his work as a longshoreman. He cannot recall ever finding anyone that had an occupationally-induced hearing loss caused by longshore work.

He has conducted a number of sound-level surveys of workplace facilities and craft activities as described by Claimant as well as other workplace areas. The language he used in Claimant's report concerning sound-level surveys is the identical language he used in cases involving Port of New Orleans longshoremen.

In another case, he stated he relied on surveys other than the five or six longshore noise surveys. That report and Claimant’s report are identical as to his statement concerning the sound-level surveys that he relied on.

He is not relying on the other surveys in his statement in Claimant’s report, but with 30 years of experience in doing noise measurements, it's hard not to think back. When somebody tells him that they operated a forklift in a warehouse and the warehouse was loud, he may think back to those situations of other industrial noise measurements that involve warehouses and forklifts. To some degree he uses those studies in making a causation determination in Claimant’s case.

The records of those other studies were subpoenaed by Claimant, but he refused to supply sound-level surveys for any industry other than longshore.

He has done only one noise survey for Employer, and that was in 1992.[38] He does not have the raw data for that study. He tested five work activities in that study. They were not time-weighted averages because time-weighted average implies a full eight hours of duration. They represent dosimetry integrations, but over a period of a few hours rather than eight hours. He does not know what they really represent because he does not have the raw data. He believes they were over four to six hours. They were not over eight hours, but they were not a few minutes or an hour.

He noted in his report that the sound levels measured may not have been representative of sound levels at a facility other than the Jordan Road Wharf. Sound-level surveys of other sites should be conducted in order to assess the potential hazard of the exposures. Each sound-level survey is limited to its own set of facts and it may or may not be representative of what happened at another time with other equipment. He does not have any sound-level studies involving Claimant.

Claimant was a hook-on man. The test for Employer did not include a hook-on man. A hook-on man and groundman probably did the same work. A hook-on works on ships and ground and a groundman works only on the dock. There are differences in the sound levels associated with those activities. The ship would be louder.

CX-5 is a study for P&O Ports in January 2004. A groundman with a personal noise Dosimeter had 96.1 dBA. An area sound level was 88.7 dBA. He was suspicious of the groundman's personal dosimeter because it was the highest reading that entire day. He also questioned the 92.1 dBA for the fifth wheelman as the second highest reading and exceeding the OSHA PEL. A wharf clerk tested at 90.4 dBA. The area sound levels of the wharf clerk next to the diesel crane had an 87.4 dBA.

A January 2004 survey of the Napoleon Avenue Wharf[39] included groundmen. They had dBAs of 89.3, 90.6, and 85.7. The spread is probably normal variation and he does not expect three people doing the same job to have precisely the same noise exposures.

If he extrapolated the information from the P&O studies and applied them to Employer during the time that Claimant was working between 1983 and 1988, Employer would have been required to have an OSHA hearing conservation program.

[38] CX-6.
[39] CX-5.

None of his studies[40] make any recording of the make, model, age, or the type of equipment that was studied. That would be relevant in making comparisons between these studies.

The OSHA regulations do not use the term "injurious noise," but Table G-16 in the original OSHA regulation explains permissible noise exposures. Those are the noise exposures that will not be injurious. If noise exposure exceeds those permissible limits, there is potential for hearing loss.

He agrees that many audiologists are of the view that 85 dBA or greater constitutes injurious noise. But a large number of audiologists don't really know what they're talking about. He is a member of the American Academy of Audiology and their position is that 85 dBA or greater constitutes injurious noise. They recommend hearing protection above 85 dBAs. That is out of an overabundance of caution.

Decibels are logarithmic. 50 percent of 90 dBA for eight hours a day is 85 dBA for eight hours a day. There are two exchange rates that are generally used in terms of sound measurements. A 3 dB exchange rate indicates that each time the energy is doubled, the decibel level increases by 3 dB. When energy is halved, the decibel level decreases by 3 dB. That exchange rate is used usually by acoustical engineers in designing or modifying equipment. There is also a 5 dB exchange rate that is required or specified by OSHA. OSHA has chosen a 5 dB doubling rate or exchange rate because the research that they reviewed indicated that the 5 dB doubling rate was more accurate in terms of the way that the human ear sustains damage. A 3 dB exchange rate would affect the groundmen that are listed on page 11 of CX-5. One of them already is over 90 dB. It will push the 89.3 over 90 dBA and push the 85.7 to close to 90.dBA.

The American Academy of Audiology endorses the views of Dr. Suter and the views of NIOSH. NIOSH's recommendation was 85dBA, but NIOSH is composed of a bunch of ivory-tower scientists and not clinical people that get out and beat the pavement, do noise surveys and see patients. The role of NIOSH is to perform research and develop the criteria that will be adequate to protect workers regardless of the economic feasibility. OSHA's 90 dBA standard came out in 1983 and has not changed since. The American Conference of Governmental Industrial Hygienist’s standard concerning exposure is 85 dBA. He is a member of the American Speech-Language-Hearing Association. They consider exposure of 85 dBA to be injurious and anything over 80 dBA is potentially hazardous. However, that is not supported by the data.

[40] CX-5-7.

Even if he assumed that Claimant had to shout to be heard by coworkers 3 to 4 feet away, it would too crude a measurement to determine injurious noise.

He has no problem with Dr. Irwin prescribing digital hearing aids. $2400 for a pair of digital hearing aids is an excellent price. He does not disagree in general with Dr. Irwin's statement that it is possible that if Claimant was exposed to sufficient levels of potential injurious noise, Claimant could have sustained some degree of sensorineural loss from that exposure. He would have to be put it in the context of what is injurious.

He never scored the audiogram for the air scores. The right ear would be 73.1 percent, the left ear 88.1 percent, and the binaural 75.6 percent. Dr. Irwin gives an air score of 76.9 percent binaural.

Both Dr. Marks and Dr. Irwin feel that the hearing aids are a possible treatment for the otosclerosis. Claimant's hearing loss by air conduction is so severe and his hearing loss by bone conduction is so mild that he is one of the few cases that justify considering using a bone conduction hearing aid. His hearing loss requires a very, very powerful hearing aid. When a patient is fitted with a very powerful hearing aid, there is considerable risk for encountering a problem with a whistling sound produced by the amount of power involved.

When he reads those studies and reviews the data, it is very conclusive that hearing loss (as defined by the AMA as greater than 25 dB) takes greater than 90 dBA time-weighted average, which is eight hours a day of exposure, to cause hearing to be worse than normal limits or greater than 25 dBA. He believes it is prudent to overprotect individuals and to have hearing conservation programs beginning at a time-weighted average of 85 dBA.

That is essentially consistent with what all these organizations are espousing and recommending. He does not see his opinion as necessarily different from that of those organizations because the same 85 dBA for eight hours a day is what he recommends to his industrial clients. However, that is a totally different issue than what causes damage. What causes damage is greater than 90 dBA time-weighted average.

In 1971, when OSHA first promulgated regulations, they established the criterion level of 90 dBA for eight hours a day. In 1983, in the amendments to that rule, OSHA never changed that criterion level. Today, it is the same as it was in 1971.

An employer can expose a worker to 86 dB, but must periodically test him. They must make available hearing protection; but they do not have to require its use.

There is no prohibition against exposure between 85 and 90 dB because the criterion level still constitutes the permissible exposure level: 90 dBA, eight hours a day.

OSHA requires that noise measurements or dosimetry be performed on a representative sample of employees. For practical purposes it is impossible to do any kind of noise sampling on every person in the workplace. Instead, a representative sample of individuals in each craft activity is usually selected and then considered to be representative of their entire group.

He has seen enough noise studies to feel that he has a representative indication of the level of noise Claimant was exposed to. He believes that the majority of audiologists and otolaryngologists insufficiently address that issue by asking if patient worked in loud noise, performing a hearing test, and then arriving at a diagnosis based on combining those two bits of data. Instead, he believes that it is absolutely necessary to more firmly base that diagnosis on actual data.

At age 80, Claimant's bone conduction thresholds are much better than his 80 year old peers who have been exposed to no occupational or recreational noise whatsoever. His air conduction thresholds have no relationship to causation of his hearing loss by any type of noise exposure. The difference between his bone conduction and his air conduction thresholds appears to be entirely attributable to his otosclerosis, which is not a work-related pathology. The focus should be on Claimant's bone conduction thresholds, which are much better than most 80-year olds.

The 90 dB on the P&O studies does not mean that there was definitely injurious exposure. Table F-2, which is the 90 dB time-weighted average for 40 years and 10 percent of the population most susceptible to noise damage, shows hearing levels still within normal limits.

Dr. Thomas Irwin testified at deposition and his reports show in pertinent part that:[41]

He graduated from Tulane Medical School and was an assistant professor of otolaryngology there. He has been in private practice and a clinical associate professor of otolaryngology at Tulane. He has testified as an expert and was engaged in this case by the Department of Labor.

He first saw Claimant on 14 Jul 06. He conducted an interview, examination of the head and neck, and an audiogram. The audiogram showed significant hearing loss of 8.4% in both ears, by AMA Guidelines. Claimant has a mixed conductive

[41] EX-10, 19, 25, 29, 32; CX-24, 33-34.

and a sensorineural loss and is a candidate for the use of hearing aids. His audiogram report is similar to those of Mr. Bode and Dr. Seidemann. Each shows a mixed hearing loss of approximately the same levels.

Any deterioration of the nerve cells in the inner ear can produce a sensorineural hearing loss. Sometimes it is an effect of aging, or it can be from trauma to the head. Some infections can cause it. Exposure to loud noise can cause it. There are some congenital forms. Claimant had no history of congenital or trauma issues. Claimant did relate a history of occupational noise exposure. He served in the military for several years and as a longshoreman was sometimes exposed to significant levels of noise.

If Claimant was exposed to sufficient levels of potentially injurious noise, he could have sustained some degree of sensorineural loss from that exposure. Over a sufficient period of time, being exposed to noise on a regular basis at 85 decibels could be considered injurious. If people 3 to 4 feet apart from each other had to yell to be heard it would suggest loud enough exposure to potentially harm hearing.

Dr. Marks' report says that surgery is a possible treatment for Claimant and could correct the conductive loss. Dr. Marks said that Claimant's conductive loss is due to otosclerosis, an overgrowth of bone where the stapes bone plugs into the inner ear. The bony extrusion actually could provide some protection from noise-induced hearing loss. It is almost like wearing earplugs. The surgical response is to remove part or all of the stapes bone and replace it with a prosthesis. In about 90% of cases it will improve the hearing.

However, a surgeon would not know whether the surgery could be beneficial until he performed it and saw what was in the ear. Most of the time surgery can correct a conductive loss. Claimant's age would not make him a good candidate for surgery if he can get an acceptable result with a hearing aid. Older individuals sometimes get a worsened sensorineural hearing loss from performing stapes replacement surgery. If Claimant were younger, he would recommend surgery. A hearing aid would address the sensorineural hearing loss, and surgery would not. If the hearing aid did not help he could try surgery.

The AMA Guides mention permanent hearing impairment as a permanently reduced hearing sensitivity outside the range of normal for the individual based on population normal values. They evaluate hearing impairment based on the individual's binaural hearing determined from the pure tone audiogram, which is both air testing and bone testing.

The AMA Guidelines have an example of a person who has a mixed sensorineural and conductive hearing loss. They determined that the patient had a 17.8% binaural impairment based on the air conduction scores. The patient had chronic ear disease and a history of ear surgery. Noise exposure was not an issue in that case. They could not use a bone conduction to do an AMA rating in the example because there was no 3000 hertz score.

He is not sure there is that much significance in arguing over 85 decibels or 90 decibels in time-weighted average. Nobody really knows how many days or years of exposure at 85 dB are required to be injurious. There is a lot of individual variation in susceptibility. Most people, given those levels of exposure, over a one or two year period, will probably evidence some high-frequency loss. However, a few people who have been exposed to that noise or louder for 20 or 30 years do not even measure a hearing loss.

The American Academy of Otolaryngology-Head and Neck Surgery Foundation's guide for conservation of hearing and noise said that 28.3% of people who weren't exposed to loud noise ever had some hearing loss. That sounds reasonable to him. The foundation also states that 31% of people exposed to 85dBA, time-weighted average for their whole career, had hearing loss.

His work is with people who complain about hearing loss and it is hard for him to find a shipyard worker who does not have at least a little high-frequency hearing loss after a few years in the shipyard.

It may be hard to prove Claimant's sensorineural is due to his exposure at work. Many people with otosclerosis have some degree of sensorineural loss, particularly over time. Claimant's noise exposure history is not limited to work as a stevedore. He was in the military and no one knows what his hearing was when he started working on the docks. Noise induced hearing loss has no latency period and any worsening after cessation of the noise exposure is unrelated to the noise.

Claimant did not have a hearing aid evaluation to determine the best type of hearing aid. His office normally prescribes a digital hearing aid. The cheapest digital hearing aid for Claimant, a Starkey Destiny 400, would be $2400. His audiologist would need to do a hearing aid evaluation to determine exactly which hearing aid is best for Claimant. That would most likely be digital.

Dr. Herbert Marks' reports show in pertinent part that:[42]

> He saw Claimant on 14 Mar 07 and reviewed the audiograms done by Mr. Bode, Dr. Seidemann and Dr. Irwin. He also took Claimant's history and conducted his own audiograms. He found Claimant had a mixed hearing loss with a mild sensorineural component. He opined that Claimant's conductive loss is due to otosclerosis and that given Claimant's age, he might be better served by amplification rather than surgery.

ANALYSIS

There is no significant dispute that Claimant suffers mixed hearing loss, with the major portion of that loss a conductive hearing loss that is a consequence of otosclerosis and has no causal relationship to noise exposure.

Claimant testified that the environment in which he worked for Employer from 1982 until 1988 was loud and that he noticed problems with his hearing as early as 1976, when he obtained a hearing aid. The first audiogram report is from 2005, some 17 years following Claimant's last day of work with Employer. Mr. Bode testified that the environment described by Claimant caused at least part of Claimant's sensorineural hearing loss. Dr. Irwin opined that the environment described by Claimant suggested potentially injurious noise exposure.

That evidence is sufficient to invoke the Section 20(a) presumption of causation. Employer submits that it has rebutted the presumption with evidence that the sensorineural hearing loss was not caused by exposure to noise. However, Claimant essentially argues that in cases of hearing loss, the Section 20(a) presumption is conclusive, not rebuttable. Claimant's brief cites a Board holding that exposure alone is a sufficient basis for the imposition of compensation liability.[43] Claimant seems to suggest that once the dual predicates of hearing loss and injurious exposure are shown and the *prima facie* case established, the question of actual causation becomes moot.[44] Employer then has the burden of proving no loss or no injurious exposure.

While consistent with a number of earlier Board opinions, the suggestion that causation becomes moot with a *prima facie* hearing loss case is inconsistent with later Board decisions. In 2000, the Board affirmed a hearing loss case in which the Claimant

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[42] EX-16-17; CX-25.

[43] *Grace v. Bath Iron Works*, 21 BRBS 244 (1988).

[44] The critical question in that regard is, "Exposure injurious to whom? A majority of employees, a substantial percentage, or the claimant?" If the answer is the claimant, the question of causation integrates into the second part of the *prima facie* case and the presumption essentially disappears. Otherwise, the suggested analysis simply does away with the possibility of rebutting the presumption and puts the burden on the employer to disprove causation.

established a *prima facie* case. The Employer did not disprove hearing loss or injurious noise exposure, but rather offered medical evidence rebutting causation.[45] Thus, the question is not whether Employer is able to disprove one of the predicates of the Claimant's *prima facie* case, but if Employer is able to rebut the presumption of causation and return to the Claimant the burden of proof on that question.

Dr. Seidemann opined that, based on his experience, Claimant's sensorineural loss was not due to his exposure to noise while working for Employer. He relied upon sound studies at other locations in the industry to extrapolate that Claimant was not exposed to sufficient noise to cause his hearing loss. While conceding he never studied Claimant's specific time and place of employment, he feels he has seen enough noise studies to understand the level of noise to which Claimant was exposed. He believes that the majority of audiologists and otolaryngologists insufficiently address that issue. They simply ask if the patient worked in loud noise, perform a hearing test, and then arrive at a diagnosis based on combining those two pieces of data. He believes that it is absolutely necessary to more firmly base that diagnosis on actual data.

He also noted that Claimant's hearing was actually better than expected for a typical man of his age who did not have a history of noise exposure. Dr. Irwin included aging as a possible cause of sensorineural hearing loss and observed that many people with otosclerosis also have some degree of sensorineural hearing loss. That is sufficient evidence to rebut the presumption of causation and return to Claimant the burden of proving his hearing loss was caused or aggravated by his work.

Consequently, the burden is on Claimant to prove by the record as a whole that his hearing loss was caused or aggravated by his work for Employer. The two parties' experts are in direct conflict. Although both Mr. Bode and Dr. Seidemann have extensive CVs, Dr. Seidemann's background is broader and affords him more credibility in that regard. While Mr. Bode has seen a large number of Claimant's counsels' clients, Dr. Seidemann has never seen a hearing loss case he believed to be caused by exposure in a longshore workplace. Moreover, Dr. Seidemann's view of what is a threshold level for injurious noise appears to be at odds with the weight of the expert community. He even testified with some disdain for other experts, but also opined that they were setting threshold injurious levels out of an abundance of caution and his view was not that far from theirs.

On the other hand, Mr. Bode retreated from his initial testimony that almost all of the seven characteristics of occupationally induced hearing loss were present and concede

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[45] *Coffee v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *see also Bridier v. Alabama Dry Dock & Ship Bldg*, 29 BRBS 84 (1995). The cases cited by Claimant predate *Coffee* and *Bridier*. While Claimant also cites *Ibos v. New Orleans Stevedore*, 317 F.3rd 480 (5th Cir. 2003), it is an occupational disease case of asbestos exposure. Hearing loss occurs at the time of exposure and is not an occupational disease under the Act. *Bath Iron Works Corp. v. Director, OWCP*, 506 *U.S.* 153 (1993).

that he was not sure of any but one. After his initial testing of Claimant, Mr. Bode stated Claimant would need to see an ENT specialist to determine if there was a true noise induced hearing loss. However, he testified that he included that note just to cover himself in the event of other medical issues. I found Dr. Seidemann to be more credible than Mr. Bode.

However, I found Dr. Irwin to be the most credible expert. He was neutral and had an extensive CV. His testimony was consistent and appeared to be an unbiased observation of the case. Dr. Irwin's audiogram report was similar to those of Mr. Bode and Dr. Seidemann, showing a mixed hearing loss of approximately the same levels. He stated sensorineural hearing loss can be a result of aging, trauma, infection, heredity, or loud noise. He noted that as a longshoreman, Claimant was sometimes exposed to significant levels of noise and if he was exposed to sufficient levels of potentially injurious noise, he could have sustained some degree of sensorineural loss from that exposure. He opined that over a sufficient period of time, being exposed to noise on a regular basis at 85 decibels could be considered injurious and, if people 3 to 4 feet apart from each other had to yell to be heard (as Claimant described) it would suggest loud enough exposure to potentially harm hearing.

Dr. Irwin does not believe there is that much significance between 85 decibels and 90 decibels in time-weighted average and opined that no one really knows how much time of exposure at 85 dB is required to be injurious. He noted much individual variation in susceptibility, but that most people, given those levels of exposure, over a one or two year period, will probably evidence some high-frequency loss. However, he added that a few people who have been exposed to that noise or louder for 20 or 30 years do not have a measurable a hearing loss.

He found it reasonable to accept The American Academy of Otolaryngology-Head and Neck Surgery Foundation's statement that 28.3% of people who were not exposed to loud noise still had some hearing loss and that 31% of people exposed to 85 dBA, time-weighted average for their whole career, had hearing loss. He noted that it is hard to find a shipyard worker without some high frequency hearing loss, but conceded his job is to work with people who have hearing problems.

He concluded that it may be hard to prove Claimant's sensorineural is due to his exposure at work, since many people with otosclerosis have some degree of sensorineural loss, particularly over time. He noted no one knows what Claimant's hearing was when he started working on the docks. He also opined that noise induced hearing loss has no latency period and any worsening after cessation of the noise exposure is unrelated to the noise.

Perhaps because of its even handed nature, I did not find Dr. Irwin's testimony to be determinative. His testimony is essentially that Claimant's work for Employer may or

may not be a cause or contributing factor in his sensorineural hearing loss. Given that and the contradictory opinions of Mr. Bode and Dr. Seidemann, the expert testimony as a whole in the case as to the ultimate question of causation is not dispositive. The absence of an audiogram from any earlier than more than 14 years after Claimant stopped working for Employer is also a factor.

While the record establishes that it is more likely than not that Claimant was exposed to noise that could have caused hearing loss in some workers, there were two aspects of the evidence I found to be most probative. The first is that Claimant's hearing continued to deteriorate after cessation of exposure at work. The second and most compelling is that Claimant's sensorineural hearing is better than his 80 year old peers who were not exposed to occupational or recreational noise. While the continued deterioration can also be explained by the otosclerosis and it is possible that Claimant started out much better than his age group peers and still suffered an occupationally induced loss, the burden is on Claimant to prove causation by a preponderance of the evidence. I find the totality of the record fails to do so.[46]

ORDER AND DECISION

The claim is **Denied**.

So ORDERED this 15th day of December, 2008 at Covington, Louisiana.

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PATRICK M. ROSENOW
Administrative Law Judge

[46] Had I accepted Claimant's argument that with his *prima facie* case he placed the burden on Employer to disprove injurious exposure in general, I would have found Employer did not do so. However, I would not have found the conductive loss to be compensable as the record does not establish it was clearly pre-existing and was without dispute unrelated to Claimant's work for Employer. I thus would have found Claimant suffers an 8.4 percent binaural permanent impairment as a result of his work for Employer. Given Claimant's age as a contra-indication for surgery, I also would have found he is entitled to digital hearing aids as necessary, reasonable, and appropriate medical treatment.