U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 January 2012

Case No.: 2011-LHC- 00147

OWCP No.: 06-206028

In the Matter of:

JAMES L. BATTS,
Claimant,
v.

LAVINO SHIPPING COMPANY,

v.

SOUTHEAST STEVEDORING INC.,

Employer,
v.

ANDREW L. SLAFKOSKY,

Employer,

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES: Gregory Camden, Esq.
For Claimant

BEFORE: KENNETH A. KRANTZ
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arose upon the filing of a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-950 (2006) ("Act" or "LHWCA"). The Office of Workers Compensation (OWCP) referred the case to the

Office of Administrative Law Judges (OALJ) on October 18, 2010. (AX 2) On February 3, 2011, I issued a Notice of Hearing to all entities listed as potentially liable employers. (AX 1)[1] On February 14 and 16, 2011, I granted the motions of several past employers to be dismissed from the case, leaving Lavino Shipping Company ("Lavino"), Southeast Stevedoring, Inc. ("Southeast"), and Andrew L. Slafkosky ("Slafkosky") as named potentially responsible operators.

I presided over a hearing in Wilmington, North Carolina on February 23, 2011. (TR 5) At the time of hearing, I noted that the best available evidence indicated that Lavino is the last employer and defunct and no successor in interest had been identified. At hearing, no representative for the Director or any employer was present. (TR 6)

Claimant submitted Exhibits I through IX, which were accepted into evidence. (TR 7) On March 3, 2011, I issued a Scheduling Order for post-hearing briefs to all potentially liable employers and Claimant. Only Claimant filed a post-hearing brief.

ISSUES (TR 6)

1. Determine Claimant's last maritime employer.

2. Determine whether and to what extent the Claimant is entitled to permanent partial disability (PPD) benefits.

3. Determine whether the Claimant is entitled to medical expenses to the degree allowable under the Act for hearing loss.

4. Determine whether Claimant is entitled to penalties for Employer's failure to controvert.

BACKGROUND

Claimant, a 71 year old man at the time of the hearing, worked as a longshoreman for 23 years. Claimant had audiograms taken on March 13, 2009 and March 9, 2010. He was diagnosed with bilateral sensori-neural hearing loss. The multiple potential responsible operators have presented no evidence and have paid no disability benefits.

SUMMARY OF THE EVIDENCE

Claimant's Testimony at the February 23, 2011 Hearing (TR 9-17)

Claimant testified that he was a member of the International Longshoremen's Association (ILA) for 23 years. During those years, he did several jobs, including driving a forklift, an 18-wheeler truck full of containers, and some "labor work" such as unhooking pipes and cargo. The

[1] The following abbreviations will be used as citations to the record:
CX – Claimant's Exhibit
AX – Administrative Law Judge's Exhibit
TR – Transcript of February 23, 2011 hearing

labor work was done on ships at the state port in Wilmington, North Carolina, on Cape Fear. (TR 10-11)

Claimant testified that he was exposed to the following sources of noise while working as a longshoreman: forklifts, bulldozers, trucks, and dropping pipe onto the steel deck of the ship. The pipes ranged from 2 to 4 inches in diameter and from 10 to 20 feet in length. Much of this work was done inside a closed steel area. Claimant stated that he was not provided hearing protection. A few times when he worked in a different location, on the Taharma, he had earplugs, but not when he worked at the state port. (TR 12-13)

Claimant had an audiogram taken on March 13, 2009 at Wilmington Ear, Nose and Throat. Prior to that date, Claimant recalled that he had his hearing tested once before but did not recall what year and did not have any documentation of that testing. He knew it occurred after he stopped working. He had the 2009 audiogram done because he had heard about hearing loss cases on the waterfront and decided to see if he was entitled to anything. He was provided a copy of the 2009 audiogram. He had a second audiogram on March 9, 2010 at Wilmington Hearing Specialists because one of the employers asked him to go there for a second test. (TR 15-17)

Claimant last worked on the waterfront for Lavino on September 12, 1989. Two days later he had a stroke and was hospitalized for seven or eight days. He filed a retirement application for disability on February 12, 1990. The delay between the stroke and application was due to the fact that he had no transportation or driver's license and had to wait for a family member to take him. His last date of work is verified on the application by Johnny McCoy, the dispatcher for ILA Local 1426. Mr. McCoy kept records of when union members worked and turned those records in so they could be paid. (TR 13-15) Claimant provided a pay stub from Lavino dated August 23, 1989, admitted as evidence. He kept this document over the years and had the actual original check stub, so he knew that he worked for Lavino in 1989.

March 13, 2009 Audiogram (CX I, A-1 through C-5)

Claimant presented with bilateral hearing loss complaints at Wilmington Ear Nose & Throat Associates, P.A. on March 13, 2009. He reported that he had experienced hearing loss for a while and that it was getting progressively worse. He thought the AS was worse than the AD. Claimant reported a vibrating noise in his ears at times but no pressure or pain. He stated that these symptoms all started after working around loud machines.

The audiogram was administered by audiologist Julie Grgurevic, M.S. It reflected the following measurements:

Frequency in Hertz (Hz)	Left Ear hearing loss in dB	Right Ear hearing loss in dB
500 Hz	45	45
1000 Hz	45	55
2000 Hz	45	60
3000 Hz	65	75
Total	200	235

Ms. Grgurevic noted tinnitus in both ears, worse in the left, and listed noise exposure of 23 years as a longshoreman. She stated that the test reliability was good and that the equipment was calibrated on October 1, 2008. Claimant submitted the Audiometer Calibration Certificates reflecting that date. (CX I, C-1 through C-5)

March 9, 2010 Audiogram (CX I, H)

Claimant was seen at Wilmington Hearing Specialists on March 9, 2010 for audiological evaluation. Audiologist Mary Maddock, Board Certified in Audiology, reviewed the 2009 testing and noted Claimant's 23 years working at local ports. Claimant "felt that his hearing was damaged by noise exposure while working at the ports without the benefit of hearing protection.

Claimant's right ear had speech reception threshold of 30 dBHL, word recognition score was 80% at 70 dBHL, and responses to pure tone revealed a moderate to severe sensori-neural hearing loss. His left ear had speech reception threshold of 35 dBHL, word recognition score was 72% at 80 dBHL, and responses to pure tone revealed a moderate to severe sensori-neural hearing loss. Dr. Maddock found the testing was "similar to the previous testing of one year ago" and that Claimant would experience difficulty hearing and understanding speech in all settings. She recommended bilateral amplification.

The audiogram was administered by Dr. Maddock. It reflected the following measurements:

Frequency in Hertz (Hz)	Left Ear hearing loss in dB	Right Ear hearing loss in dB
500 Hz	35	45
1000 Hz	40	50
2000 Hz	50	60
3000 Hz	55	65
Total	180	220

Employers – ILA Pension, Welfare and Vacation Fund Documents (CX I, D-1 through F-3)

By letter dated March 30, 2009, the Employers – ILA Pension, Welfare and Vacation Fund ("Fund") verified through pension records that Claimant's last day worked was September 12, 1989, for Lavino, and his date of retirement was March 1, 1990.

The Fund provided a copy of Claimant's Summary of Application for Retirement Pension, filed on February 12, 1990. That application confirmed the last day worked and date of disability as September 12, 1989, as well as 23 years of service with ILA. The application states that the date last worked was verified by "Johnny McCoy, ILA Local 1426."

Social Security Itemized Statement of Earnings (CX I, G)

Claimant's Social Security records reflect that in 1989 he earned income from Ceres Marine Terminals Inc., Wilmington Shipping Co., Southeast Crescent Shipping Co., Trustees of the Employees ILA AFL CIO Containerization Vacation Plan, Southeast Stevedore Inc., South

Atlantic ILA Employers Vacation and Holiday Fund, SSA Gulf Inc., Andrew L. Slafkosky, Cooper-T Smith Stevedoring Co Inc., and Pension Welfare & Vacation Trust. The records also show income of $1,157.16 earned from Pension Welfare & Vacation Trust in 1990. The records show no income earned after 1990.

Check Stub from Lavino Shipping (CX I, J)

Claimant presented a check stub from Lavino Shipping Company showing gross earnings of $351.00 dated August 23, 1989. The stub shows gross year to date earnings of $3,478.14 for a total of 141 hours worked for Lavino. With the check stub is a letter from Claimant asserting that though Lavino did not appear on his Social Security records, the check proves that he did work for Lavino in 1989 and that Lavino must not have filed these wages with the Social Security Administration that year.

Notice of Claim to Southeast (CX V)

Claimant filed an Employee's Claim for Compensation (LS-203) on January 19, 2010 citing a date of injury of March 13, 2009 and an injury of hearing loss due to exposure to injurious noise levels at work in Wilmington, NC. This LS-203 was sent to Southeast on January 19, 2010, along with a copy of the 2009 audiogram.

On January 22, 2010, the OWCP sent Southeast notification that the claim had been filed with instructions regarding controversion of the claim. On February 11, 2010, the OWCP notified Claimant that correspondence to Southeast had been returned by the Post Office marked undeliverable.

Andrew L. Slafkosky (CX I, I; CX V, D-1)

Claimant filed an Employee's Claim for Compensation (LS-203) on January 19, 2010, citing a date of injury of March 13, 2009 and an injury of hearing loss due to exposure to injurious noise levels at work in Wilmington, NC. This LS-203 was sent to Slafkosky on January 19, 2010, along with a copy of the 2009 audiogram.

On January 22, 2010, the OWCP sent Slafkosky notification that the claim had been filed with instructions regarding controversion of the claim. On February 11, 2010, the OWCP notified Claimant that correspondence to Slafkosky had been returned by the Post Office marked undeliverable.

Claimant's counsel notified Employer by letter on August 5, 2010, that he had discovered upon attempting to serve Slafkosky that Slafkosky is a deceased priest who never had any connections with Wilmington, North Carolina or the Longshore industry.

LS-203, Notice of Claim to Lavino (CX II, A, C)

Claimant filed an Employee's Claim for Compensation (LS-203) on May 1, 2009 citing a date of injury of March 13, 2009 and an injury of hearing loss due to exposure to injurious noise

levels at work in Wilmington, NC. This LS-203 was sent to Lavino on April 17, 2009, along with a copy of the 2009 audiogram.

On May 14, 2009, the OWCP sent Lavino notification that the claim had been filed with instructions regarding controversion of the claim.

Lavino LS-207/Notice of Controversion (CX II, E)

Lavino filed a Notice of Controversion of Right to Compensation (LS-207) with the OWCP on August 17, 2009. On that form, Lavino indicated its first knowledge of the injury was August 3, 2009. It stated that it was controverting the right to compensation because "Lavino Shipping Co was dissolved long time ago – See the attached file from Florida, Virginia & North Carolina Secretary of State. Lavino Shipping Co is not related to my company." The form was signed by Brit Mellon, Financial Administrator.

Attached are three web site printouts. The first is from the Florida Department of State Division of Corporations and shows a Lavino Shipping Company was involuntarily dissolved on December 8, 1980. The second is from the Virginia State Corporation Commission and states that a Lavino Shipping Company was purged on December 31, 1995. Finally, the North Carolina Department of the Secretary of State shows a Lavino Shipping Company with "Office Discontinued" but provides no date information.

June 11, 2010 email (CX II, F)

An e-mail from Leslie Higgins, a Claims Manager at Signal Administration, Inc., an insurer, to Derrell Dehart states that "Wescol Shipping Inc cba Lavino Shipping Agencies" had coverage from 2/21/90 through 3/13/92. "The stevedoring operation was sold to Cooper T Smith and the agency sold to Southern Steamship. Longshore exposure was covered by the new owners from the date of sale (4/1/92)."

American Medical Association's *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008)

I take judicial notice of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (6th ed. 2008) (*Guides*). The Sixth Edition is the most currently revised edition. In determining the level of hearing loss, the *Guides* require that each ear be tested with a pure tone audiometer and that the hearing levels at 500, 1000, 2000, and 3000 Hz be recorded. The four hearing levels for each ear are added separately, resulting in a sum for each ear. The *Guides* provide a chart at Tables 11-1, 11-2, and 11-3 from which binaural hearing impairment can be calculated using the sums for each ear. (*Guides* at 250-254)

DISCUSSION

I. Claimant has successfully invoked the Section 20(a) presumption.

Section 20(a) provides a claimant with a presumption that his condition is causally related to his employment if he establishes a *prima facie* case by proving that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See U.S. Industries/Federal Sheet Metal v. Director, OWCP* (*Riley*), 455 U.S. 608, 615, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980). A claimant's subjective complaints of symptoms and pain can be sufficient to establish the elements of physical harm if such complaints are found credible. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

If the claimant invokes the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Swinton v. J. Frank Kelly Inc.*, 554 F.2d 1075, 1081, 4 BRBS 466, 474-75 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). If the presumption is rebutted, it falls out and the administrative law judge must weigh all the evidence and render a decision that is based on the record as a whole. *Id*. at 1082, fn. 35. This rule is an application of the "bursting bubble" theory of evidentiary presumptions, derived from the Supreme Court's interpretation of Section 20(d) in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). *See Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947 (1978) (applying *Del Vecchio* to Section 20(a)).

In this case, the Claimant testified in his deposition that he was exposed to industrial noise during his 23 years of longshoreman work. Specifically, noise was produced by working with forklifts, bulldozers, and trucks, sometimes inside a closed steel area, and dropping pipe onto the steel deck of the ship. He stated that he was not provided hearing protection, with the exception of a few times on Taharma. (TR 12-13) The record gives me no reason to find that Claimant's testimony is not credible.

Claimant does not need to establish actual levels of injurious noise in the workplace in order to invoke the Section 20(a) presumption. A claimant's credible testimony regarding the noise conditions at his job can be sufficient evidence to establish that he was exposed to harmful noise levels during his employment. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959-60, 31 BRBS 206, 210 (CRT) (9th Cir. 1998); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 692, 31 BRBS 178, 185 (CRT) (9th Cir. 1997); *Damiano v. Global Terminal & Container Service*, 32 BRBS 261, 262 (1998).

Claimant's March 13, 2009 audiogram showed levels of hearing loss in both ears, worse in the left than in the right. Under the Act and regulations:

> (b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:
>
> (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.
>
> (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 produces a contrary audiogram of equal probative value (meaning one performed using the standards described herein) made at the same time. "Same time" means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue. Audiometric tests performed prior to the enactment of Pub. L. 98-426 will be considered presumptively valid if the employer complied with the procedures in this section for administering audiograms.
>
> (c) In determining the amount of pre-employment hearing loss, an audiogram must be submitted which was performed prior to employment or within thirty (30) days of the date of the first employment-related noise exposure. Audiograms performed after December 27, 1984 must comply with the standards described in paragraph (d) of this section.
>
> (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. In addition, the audiometer used for testing the individual's threshold of hearing must be calibrated according to current American National Standard Specifications for Audiometers. Audiometer testing procedures required by hearing conservation programs pursuant to the Occupational Safety and Health Act of 1970 should be followed (as described at 29 CFR, Section 1910.95 and appendices).

20 C.F.R. §702.441(b)-(d). In this case the 2009 audiogram was administered and by audiologist Julie Grgurevic, M.S., who also interpreted and certified the results, satisfying §702.441(b)(1). Claimant testified that he was provided the audiogram and a report, which is the copy in the record, dated March 13, 2009, the day of the testing. There is no evidence in the record controverting this testimony, therefore the audiogram satisfies §702.441(b)(2). No contrary audiogram was produced within thirty days or six months, as the only other audiogram of record was administered March 9, 2010, nearly a full year later. Further, that audiogram is not contrary; Dr. Maddock found the results "similar to the previous testing of one year ago." (CX I, H)

Therefore, the 2009 audiogram satisfies §702.441(b)(3). Evidence shows that the audiometer used for testing was calibrated to the *Guides'* requirements within a year of the testing. (CX I, C-1 through C-5) Therefore, the 2009 audiogram satisfies §702.441(d). There is no pre-employment audiogram, so §702.441(c) is irrelevant.

Finally I must use the criteria in the *Guides* to evaluate the audiogram. The *Guides* require, in relevant part, that the following steps be taken to determine impairment:

- Test each ear separately with a pure tone audiometer and record the hearing levels at 500, 1000, 2000, and 3000 Hz.
- Add the four hearings levels (dB) for each ear separately.
- For binaural impairment, see Section 11.2b and consult Table 11-2 to convert the monaural hearing impairment percentages to a binaural hearing impairment rating.
- Consider Table 11-3 to determine the impairment of the whole person.

See Guides at 250. The 2009 audiogram tested each ear at the required hearing levels, and each ear added separately totals 200 DB for the left ear and 235 for the right. Table 11-2 shows that these totals yield a binaural hearing impairment of 39.7%. (*Guides* at 252) Table 11-3 shows that a 39.7% binaural hearing impairment corresponds with a 14% impairment of the whole person. (*Guides* at 254)

Having satisfied all regulatory requirements, I find that the 2009 audiogram is presumptive evidence of the amount of hearing loss on March 13, 2009.[2]

I find that, given Claimant's testimony and the fact that both audiograms diagnosed him with similar hearing loss, Claimant has established that he suffered a harm (hearing loss) for the purposes of invoking the Section 20(a) presumption, and that working conditions existed (industrial noise) that could have caused the harm.

II. Employer has failed to rebut the presumption.

Once the presumption is invoked, Section 20(a) places the burden on the employer to come forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment. *Swinton*, 554 F.2d at 1081. None of the three named potential responsible operators submitted any evidence. There is no evidence in the record contradicting Claimant's assertion that he suffered the harm of hearing loss, or that working conditions existed (industrial noise) that could have caused the harm. Therefore I find that none of the employers produced substantial countervailing evidence to rebut Claimant's *prima facie* case. Accordingly, Claimant has the benefit of invoking the Section 20(a) presumption. Hence, his binaural hearing loss is shown to have arisen out of and in the course of his employment, and, as such, is compensable under the Act.

III. Lavino is the last maritime employer and the responsible operator for Claimant's claim

The Board has held that if a hearing loss claimant establishes exposure with a covered employer, he does not have the burden of proving that no other employer is liable. *Susoeff v. San*

[2] The 2010 audiogram is discussed *infra* under the "Permanent Partial Disability" section.

Francisco Stevedoring Co., 19 BRBS 149 (1986). Employers joined to the case may escape liability by rebutting the presumption at 33 U.S.C. § 920(a) presumption with respect to causation, or demonstrating that the claimant was exposed to injurious stimuli while working for a subsequent employer. *Id.* at 151. As already noted *supra*, none of the named responsible operators rebutted that presumption or demonstrated anything with respect to subsequent employers. Therefore none of the named responsible operators may escape liability this way.

In this case, three potentially responsible operators remain: Lavino, Southeast, and Slafkosky. There is no exculpatory evidence in the record with respect to Southeast. It is clear that Southeast has not exculpated itself from liability. There is credible evidence that Slafkosky, a priest who lived only in Pennsylvania and Florida, was never actually an employer or tied to the longshore industry. However, Social Security records show Claimant earned income from Southeast and Slafkosky in 1989. (CX I, G) The evidence regarding Slafkosky is conflicting and likely insufficient to meet a burden of substantial evidence. However, in this case the exculpation of Southeast and Slafkosky are moot because there is no evidence that either was the last employer.

Noise-induced hearing loss has traditionally been treated under the Act as an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). In hearing loss cases, the Board has imposed liability on "the last employer to expose claimant to injurious stimuli prior to the determinative... audiogram and the filing of the claim." *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163-64 (1992); *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118, 125 (1991); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203, 208 (1991). "In occupational disease cases, the last covered employer is liable for the totality of claimant's disability from the occupational disease, regardless of whether it was aggravated by subsequent non-covered employment." *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159, 162 (1991)(citing to *Johnson v. Ingalls Shipbuilding Div.*, 22 BRBS 160 (1989)); *see Bath Iron Works v. Brown*, 194 F.3d 1 (1st Cir. 1999).

There is no evidence as to the final dates Claimant worked for Southeast or Slafkosky. However, Claimant's testimony, the check stub admitted into evidence, the Summary of Application for Retirement Pension, and the pension verification letter from the Fund all support the assertion that Claimant worked for Lavino in 1989. Further, Claimant's testimony, the Summary of Application, and the Fund letter all provide a last date worked as September 12, 1989, and state that Claimant worked for Lavino on this date. Claimant's assertion that this was his last day of work is supported by evidence that he had a disabling stroke two days later and has not worked since. No party argued that Southeast or Slafkosky are the last employer; nor has any party has argued that Lavino is *not* the last employer.

Lavino's sole entry in the record is its notice of controversion, which relies on documentation from Florida regarding a business that dissolved in 1980, which cannot be Claimant's employer as he has a paycheck stub dated August 1989, nine years later. There is no clear relevance of the website printout from Virginia, as this case deals only with the port in Wilmington, North Carolina. Further, the Virginia document shows a company purged in 1995, well after Claimant's last day worked. The printout from North Carolina shows only that at some unspecified date, a company called Lavino Shipping Company had a status of "office

discontinued." I do not find these four pages persuasive evidence that Lavino was not Claimant's last employer.

When no employer presents persuasive exculpatory evidence, as none has here, the Board has held

> the purposes of the Act would best be served by assigning liability to the later employer, consistent with case law defining responsible employer in an occupational disease context. *See, e.g., General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991).

Buchanan v. Int'l Transp. Services, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.,* 7 Fed. Appx. 547 (9th Cir. Feb. 26, 2001).

I find that Claimant's testimony, the check stub, the Summary of Application, and Fund letter are the best evidence of record on the issue of which employer last employed Claimant. I find that Lavino was the last maritime employer, and, following *Buchanan*, I assign liability to Lavino.

IV. Average Weekly Wage (AWW)

The Lavino check stub shows gross year to date earnings of $3,478.14 for a total of 141 hours worked. This is the only evidence in the record regarding Claimant's earnings with Lavino.[3] These figures produce an hourly wage of $24.67.

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910(a)–(c) (2006), which are then divided by 52, pursuant to Section 10(d), to arrive at an AWW. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *Universal Mar. Services Corp. v. Wright*, 155 F.3d 311, 327, 33 BRBS 15, 28 (CRT) (4th Cir. 1998); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 441, 30 BRBS 57, 59 (CRT) (5th Cir. 1996); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823, 25 BRBS 26, 29 (CRT) (5th Cir. 1991).

Sections 10(a) and 10(b) are the statutory provisions relevant to a determination of an employee's AWW where an injured employee's work is regular and continuous. Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). However, if neither of these two methods "can [] reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. *Wright*, 155 F.3d at 327, 33 BRBS at 28 (CRT); *Gatlin*, 936 F.2d at 821, 25 BRBS at 28 (CRT).

[3] In Claimant's post-hearing brief it asserts that the AWW is $787.44 but provides no support or explanation whatsoever for that figure. Further, the brief is not part of the evidence of record so it cannot be considered in this determination.

Claimant has testified that he worked as a longshoreman for 23 years, and his Social Security Earnings records show he earned income from at least six maritime employers in 1988 and 1989. In addition to those six employers, Claimant worked 141 hours for Lavino by August 23, 1989 and presumably additional hours between the date of the stub and his last day of work on September 12, 1989. There is no evidence that Claimant did any other kind of work in the whole of the year immediately preceding the injury. The evidence supports a finding that Claimant worked in same type of employment for the year immediately preceding the injury. However, there is very little evidence of record regarding Claimant's wages and the timing thereof, or of how many hours he worked for any given employer over any given period of time. To perform the calculations required by § 10(a), I would need to know the actual earnings for the 52 weeks prior to the injury and the number of days he actually worked during that period. This information simply is not in the record, and I cannot reasonably and fairly apply this method to determine Claimant's average annual earnings.

Because Claimant did not demonstrate that he worked substantially the whole of the preceding year, Section 10(b) might have been applicable. However, § 10(b) requires that the record contain evidence of the substitute employee's wages. *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135 (1990); *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989); *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). Here, the record contains no such evidence. Therefore, I cannot reasonably and fairly apply this method to determine Claimant's average annual earnings.

Where there are no employees of the same class, who have worked substantially the whole of the year, I must resort to Section 10(c). *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987). Section 10(c) of the Act provides:

> If either [subsections 10(a) or 10(b)] can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c). Where there is insufficient evidence in the record to make a determination of average daily wage under either subsections (a) or (b), as is the case here, Section 10(c) applies. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), *aff'g and remanding in part* 1 BRBS 159 (1974); *Sproull*, 25 BRBS 100; *Taylor*, 14 BRBS 489.

The administrative law judge has broad discretion in determining annual earning capacity under subsection 10(c). *Gatlin*, 936 F.2d at 823, 25 BRBS at 29 (CRT); *Fox v. West State, Inc.*, 31 BRBS 118, 123 (1997); *Hicks v. Pac. Marine & Supply Co., Ltd.*, 14 BRBS 549, 565 (1981).

The primary objective of subsection 10(c) is to arrive at a reasonable and accurate assessment of the claimant's earning capacity at the time of the injury. *Wright* at 327; *Gatlin* at 823. Such earning capacity is defined as "the amount that the employee would have the potential and opportunity of earning absent the injury." *Gatlin* at 822.

One way to compute a claimant's annual earning capacity under Section 10(c) is to multiply claimant's wage rate by a time variable. The Board has approved this use of the claimant's hourly wage. *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283, 287 (1980). The Lavino stub reflects an hourly wage of $24.67. Claimant stated that he usually worked five days a week. There is no evidence regarding how many hours he typically worked in one day or week, therefore I will multiply the hourly wage by a standard forty-hour workweek. This calculation results in an average weekly wage of $986.80. In the absence of other evidence, I find this to be Claimant's AWW.

V. Permanent Partial Disability

Because the Claimant's injury is of the scheduled type, Sections 8(c)(13) and 8(c)(19) of the Act govern and state, in pertinent part:

> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:
>
> . . .
>
> (13) Loss of hearing:
>
> . . .
>
> (B) Compensation for loss of hearing in both ears, two-hundred weeks.
>
> (C) 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, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.
>
> . . .
>
> (E) Determinations 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.
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

33 U.S.C. § 908(c)(13), (19) (2006). The scheduled permanent partial disability rates established by Sections 8(c)(1)-8(c)(20) of the Act are the minimum levels of compensation to which an injured employee is automatically entitled as a result of his injury, and no proof of actual loss of wage-earning capacity is required in order to receive at least the amount specified in the schedule for such injury. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS. 1000 (1979).

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). As discussed *supra*, the 2009 audiogram satisfies the regulatory requirements.

"The Board has repeatedly held that it is for the administrative law judge to assess the probative value of audiograms in determining the extent of a claimant's hearing loss." *R.H. v. Bath Iron Works, Corp.*, 42 BRBS 6, 9 (2008) (citing *Steevens*, 35 BRBS 129). If an 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 Industries, Inc.*, 36 BRBS 65, 67 (2002). However, the administrative law judge may give less weight to audiograms not meeting the "presumptive evidence" standards. *Steevens*, 35 BRBS at 133.

Two audiograms were submitted into evidence. Both were conducted by properly qualified medical personnel under the regulations. I also note that the 2010 audiogram results were similar to those of the 2009 audiogram. The Claimant testified that he received a copy of the 2009 audiogram; however, there is no evidence as to whether a copy of the 2010 audiogram was given to Claimant within 30 days of when it was administered. Thus, only the 2009 audiogram satisfies the requirements of the Act and regulations, qualifying it as presumptive evidence of the amount of the Claimant's hearing loss. I give less weight to the 2010 audiogram because it does not meet the presumptive evidence standard.

For these reasons, I find the 2009 audiogram to be the most probative evidence in determining the extent of Claimant's hearing loss. Accordingly, I find that the Claimant suffers from 39.7 percent binaural hearing loss.

The Board and the courts have consistently held that a schedule award runs for the proportionate number of weeks attributable to the loss of use of the member at the full compensation rate of two-thirds of the average weekly wage. *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), *aff'd on recon. en banc*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986). For hearing loss claims, 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); *see* 33 U.S.C. § 906 (2006). In this case, the March 13, 2009 audiogram was the first audiogram from which an impairment rating could be calculated.

I found that the AWW is $986.80. Two-thirds of that figure is $657.87. Thus, I find that the Claimant is entitled to PPD benefits at the rate of $657.87 per week for 79.4 weeks[4] beginning on March 13, 2009, for a total award of $52,234.88.

VI. Section 7 Medical Benefits are due

Section 7(a) of the Act provides that, "[t]he 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) (2006).

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 they must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care should also be appropriate for the injury. 20 C.F.R. § 702.402 (2008). It is the claimant's burden to establish the necessity of treatment rendered for his work-related injury. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

In this case, the Claimant has established that his hearing loss is causally related to his employment, and thus he is entitled to medical expenses pursuant to Section 7. Dr. Maddock recommended bilateral amplifications. (CX I, H-3) There is no evidence contradicting this recommendation. I find that the Claimant is entitled to all appropriate, necessary, and reasonable medical expenses associated with the his hearing loss, including hearing aids.

VII. Section 14(e) Penalties are due

Section 14(e) of the LHWCA provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e). The Board has held that in order to escape Section 14(e) liability, the employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981). Lavino has paid no compensation and has not shown irreparable injury.

[4] 39.7% of 200 weeks = 79.4 weeks.

Claimant filed his case on May 1, 2009, and the District Direct sent Notice to Lavino and carrier Signal on May 14, 2009 that the claim had been filed with instructions regarding controversion of the claim, stating:

> Section 14(d) [of the Act] provides that if the employer controverts the right to compensation, he/she shall file with the District Director, on or before the 14th day after having knowledge of the alleged injury. . . a notice stating that the right to compensation is controverted. . .

(CX II, B-C) The Notice included a copy of the LS-203 and 2009 audiogram, and a blank LS-207 form.

Employer filed a Notice of Controversion of Right to Compensation ("NOC") (Form LS-207) dated August 17, 2009. It listed March 3, 2009 as the date of injury and stated its date of first knowledge of injury was August 3, 2009. (CX II E-1)

It is the duty of the trier of fact to determine when the employer had knowledge of the alleged injury. *Maddon v. Western Asbestos Co.*, 23 BRBS 55, 60 (1989). An employer has knowledge if it knows of the injury and of such facts so that a reasonable man would consider that compensation liability was possible and that further investigation should be made. *Pardee v. Army & Air Force Exch.*, 13 BRBS 1130, 1137 (1981); *Willis v. Washington Metro. Area Transit Auth.*, 12 BRBS 18, 24 (1980). The time for filing the NOC is tolled until the controversy arises: when the controversy arises, the employer must file a NOC on or before the fourteenth day after the controversy arises to escape potential liability for additional compensation pursuant to Section 14(e). *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981).

I find that a reasonable man would consider that compensation liability was possible and that further investigation should be made upon receipt of Notice from the DOL of the claim with a copy of the claim attached. *See Paul v. General Dynamics Corp.*, 13 BRBS 1073 (1981). Therefore, I find that Lavino had knowledge of the injury on May 14, 2009, the date of the Notice from the DOL. Under Section 14(d), Lavino was required to file its NOC on or before the 14th day after this date, which would have been May 28, 2009. The NOC filed by Lavino is dated months after this deadline.

The Fourth Circuit has stated that the Section 14(e) "penalty is mandatory unless non-payment [or the failure to timely controvert] is due to conditions beyond employer's control." *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 171, 8 BRBS 241, 247 (4th Cir.), cert. denied, 439 U.S. 979 (1978). Employer has made no claim that its failure to timely controvert was due to conditions beyond its control.

I find that Employer failed to timely file the NOC. In determining which installment of compensation may be subject to an additional assessment of compensation under Section 14(e), the controlling date is the date the installment of compensation became due. *See Oho v. Castle & Cooke Terminals, Ltd.*, 9 BRBS 989, 991 (1978). Therefore, all payments of compensation which became due during the period from the date the controversy arose to the date either the untimely notice of controversion was filed or the date of the informal conference, whichever is

earlier, will be subject to an assessment of additional compensation under Section 14(e) if not paid within fourteen days after it became due. I have found that the controversy arose on May 14, 2009. There does not appear to have been an informal conference, therefore I will use the untimely controversion date of August 17, 2009.

All payments of compensation which became due between May 14, 2009 and August 17, 2009,[5] are subject to an assessment of additional compensation under §14(e). I have found that Claimant is entitled to PPD benefits at a compensation rate of $657.87 per week from March 13, 2009 for 79.4 weeks, so Claimant was due that compensation during the relevant window. Section 14(e) penalties are "added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment." Therefore, an additional penalty of $65.79[6] per week will be added to the PPD due to Claimant, multiplied by a period of 13.57[7] weeks, a penalty totaling $892.77.[8]

CONCLUSION

I have determined the following based on a complete review of the record in light of the argument of the parties, testimony of the witnesses, applicable statutory provisions, regulations, and pertinent precedent. Lavino is the last maritime employer and liable for the claim. Claimant has established that his hearing loss is causally related to his employment. Based on the audiogram evidence, I have determined that the Claimant suffers from 39.7 percent binaural hearing loss. Accordingly, the Claimant is entitled to PPD benefits for 79.4 weeks beginning on March 13, 2009. The Claimant is also due medical expenses relating to his hearing loss, as allowable under Section 7, including hearing aids. Further, I find that Lavino failed to timely controvert the claim, and Section §14(e) penalties are due to Claimant.

ORDER

It is hereby **ORDERED** that:

1. Lavino shall pay Claimant permanent partial disability benefits for 79.4 weeks, beginning on March 13, 2009, at the rate of $657.87 per week.

2. Lavino shall pay Claimant $892.77 in Section 14(e) penalties.

3. Lavino is responsible for medical treatment for Claimant's work injuries in accordance with Section 7 of the Act, to include all necessary and allowable care for his hearing loss, including hearing aids.

4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits

[5] 95 days
[6] 10% of $657.87 = $65.79
[7] 95 days = 13.57 weeks
[8] $65.79 * 13.57 = $892.77

computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

5. All computations are subject to verification by the District Director.

6. Claimant's counsel, within 20 days of receipt of this Order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have twenty (20) days to respond with objections thereto.

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/LEC/mrc
Newport News, Virginia