U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 November 2011

CASE NO.: 2010-LHC-793

OWCP NO.: 07-185664

IN THE MATTER OF:

MARSHALL JACKSON

Claimant

v.

CERES GULF, INC.

Self-Insured Employer

APPEARANCES:

EDWARD S. RAPIER, JR.
ARTHUR J. BREWSTER

For The Claimant

LARRY P. POSTOL

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Ceres Gulf, Inc. (Self-Insured Employer).

The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice

of Hearing was issued scheduling a formal hearing on February 4, 2011, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs. Claimant offered forty-two (42) exhibits, Employer proffered twenty-eight (28) exhibits, all of which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

The parties stipulated (JX-1), and I find:

1. That the date of injury is May 14, 2009.
2. That there existed an employee-employer relationship at the time of the accident/injury.
3. That Claimant became aware of the employment/hearing loss relationship on May 14, 2009.
4. That Employer was advised of the hearing loss on September 25, 2009.
5. That Employer filed a Notice of Controversion on September 25, 2009.
6. That an informal conference before the District Director was held in November 2009.
7. That Claimant is employed.
8. That Claimant's applicable average weekly wage is $926.63.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___. For purposes of brevity, the following exhibits are duplicates, and citations will only be made to one in the decision: CX-4 & EX-7; CX-25 & EX-15; CX-27 & EX-17; CX-22 & EX-18; CX-29 & EX-19; and CX-30 & EX-20.

9. That five (5) audiograms have been produced:
   a. Mr. Daniel Bode dated May 14, 2009.
   b. Dr. Michael Seidemann dated October 14, 2009.
   c. Dr. Herbert Marks dated November 20, 2009.
   d. Dr. Michael Seidemann dated November 22, 2009.
   e. Dr. Herbert Marks dated May 25, 2010.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability including whether Claimant has reached maximum medical improvement.
2. Causation.
3. Entitlement to and authorization for medical benefits and the cost of hearing aids.
4. Entitlement to and amount of indemnity benefits.
5. Attorney Fees

III. STATEMENT OF THE CASE

A. The Testimonial Evidence

1. Claimant's Testimony

Claimant is a forty-five (45) year old, married man who has a tenth (10th) grade education and has worked as a longshoreman for eighteen (18) years. (Tr. 24-25). In his capacity as a longshoreman, Claimant has driven trucks, operated equipment, and worked with Skil saws and chain saws. (Tr. 25). Claimant testified that he worked in barges alongside machinery such as a Bobcat top loader. (Tr. 25-26). He described his working conditions on the river as "very noisy" and "real loud." (Tr. 26). He also recalled not being able to hear a forklift that was backing up due to the level of noise and almost being run-over as a result. (Tr. 26). Claimant testified when he worked at Domino Sugar, he was not required to and did not wear hearing protection. (Tr. 32-33).

According to Claimant, he first noticed a hearing problem approximately six (6) to eight (8) years ago. (Tr. 27). He testified that he began noticing his hearing problems in conversations and through the volume of the television. (Tr. 28). Claimant had never had his hearing tested prior to his first examination by Mr. Bode, but he has subsequently undergone testing conducted by three other examiners. (Tr. 28). According to his testimony, Claimant cooperated with the examiners to the best of his ability. (Tr. 28-30). Claimant further testified that if either surgery or medication could correct his hearing loss, he would be willing to try either. (Tr. 34).

B. The Medical Evidence

1. Mr. Bode's Testimony and Reports

Mr. Daniel Bode, a licensed Clinical Audiologist, performed an audiological evaluation of Claimant on May 14, 2009, and issued a report on May 15, 2009. (CX-2). After visually inspecting Claimant's ears, Mr. Bode performed impedance audiometry, pure tone air conduction testing, DPOAE testing, bone conduction testing, speech reception threshold testing, and speech discrimination testing. (CX-2, p. 1). The pure-tone air conduction testing indicated Claimant suffered a bilateral, sloping, mild/moderate to severe, high frequency hearing loss. The DPOAE test results were consistent with bilateral hearing loss throughout all frequencies. (CX-2, p. 1). The results of Mr. Bode's bone conduction tests corroborated the sensorineural nature of Claimant's hearing loss. (CX-2, p. 1). According to Mr. Bode's report, the impedance testing showed normal middle ear function. (CX-2, p. 1). Mr. Bode also found Claimant's Speech Reception Threshold (SRT) to be at fifty decibels (50 dB HTL), bilaterally. (CX-2, p. 1). Mr. Bode performed speech discrimination (SD) testing by presenting at a loud conversational speech level of ninety-five decibels (95 dB HL); and Claimant scored excellent, bilaterally. (CX-2, p. 1). In the report, Mr. Bode opined that the results of his evaluation are consistent with a high frequency sensorineural hearing loss resulting from continuous exposure to excessively loud noise. (CX-2, p. 1). Mr. Bode estimated the cost of hearing aids at $5,400 per pair plus tax and the cost of batteries at $120.00 per year.

At the hearing, Mr. Bode testified he examined Claimant on May 14, 2009. Mr. Bode found Claimant had "a mild to moderate and then to severe sloping sensorineural hearing loss" and found no conductive loss. (Tr. 52). According to Mr. Bode,

Claimant's SRT corroborated the pure tone average. (Tr. 52). Mr. Bode testified that Claimant scored ninety-four percent (94%) in his left ear and ninety-two percent (92%) in his right ear. (Tr. 53). In Mr. Bode's opinion, the speech discrimination test results are possible in relation to the pure tone test results. (Tr. 54). Mr. Bode further testified that Claimant's otoacoustic emissions (OAE) test results corroborated his pure-tone findings. (Tr. 54).

Mr. Bode opined Claimant's sensorineural hearing loss was caused by noise exposure. (Tr. 54). He reached this conclusion based upon his experience, the case history, and the test results. (Tr. 54). The absence of a notch on Claimant's audiogram did not affect Mr. Bode's opinion as he does not know of any other option for the cause of Claimant's hearing loss. (Tr. 55).

Regarding Dr. Seidemann's results, Mr. Bode testified that his OAE tests refute Dr. Seidemann's results. (Tr. 55-56). He clarified his statement by testifying that if one were to accept Dr. Seidemann's results one would not expect the OAE test results to show no emissions. (Tr. 55-56). In other words, based on the OAE test results he achieved, Mr. Bode would not expect to see hearing at the levels reported by Dr. Seidemann. (Tr. 55-56).

Regarding Dr. Marks's test results, Mr. Bode testified that Dr. Marks's tympanogram is similar to his and Dr. Marks's OAE results corroborated his pure tone results but refuted Dr. Seidemann's. (Tr. 57). The main difference between Dr. Marks's results and Mr. Bode's results was the presence of a conductive component to the hearing loss, which Dr. Marks found and Mr. Bode did not. (Tr. 57-58). Mr. Bode testified that he determined there was no conductive loss based on the tympanogram which is usually "very indicative of a . . . a middle ear problem." (Tr. 58). In addition, the compliance values recorded are within normal limits indicating that nothing is restricting the ear drum. (Tr. 58). He further testified that a conductive component is in the middle ear and that a tympanogram is the indicator he uses for determining whether a middle ear problem exists. (Tr. 58-59).

According to Mr. Bode, the speech discrimination test results he achieved should not have been a red flag indicating a problem with his tests. (Tr. 59). Mr. Bode does not think so because his speech discrimination test results were so similar to Dr. Marks. (Tr. 59).

During cross-examination, Mr. Bode testified that a large conductive loss in the low frequencies is not possible with a normal tympanogram. (Tr. 85). In Mr. Bode's opinion, Dr. Marks's two audiograms are not within test-retest of each other. (Tr. 87). Further, conductive hearing loss has not been known to occur due to noise. (Tr. 87).

Mr. Bode agrees with Dr. Seidemann and disagrees with Dr. Marks that issues related to clinical masking were incapable of explaining the difference between the bone conduction test results on the various audiograms. (Tr. 124).

Mr. Bode testified that Claimant's diabetes was not a factor in his hearing tests and that, more often than not, he does not see a recovery notch in the audiogram. (Tr. 127, 131). He also testified that the OAE and ABR tests confirmed both his and Dr. Marks's findings of a significant hearing loss. (Tr. 131).

2. Dr. Seidemann's Reports and Testimony

Dr. Seidemann, Ph.D., performed an audiological evaluation of Claimant on October 14, 2009, and according to Dr. Seidemann's report "all aspects of [Claimant's] evaluation far exceed the requirements of 29 C.F.R. 1910.95." (EX-7, p. 1). Further, Dr. Seidemann's equipment was calibrated on August 6, 2009. (EX-7, p. 1).

Dr. Seidemann found that Claimant suffered a mild sensorineural hearing loss in his left and his right ear. (EX-7, p. 2). Claimant's right ear hearing sensitivity was within normal limits up to five hundred hertz (500 Hz) with mild sensorineural loss in the higher frequencies, and Claimant's left ear hearing sensitivity was within normal limits up to two thousand hertz (2000 Hz) with mild sensorineural loss in the higher frequencies. (EX-7, p. 2).

According to Dr. Seidemann's report, Mr. Bode's diagnosis of noise-induced hearing loss is invalid as such a diagnosis cannot be reached without "noise-causative data . . ., which Mr. Bode does not seem to have." (EX-7, p. 2). Dr. Seidemann's report goes further and states that he has performed sound level surveys indicating that Claimant's hearing loss could not have been caused by his activities in his workplace. (EX-7, p. 2).

Dr. Seidemann evaluated Claimant again on November 22, 2010, and submitted an additional report dated December 1, 2010. (EX-19). In this report, Dr. Seidemann accuse**d** Claimant of producing "numerous and constant indications of exaggeration of hearing levels," but according to Dr. Seidemann he was still able to obtain accurate test results. (EX-19, p. 1). After reviewing the prior audiograms, Dr. Seidemann attempt**ed** to discredit Dr. Marks's findings by pointing out all three hearing tests showed normal tympanograms. (EX-19, p. 1). Further, Dr. Seideman**n** state**d** "The findings of all three tests indicating normal middle ear function are in gross contradiction to the finding of a significant conductive component to [Claimant's] hearing loss by [Dr. Marks' office]." Regarding causation, Dr. Seidemann noted in his report that neither his own, Mr. Bode's, nor Dr. Marks's audiograms are "consistent with causation related to noise exposure." (EX-19, p. 2).

A supplemental report dated December 16, 2010, and written by Dr. Seidemann was also submitted. This report addressed the auditory brainstem response (ABR) evaluation performed by Dr. Sanborn. (EX-20). According to Dr. Seidemann, these tests do not allow the determination of actual hearing thresholds because the tests lack sufficient specificity. (EX-20, p. 1). He further noted that the ABR test can neither confirm nor reject the accuracy of the behavioral tests in this case. (EX-20, p. 1).

At the hearing, Dr. Seidemann was accepted as an expert in the field of forensic and industrial audiology. (Tr. 145). After taking the patient's history, Dr. Seidemann ran audiological tests including air and bone conduction audiometry as well as speech reception threshold and speech discrimination testing. (Tr. 146). According to Dr. Seidemann, he also noted the presence of false under-hearing during his October 14, 2009, examination. (Tr. 146). In an attempt to prevent a patient from exaggerating his responses, Dr. Seidemann generally uses persistence, repetition, and variability. (Tr. 148). For example, during the testing procedure he will repeat words and change the sound level up and down at various decibel levels. (Tr. 148).

According to Dr. Seidemann's testimony as well as his reports, a person cannot have a normal typanogram and have a conductive hearing loss. (Tr. 149). When confronted with a contrary statement made by Dr. Marks, Dr. Seidemann testified that otolaryngologists are simply not as well versed in audiology as an audiologist. (Tr. 150). He explained:

> . . . the audiologist is the person who does the teaching of the ENT's (sic) in regard to issues related to hearing, hearing loss, and hearing testing. That instruction is not in any sense extensive or comprehensive. I know of only a very few otolaryngologists around the United States who truly have an excellent understanding [of] hearing tests and the intricacies thereof like cases of conductive loss that may have a normal tympanogram, but in fact, end up with some kind of conductive component.

(Tr. 149-50).

Dr. Seidemann also testified that Claimant's time on the waterfront does not correlate with the level of hearing loss found by Mr. Bode. (Tr. 154). According to Dr. Seidemann, Claimant's hearing loss is not due to his employment. (Tr. 159). Dr. Seidemann testified that he based his opinion on noise dissymmetry studies that he has performed and on the appearance of Claimant's audiogram. More specifically, Dr. Seidemann testified that Claimant's audiogram has a gentle slope and does not have the "noise notch."

Dr. Seidemann testified the dissymmetry studies relative to longshore activities that he has performed, have generally shown exposures below ninety (90) DBA. (Tr. 159). Regarding the personal noise dissymmetry measurements Dr. Seidemann relies on, *inter alia*, he testified that the measurements are made by mounting a noise dosimeter on a worker's belt. (Tr. 161-62). The dosimeter accumulates information, recorded in Decibels, over an entire work shift via an attached microphone that is clipped to the worker's collar. (Tr. 162). This information is then used to determine the time weighted average noise exposure. The study performed at the France Road facility of P & O Ports by Dr. Seidemann showed a low of seventy-one point eight decibels (71.8 dB) and a high of ninety-six point one decibels (96.1 dB). (Tr. 162). According to Dr. Seidemann, he believes the noise studies he performed are representative of Claimant's noise exposure. (Tr. 163).

Dr. Seidemann also testified that Claimant's test results, including the tests performed by Mr. Bode and Dr. Marks, showed good speech discrimination scores and that this "definitely" does not indicate a significant sensorineural hearing loss. (Tr. 164). According to Dr. Seidemann, speech discrimination scores such as Claimant's are indicative of either normal

hearing, close to normal hearing, or a conductive hearing loss. (Tr. 164).

Dr. Seidemann also testified that, Mr. Bode was correct when he stated that the absence of acoustic reflexes could indicate either a conductive loss or a sensorineural loss. (Tr. 167). When presented with a statement allegedly made by Dr. Marks that this would indicate a conductive loss, again Dr. Seidemann was "certain" that otolaryngologists are not trained quite as well. (Tr. 167).

Mr. Bode and Dr. Marks performed otoacoustic emissions (OAE) testing on Claimant. Contrary to both Mr. Bode and Dr. Marks, Dr. Seidemann believes the OAE test results are consistent with his findings. (Tr. 164). Specifically, he testified that he found Claimant had normal hearing at some frequencies and mild to moderate hearing loss at others which is consistent with the OAE test results. (Tr. 164). As an example, Dr. Seidemann testified that he found Claimant had a hearing threshold of forty decibels (40 dB) in both his left and right ears at four thousand hertz (4,000 Hz) and that this was within a reasonable correlation of the otoacoustic emissions that were obtained. (Tr. 165).

Dr. Seidemann also opined the Auditory Brainstem Response (ABR) test results were "very" consistent with his hearing test results. (Tr. 165). According to his testimony, the ABR test is an estimation of hearing thresholds in the two thousand (2,000 Hz) to four thousand hertz (4,000 Hz) range. (Tr. 165).

Furthermore, it is Dr. Seidemann's opinion that Claimant does not have a conductive component to his hearing loss. (Tr. 171). However, if Claimant suffers from a large conductive hearing loss then Dr. Seidemann believes he is not at MMI. (Tr. 167). Because of Claimant's hearing loss, Dr. Seidemann opined he is a candidate for hearing aids which would cost $3,000.00 a pair at Dr. Seidemann's office.

On cross-examination, Dr. Seidemann admitted that the results of the two OAE tests and the ABR test, which are all objective tests, show that Claimant has a sensorineural hearing loss greater than what he found in his audiometric testing. (Tr. 198-99).

3. Dr. Marks's Reports and Deposition

After examining Claimant on November 20, 2009, Dr. Marks, an otolaryngologist, noted that both of Claimant's tympanic membranes were within normal limits. (CX-25, p. 1). Dr. Marks's audiometry revealed a bilateral mixed hearing loss including a moderate mid-range to high frequency sensorineural hearing loss with a much larger conductive component. (CX-25, p. 1). He also found Claimant's speech discrimination (SD) scores to be eighty-eight percent (88%) in the right ear and ninety-two percent (92%) in the left ear. (CX-25, p. 1).

According to Dr. Marks, the conductive loss when considered with the normal tympanic membranes would indicate middle ear disease and the degree of conductive loss would indicate a failure of transmission of sound through the ossicular chain of the middle ear to the inner ear. (CX-25, p. 1). Dr. Marks also stated the conductive component of Claimant's hearing loss could not be related to noise; could be benefitted by hearing aids; and could, theoretically, be improved by surgery. (CX-25, p. 1).

In a report dated March 19, 2010, Dr. Marks stated that normal tympanometery values do not mean there is no conductive hearing loss because certain middle ear pathologies can produce a Type A tympanogram. (EX-16, p. 1). Dr. Marks also stated that due to certain discrepancies in his own results and the major discrepancies between the various audiograms, he believed a subsequent evaluation would be beneficial. (EX-16, p. 2).

Claimant was evaluated a second time by Dr. Marks's office on May 25, 2010, followed by a report by Dr. Marks dated June 8, 2010. (CX-27, p. 1). Dr. Marks again found mixed conductive and sensorineural hearing loss and noted the audiometry was "virtually identical" to the first audiogram performed by his office. (CX-27, p. 1). Dr. Marks's testing also indicated (1) Type "A" tympanometry, indicating there is no evidence of middle ear fluid causing the conductive component of Claimant's hearing loss; (2) absence of acoustic reflexes, substantiating the conductive hearing loss; and (3) absent otoacoustic emissions. (CX-27, p. 1).

In a report dated October 26, 2010, Dr. Marks answered certain questions posed by Claimant's Counsel. (CX-28). Dr. Marks noted that the ABR testing performed by Dr. Sanborn confirmed that Claimant suffers a significant sensorineural hearing loss bilaterally; however, the ABR testing was unable to

clarify the mixed nature of Claimant's loss. (CX-28, p. 1). Dr. Marks also explained that the discrepancies in the tests performed by his office in May 2010 and November 2009 were caused by the nature of the testing, to use Dr. Marks's words "this was the behavioral test of a human being. . ." (CX-28, p. 1).

Regarding the permanency of Claimant's hearing loss, Dr. Marks opined that the sensorineural component is "certainly permanent;" that it is unclear whether it would be possible to reverse the conductive component as the cause of the conductive component is unknown; and that amplification, as opposed to hearing loss surgery, would be the most appropriate way to deal with Claimant's hearing loss. (CX-28, p. 1).

Dr. Marks was appointed by the Department of Labor to perform an independent medical examination on Claimant and was deposed by the parties on March 15, 2010. (CX-34). Dr. Marks's office performed tympanometry, acoustic reflex testing, otoacoustic emissions (OAE) testing, pure tone testing, masked bone conduction, speech reception testing (SRT) and speech discrimination (SD) testing. (CX-34, pp. 3-4). After evaluating Claimant, Dr. Marks found evidence of a sensorineural hearing loss and indications that there was also a conductive component to the loss; thus, Dr. Marks opined that Claimant suffered from a mixed hearing loss. (CX-34, pp. 4-5). Dr. Marks testified he felt the results of the tests performed in his office were accurate and noted his audiologist estimated the accuracy of the test was good. (CX-34, p. 5).

After reviewing both Mr. Bode's and Dr. Seidemann's audiograms, Dr. Marks could not explain why Dr. Seidemann's audiogram showed such a low level hearing loss, but he believed it may be because Dr. Seidemann did not perform masked bone conduction. Further, he believed that it was possible Mr. Bode over-masked when performing the bone conduction on Claimant and, as a result, overpowered the subtleties of the conductive hearing loss. (CX-34, p. 5). According to Dr. Marks, this would explain why Mr. Bode's audiogram shows hearing thresholds similar to his own but without the conductive loss. (CX-34, p. 5). Dr. Marks also testified he stands behind his results and believes Claimant suffers from a permanent hearing loss. (CX-34, p. 5).

Dr. Marks also stated that if his conductive hearing loss was reversed, Claimant would hear substantially better. (CX-34, p. 6). However, when asked about the cause of the conductive component of Claimant's hearing loss, Dr. Marks testified he could not be sure without exploring Claimant's ear but did note that it was an ossicular problem. (CX-34, p. 7).

In Dr. Marks's opinion, the speech discrimination scores also provide evidence of a conductive component to Claimant's hearing loss. He explained that someone suffering from a moderate to severe sensorineural hearing loss should not have speech discrimination scores as high as Claimant, but he also explained that a person with a conductive hearing loss can have excellent speech discrimination scores. (CX-34, p. 7). According to Dr. Marks, a moderate to severe sensorineural only hearing loss does not fit with Claimant's speech discrimination scores, however, if a portion of the hearing loss was conductive, it would fit with Claimant's speech discrimination scores. (CX-34, p. 8).

Regarding Mr. Bode's audiogram, Dr. Marks's opinion is that Mr. Bode may have over-masked and missed the conductive loss and that Mr. Bode's speech discrimination scores do not match up with the lack of air-bone gap and pure tone results. (CX-34, p. 8). Again, Dr. Marks could offer no explanation as to Dr. Seidemann's results and stated "it literally is inexplicable" when questioned about the difference between his and Dr. Seidemann's results. (CX-34, p. 8).

Claimant showed no response in either ear to the OAE testing performed by Dr. Marks's office. According to Dr. Marks, the failed OAE testing tends to fit with the severity of the hearing loss he found and would tend to show Dr. Seidemann is wrong. (CX-34, p. 14). Dr. Marks explained that if Dr. Seidemann's results were correct he would expect to have detected otoacoustic emissions in the lower frequencies and such emissions were not found. (CX-34, p. 14).

4. Dr. Sanborn's Report and Deposition

After performing the Audiological Brainstem Response (ABR) evaluation on Claimant, Dr. Sanborn concluded that the results support the presence of a significant sensorineural hearing loss, but Dr. Sanborn also noted that a conductive component could not be ruled out due to the "output limits of the

transducers which allow for a higher air conduction output than bone conduction output." (CX-22, p. 1).[2]

Dr. Kimberly Fos Sanborn, Au.D., was requested to do an auditory brainstem response (ABR) evaluation for Claimant and performed the test in July 2010. (CX-33, p.3). Dr. Sanborn stated the purpose of the ABR test was to determine Claimant's audiological threshold by recording Claimant's brain's response via electrodes to clicking sounds made in his ears. (CX-33, p. 4). In general, the tester attempts to determine how soft the clicks can be made and still elicit a response from the brain. (CX-33, p. 4). ABR testing provides an objective means of assessing a person's hearing and can be used to estimate a person's hearing threshold, as was done in this case.[3] (CX-33, p. 4). Dr. Sanborn testified that the threshold recorded by ABR will be slightly above the patient's true threshold. (CX-33, p. 5). According to Dr. Sanborn, an ABR threshold search, as was performed in this case, can also be used to confirm the pure tone test results and the response should be within twenty to thirty decibels (20 to 30 dB) of the patient's pure tone responses for the specific frequency range tested. (CX-33, p. 6).

In Dr. Sanborn's evaluation of Claimant, she performed a series of tests including air conduction clicks (maximum of 95 dB nHL); bone conduction clicks (70 dB); a five-hundred hertz (500 Hz) toneburst evaluation (85dB nHL); and a two-thousand hertz (2000 Hz) toneburst evaluation (95dB nHL). (CX-33, pp. 6-7). Dr. Sanborn testified that she did not obtain any replicable responses on any testing in either ear. (CX-33, p. 7). Based on her test results, Dr. Sanborn opined Claimant has a hearing loss that is most likely moderate to, possibly, significant and that the test results accurately reflect Claimant's hearing loss. (CX-33, p. 7).

Dr. Sanborn did not perform OAE testing, but did testify regarding the use of such tests. (CX-33, p. 5). In OAE testing, sound is put into the ear canal using the OAE equipment. (CX-33, p. 5). The OAE equipment is used to stimulate the hair cells inside of the cochlea, and as a result of the stimulation the patient's cochlea should emit a recordable response. (CX-33, pp. 5-6). These responses are called otoacoustic emissions and should only be present in an

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[2] EX-18 is identical to CX-22.

[3] Dr. Sanborn defined hearing threshold as the lowest intensity level at which a patient is able to respond to a sound.

individual who has normal hearing or possibly a mild degree of hearing loss. (CX-33, pp. 5-6).

After reviewing the tests previously performed on Claimant, Dr. Sanborn testified that her test results agree with Mr. Bode's OAE test results and with Dr. Marks's two OAE test results. (CX-33, p. 7). Furthermore, the high level of hearing loss shown in Mr. Bode's air and bone tests and in Dr. Marks's audiogram correlate to the results of her ABR testing. (CX-33, p. 7). However, Dr. Sanborn testified that she would not expect Claimant to have pure tone test results such as Dr. Seidemann found and, more specifically, would expect Claimant to have a greater hearing loss than what was found by Dr. Seidemann. (CX-33, p. 8).

She explained that the absence of otoacoustic emissions is typically an indication of some level of hearing loss. (CX-33, p. 8). Further, when a patient exhibits no response the patient either has at least a mild hearing loss or has some conductive pathology that prevents the transmission of the emissions. (CX-33, p. 8). Regarding her examination of Claimant, Dr. Sanborn testified that based on her results from the ABR testing she would not expect to see an audiogram such as Dr. Seidemann's test results. (CX-33, p. 8).

Based on the ABR testing performed, Dr. Sanborn was unable to rule out a conductive component to Claimant's hearing loss. (CX-33, p. 8). According to Dr. Sanborn, a conductive loss is determined by comparing the results from the air conduction and the bone conduction tests. (CX-33, p. 8).

During questioning by Employer's Counsel, Dr. Sanborn repeatedly and consistently testified that ABR threshold testing provides an estimation of the patient's hearing threshold. (CX-33, pp. 11-15). She testified that ABR testing does not give and is not meant to give a precise measurement of a patient's specific hearing loss. (CX-33, pp. 11-15). However, Dr. Sanborn clearly testified that based on her experience with her ABR equipment she would expect a patient that shows no response in ABR testing to have subjective tests that show a moderate degree of hearing loss. (CX-33, p. 14).

C. The Contentions of the Parties

Claimant contends the hearing test results of Mr. Bode and Dr. Marks are more probative than the results of Dr. Seidemann because Dr. Marks and Mr. Bode's results are supported by objective testing such as the OAE and ABR tests. He also

contends that he has established exposure to loud noise while at work and is, therefore, entitled to the Section 20(a) presumption of causation which Employer failed to rebut. Claimant further argues that this court should disregard Dr. Seidemann's testimony and conclusion and should accept Mr. Bode's test results, which qualifies as a presumptive audiogram, because the objective testing supports his findings.

In summary, Claimant contends he has suffered a work-related hearing loss, has reached maximum medical improvement, and is entitled to digital hearing aids.

On the other hand, Employer contends (1) Claimant has not produced noise studies showing he was exposed to injurious noise and, thus, is not entitled to the Section 20(a) presumption; (2) if Claimant is entitled to the Section 20(a) presumption, Dr. Seidemann's testimony is sufficient to rebut the presumption; and (3) considering the record as a whole, Claimant has not suffered a work-related hearing loss.

Alternatively, Employer argues that if this court finds Claimant has suffered a compensable hearing loss then the award should be based on Dr. Seidemann's findings of a four point seven percent (4.7%) hearing loss.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

A. Credibility

I have considered and evaluated the rationality and internal consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record.

See Indiana Metal Products v. National Labor Relations Board, 442 F.2d. 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941 (5th Cir. 1991).

Moreover, in arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct. 1965, 1970 n.3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

In hearing loss cases, the Board has stated that the judge is not required to credit the lowest audiogram rating. See Norwood v. Ingalls Shipbuilding, Inc., 26 BRBS 66 (1992) (judge credited an earlier audiogram evaluated by an audiologist over a subsequent one evaluated by an audiologist with a Ph.D. in audiology). See Uglesich v. Stevedoring Servs. of America, 24 BRBS 180 (1991).

I have been presented with five different audiograms and the opinions of four different experts. In this case, I find Dr. Marks's opinion regarding Claimant's hearing loss to be the most reliable. In addition to his qualifications as an otolaryngologist, he provided reasonable and unbiased explanations regarding the differences between the audiograms when possible. Furthermore, Dr. Marks's findings were supported by the objective tests performed including the OAE and ABR tests, and he did not assert unsupported conclusions in order to further his position.

For the following reasons, the undersigned must reject the audiograms and findings of Dr. Seidemann in this matter. Dr. Seidemann, on two separate occasions, found that Claimant has suffered only a mild hearing loss; however, this is contradicted by every other expert and objective test performed in this case. The undersigned finds Dr. Seidemann's attempts at explaining the contradictions to be self-serving and unpersuasive. Furthermore, I find Dr. Seidemann's implication that he is simply better trained than Mr. Bode, Dr. Marks, and Dr. Sanborn to be incredible. Also, the undersigned cannot accept the proposition that Claimant was able to deceive all other experts in this case especially considering the results of the OAE and ABR tests.

The ABR testing performed by Dr. Sanborn and the OAE tests performed by Mr. Bode and Dr. Marks are indicative of at least a moderate hearing loss. These findings match the findings of both Mr. Bode and Dr. Marks. In direct contrast, Dr. Seidemann found only a mild hearing loss. Dr. Seidemann is also the only examiner to believe Claimant was engaged in symptom magnification. Also, when presented with the ABR test results indicating the presence of a significant hearing loss, Dr. Seidemann attempted to discredit the usefulness of such a test.

Comparing Mr. Bode and Dr. Marks, Mr. Bode's audiogram is similar to Dr. Marks's, but I find Dr. Marks's interpretation to be more persuasive. While I find no reason to discredit Mr. Bode, I accept Dr. Marks's explanation and reasoning regarding the presence of a conductive component in Claimant's hearing loss. As explained by Dr. Marks, the presence of a conductive component would explain many of the inconsistencies present in this case.

The undersigned also credits Dr. Marks based on the following reasoning. The results of the objective tests are indicative of a patient with a significant hearing loss, and three of the five audiograms indicate a significant hearing loss. The only two audiograms indicating a mild hearing loss were performed by Dr. Seidemann who believed Claimant was engaged in under-hearing and who the undersigned discredits in this case. Thus, it appears Claimant has some significant level of hearing loss.

All evaluators found Claimant had either good or excellent speech discrimination scores; a fact that does not correlate with a significant sensorineural hearing loss. As Dr. Marks explained, this apparent contradiction is solved if a large portion of Claimant's hearing loss is due to a conductive loss.

However, Mr. Bode and Dr. Seidemann believe that Claimant cannot have a conductive hearing loss because of the tympanogram test results. In fact, in his report dated December 1, 2010, Dr. Seidemann stated the tympanogram results "are in gross contradiction to the finding of a significant conductive component" to Claimant's hearing loss. (CX-29, p. 1). In contrast, Dr. Seidemann's testimony indicates there are "cases of conductive loss that may have a normal tympanogram." (Tr. 150). According to Dr. Marks, Claimant can suffer a conductive hearing loss and have a normal tympanogram. Furthermore, if Mr. Bode failed to detect the significant conductive component, it would help explain the differences between Mr. Bode's and Dr. Marks's audiograms.

In summary, I discredit Dr. Seidemann's results because they are too inconsistent with all other evidence including the objective testing. Further, I find it more probable than not that Mr. Bode failed to detect a significant conductive loss. I find Dr. Marks's results to be consistent with all other credible evidence presented and, considering his qualifications, find that his opinion should be given the most credibility.

B. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a prima facie case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Based upon his testimony and Mr. Bode's report, Claimant contends he has established that he suffered a hearing loss (harm) and that he was exposed to loud noise at work (working conditions). Therefore, Claimant argues he has made a **prima facie** case sufficient to invoke the Section 20 presumption.

On the other hand, Employer contends Claimant has failed to establish a **prima facie** case as he has failed to produce noise studies showing injurious noise existed in his workplace and has failed to produce evidence establishing that he was exposed to noise levels above 85 dB. As a result, Employer argues that Claimant has failed to establish working conditions existed which could have caused Claimant's hearing loss. Employer does not dispute that Claimant has suffered some hearing loss.

Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

It is a well-established principle that a compensable injury need not involve unusually dangerous employment conditions. Bell Helicopter Int'l v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984), aff'g Darnell v. Bell Helicopter Int'l, 16 BRBS 98 (1984). In Everson v. Stevedoring Services of America, 33 BRBS 149 (1999), the Board upheld the ALJ's finding that the presumption was invoked based on the claimant's testimony that his work environment exposed him to loud noise and a doctor's opinion that the noise exposure likely caused some of the claimant's hearing loss.

In this case the evidence clearly shows Claimant suffered a hearing loss. All five audiograms show at least some amount of hearing loss. Furthermore, Claimant testified that he was exposed to loud noises at work, and the undersigned finds Claimant's testimony regarding the nature of his working conditions sufficient to establish his exposure to injurious stimuli.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a hearing loss and that his working conditions exposed him to injurious noise levels that could have caused his hearing loss. See Conoco, Inc. v. Director, OWCP, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); Jones v. Aluminum Co. of America, 35 BRBS 37 (2001).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332

F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

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). 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).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer argues it rebutted the Section 20(a) presumption of causation because Dr. Seidemann testified that Claimant's hearing loss was not caused by his work. However, Dr. Seidemann's testimony and conclusions are based on noise studies that he has performed in the past and are not based on this Claimant's actual exposure. In an unpublished decision involving, inter alia, a nearly identical issue the Board has previously stated that:

> noise surveys indicating employer's conformance with OSHA noise level standards during two years in the facility in which an employee was exposed to noise was insufficient to rebut the Section 20(a) presumption since such evidence cannot demonstrate the absence of a work-related injury incurred over the course of the employee's employment. *Everson v. Stevedoring Services of America,* 33 BRBS 149 (1999). Similarly, noise surveys taken at other facilities cannot rebut the presumption that the noise exposure experienced by claimant here at employer's facility, which the administrative law judge credited in finding invocation, caused or aggravated claimant's documented hearing loss. See Damiano v. Global Terminal & Container Serv., 32 BRBS 261 (1998).

Plaisance v. Ceres Gulf, Inc., BRB Nos. 10-0562 and 10-0562A, ALJ No. 2007-LHC-01706 (Sept. 2009) (unpublished). Based on the foregoing, I find Employer has failed to rebut the Section 20(a) presumption.

C. Nature and Extent of Disability

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). Furthermore, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

1. Nature of Claimant's Disability

The permanency of any disability is a medical rather than an economic concept. Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services

v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

An injured worker's impairment may be found to have changed from temporary to permanent under either of two tests. Eckley v. Fibrex & Shipping Co., 21 BRBS 120, 122-23 (1988). Under the first test a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988); Trask, 17 BRBS at 60. Thus, an irreversible condition is permanent per se. Drake v. General Dynamics Corp., Elec. Boat Div., 11 BRBS 288, 290 n.2 (1979). The date of the diagnosis of an irreversible medical condition is the date of permanency. Crouse v. Bath Iron Works Corp, 33 BRBS 442 (ALJ) (May 4, 1999), see also, Drake v. General Dynamics Corp., 11 BRBS 288(1979)(Held, an irreversible medical condition is permanent per se).

Under the second test a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). See also Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (D.C. Cir. 1984) (physician's evaluations of claimant indicated that his heart condition, although improved, was of indefinite duration); Air America, Inc. v. Director, OWCP, 597 F.2d 773, 781-82 (1st Cir. 1979); Care v. Washington Metro. Area Transit Auth., 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment, with a view toward improving his condition. Leech v. Service Eng'g Co., 15 BRBS 18, 21 (1982).

Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for an ALJ to find that MMI has been reached. Dixon v. John J. McCullen & Assos., 19 BRBS 243, 245 (1986). Similarly, where the treating physician stated that surgery might be necessary in the future and that the claimant should be

reevaluated in several months to check for improvement, it was reasonable for the ALJ to conclude that the claimant's condition was temporary rather than permanent. Dorsey v. Cooper Stevedoring Co., 18 BRBS 25, 32 (1986), pet. dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP, 826 F.2d 1011 (11th Cir. 1987).

Permanency does not, however, mean unchanging. Accordingly, permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. Watson, 400 F.2d at 654; Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988); Brown v. Bethlehem Steel Corp., 19 BRBS 200, 204, aff'd on recon., 20 BRBS 26 (1987); Trask, 17 BRBS at 60. Thus, for example, the possibility that an employee who has been obese his whole life might alleviate his disability by losing weight is too speculative to foreclose an award for permanent disability. Vogle v. Sealand Terminal, 17 BRBS 126, 130 n.9 (1985).

Likewise, a prognosis stating that chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. Walsh v. Vappi Constr. Co., 13 BRBS 442, 445 (1981); Johnson v. Treyja, Inc., 5 BRBS 464, 468 (1977). In dicta, the Board has remarked that even a prognosis that improvement and employment are "likely" at some unspecified time in the future does not preclude a finding of permanency. Walsh, 13 BRBS at 445. In addition, where an employee's condition deteriorates after a physician rates it as stable, maximum medical improvement may be found. Davenport v. Apex Decorating Co., 18 BRBS 194, 197 (1986). Similarly, a temporary worsening of a condition does not render a permanent disability temporary. Leech v. Service Eng'g Co., 15 BRBS 18, 22 (1982).

As noted above, Employer argues that if this court accepts Dr. Marks’s findings regarding Claimant’s hearing loss then Claimant’s disability is temporary as he has not reached maximum medical improvement. More specifically, Employer argues that the conductive hearing loss can be corrected by medicine and/or surgery; thus, the conductive portion of Claimant’s hearing loss is by definition temporary.

However, the Board has held that where no physician concludes that a claimant's condition has reached maximum medical improvement and further surgery is anticipated, permanency is not demonstrated. Kuhn v. Associated Press, 16 BRBS 46, 48 (1983). The Board has further held that where a claimant undergoes surgery, his condition is permanent only after recovery from surgery. Walker v. National Steel &

Shipbuilding Co., 8 BRBS 525, 528 (1978); Edwards v. Zapata Offshore Co., 5 BRBS 429, 432 (1977).

The mere possibility of future surgery, by itself, does not preclude a finding that a condition is permanent. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. Morales v. General Dynamics Corp., 16 BRBS 293, 296 (1984), aff'd in pert. part sub nom. Director, OWCP v. General Dynamics Corp., 769 F.2d 66 (2d Cir. 1985).

Also, a claimant's disability is permanent if the future surgery is not expected to improve the condition. Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988). In fact, if the employee's recovery or ability to do any work after surgery is uncertain or unknown, his disability may be found to be permanent. White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

In this case, Dr. Marks testified that he did not know what caused the conductive portion of Claimant's hearing loss and that Claimant's hearing loss was permanent. In addition, his report indicates that while the conductive portion of Claimant's hearing loss could "theoretically" be improved through medication or surgery, amplification would be the appropriate way to treat Claimant. Accordingly, I find Employer's argument lacks merit and conclude Claimant's hearing loss is permanent.

2. Extent of Claimant's Hearing Loss

In this case, the parties disagree concerning the extent to which Claimant has suffered a loss of hearing. In support of their respective positions, a total of five audiograms and the reports of four expert witnesses have been introduced.

Under the LHWCA, as amended, and the implementing regulations, an audiogram provides presumptive evidence of the extent of a claimant's hearing loss if the following conditions are met:

> (1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology . . .;

> (2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.
>
> (3) No one has provided a contrary audiogram of equal probative value (meaning one performed using the standards described herein) . . . within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue.

20 C.F.R. § 702.441(b)(1)-(3). The regulations further provide:

> (d) . . . the evaluator shall use the criteria for measuring and calculating hearing impairment as published . . . by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment*, using the most currently revised edition . . . In addition, the audiometer used . . . must be calibrated according to current American National Standard Specifications for Audiometers . . .

20 C.F.R. § 702.441 (d).

The claimant "is entitled to benefits for the totality of his occupational hearing loss based on the most credible evidence of record." Steevens v. Umpqua River Navigation, 35 BRBS 129, 133 (2001).

If the audiogram does not meet the requirements of 33 U.S.C. § 908(c)(13)(C) and 20 C.F.R. § 702.441, it is not inadmissible; rather, the administrative law judge has the discretion to determine the probative value of the test in determining the claimant's hearing loss. Craig v. Avondale Indus., Inc., 36 BRBS 65, 67 (2002). If there is more than one credible audiogram, it is within the administrative law judge's authority to determine the amount of hearing loss by averaging the results of the audiograms. Steevens, 35 BRBS at 133.

However, the Fourth Circuit recently held "when there is contradictory, equally probative evidence as to whether a disability exists at all, an ALJ cannot average a 'zero' result with a higher result to find that a disability exists." Ceres

Marine Terminals, Inc. v. Director, OWCP, 656 F.3d 235, 241 n. 2 (4th Cir. 2011).

For the reasons assigned above, I find the audiograms produced by Dr. Marks to be the only credible audiograms. In his report dated December 22, 2009, Dr. Marks used the AMA formula to calculate Claimant's hearing impairment and found Claimant had a fifty-six percent (56%) binaural impairment. Based on Dr. Marks's second audiogram dated May 25, 2010, Claimant had a thirty-nine and six-tenths percent (39.6%) impairment rating. The undersigned finds it appropriate to average these two ratings in order to determine the percentage of Claimant's loss of hearing. Thus, I find Claimant has a forty-seven and eight-tenths percent (47.8%) hearing loss.

3. Compensation for a Scheduled Injury

Compensation for a permanent partial disability must be determined in one of two ways. First, if the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of his average weekly wage for a specific number of weeks, regardless of whether his earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984). Second, in "all other cases" of permanent partial disability, Section 8(c)(21) authorizes compensation equal to two-thirds of the difference between the employee's pre-injury average weekly wage and his post-injury wage earning capacity. 33 U.S.C. § 908(c)(21).

An employee with a scheduled injury under the LHWCA is presumed to be disabled, even though the injury does not actually affect his earnings. Bath Iron Works Corp. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT). As such, no proof of loss of wage-earning capacity was specified in the schedule.

Generally, the claimant must have an economic loss and a physical or psychological impairment to receive compensation. Sproull v. Stevedoring Services of America, 25 BRBS 100 (1991). However, if the claimant sustains a permanent partial disability to a body part listed in the schedule, he is entitled to compensation "regardless of whether his earning capacity has actually been impaired." Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 14 BRBS 363, 363 (1980) [hereinafter PEPCO].

When the claimant has suffered a permanent partial disability and the body part is one listed in the Section 8(c) schedule, he is entitled to compensation equal to two-thirds of his average weekly wage for a specified number of weeks. 33 U.S.C. § 908(c)(1)-(20) (2000).

Where the injury is binaural hearing loss, the claimant is entitled to two hundred weeks of compensation. 33 U.S.C. § 908(c)(13)(B). If the claimant has sustained permanent partial loss or loss of use of the body part, "[c]ompensation ... may be for proportionate loss or loss of use of the member." 33 U.S.C. § 908(c)(19). Thus, the claimant is entitled to receive the full compensation rate of two thirds of his average weekly wage for the number of weeks proportionate to the loss of use. Nash v. Strachan Shipping Co., 15 BRBS 386, 391 (1983), aff'd in relevant part but rev'd on other grounds, 760 F.2d 569, 17 BRBS 29 (CRT) (5th Cir. 1985). Unless the claimant can prove he is totally disabled, he is not entitled to any more compensation than that awarded by the schedule. PEPCO, 14 BRBS at 363.

Because Claimant suffers from a mixed hearing loss, the undersigned must determine the extent of Employer's liability for Claimant's hearing loss. Employer argues the conductive portion of Claimant's hearing loss was not, and could not be, caused by noise. Therefore, according to Employer, the conductive portion of Claimant's hearing loss is not compensable.

However, the employer is liable for the claimant's entire hearing loss where the claimant's exposure to injurious noise levels during his employment with employer combined with his pre-existing hearing loss to cause a greater degree of disability. Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1 (1986); Fishel v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 520 (1981), aff'd, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982).

The aggravation rule of compensation liability does not permit a deduction from the employer's liability in hearing loss cases for the effects of presbycusis (hearing loss due to age). Thus, the employer is liable for the claimant's entire hearing loss. 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, 24 BRBS 137 (CRT) (9th Cir. 1991).

In view of the Section 20(a) presumption that Claimant's entire hearing impairment is work-related, it is employer's burden to produce substantial evidence that some portion of the disability is due to an intervening cause post-dating the work injury. Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); Mississippi Coast Marine v. Bosarge, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981); Voris v. Texas Employers Ins. Ass'n, 190 F.2d 929 (5th Cir. 1951); Davison v. Bender Shipbuilding & Repair Co., Inc., 30 BRBS 45 (1996); Bass v. Broadway Maintenance, 28 BRBS 11 (1994); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). In a hearing loss case, the aggravation rule requires only that a claimant's disabilities combine in an additive way. Port of Portland, 932 F.2d 836, 24 BRBS 137(CRT). Where a claimant has an existing hearing loss and his work injury combines with that loss to create a greater loss, the employer is liable for the entire hearing loss. Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1 (1986) (Brown, J., concurring).

The date of onset for payment of the claimant's benefits is the date the evidence of record first demonstrates a permanent hearing loss. Howard v. Ingalls Shipbuilding, Inc., 25 BRBS 192 (1991); Fairley v. Ingalls Shipbuilding, Inc., 25 BRBS 61, 64 (1991) (Decision and Order on Remand).

In this case, Claimant's date of injury is May 14, 2009; he is currently employed; and he is not a retiree. As stated above, if Claimant's work-related, sensorineural hearing loss increased Claimant's overall hearing loss, Employer is liable for Claimant's entire hearing loss unless Employer is able to produce substantial evidence that some portion of the disability is due to an intervening cause post-dating the work injury. In this matter, Employer has put forth no evidence suggesting Claimant's conductive hearing loss is the result of an intervening cause occurring after the date of Claimant's work-injury.

Furthermore, the parties have stipulated that Claimant's injury occurred on May 14, 2009, and I have accepted Dr. Marks's opinion that Mr. Bode failed to detect the presence of a conductive loss in his evaluation on the same date. Considering the undersigned has found the conductive loss existed on the date of injury, it cannot be said that the conductive loss occurred subsequent to the work injury or that Employer put forth substantial evidence supporting such a proposition. Thus, I find Employer is liable for Claimant's entire hearing loss pursuant to the aggravation rule. See Plaisance, supra.

Claimant's applicable average weekly wage is $926.63 resulting in a compensation rate of $617.75. (JX-1). As noted above, I find Claimant's proportionate disability to be forty-seven and eight-tenths percent (47.8%); thus, Claimant is entitled compensation for the number of weeks proportionate to his loss of use or ninety-five and three-fifths (95.6) weeks. This calculation results in a total of $59,057.22 in compensation benefits owed to Claimant.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Based on Dr. Marks's recommendation that amplification would be the most appropriate way to treat Claimant's hearing loss, I find Employer is liable for the cost of that treatment which includes the cost of digital hearing aids.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United

States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[4] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for permanent partial disability based on a forty-seven and eight-tenths percent (47.8%) binaural hearing loss and Claimant's average weekly wage of $926.63 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(13).

2. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 14, 2009, work injury, pursuant to the provisions of Section 7 of the Act.

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[4] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **February 8, 2010**, the date this matter was referred from the District Director.

3. Employer shall receive credit for all compensation heretofore paid, if any, as and when paid.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 15th day of November, 2011, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge