UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 14 November 2012

CASE NO..: 2011-LHC-01974
OWCP NO.: 01-172243

In the Matter of:

PAUL LOSACANO,
Claimant

v.

ELECTRIC BOAT CORPORATION,
Employer/Self-Insured

Before: Timothy J. McGrath, Administrative Law Judge

Appearances:

David N. Neusner, Esq., Embry and Neusner, Groton, Connecticut, for the Claimant

Robert J. Quigley, Jr., Esq., McKenney, Quigley, Izzo & Clarkin, LLP, Providence, Rhode Island, for the Employer

DECISION AND ORDER AWARDING BENEFITS

I. STATEMENT OF THE CASE

This proceeding arises from a claim for workers' compensation and medical benefits filed by Paul Losacano (the "Claimant") against Electric Boat Corporation ("EBC" or "Employer") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). A formal hearing on the matter was held in New London, Connecticut on January 24, 2012.

At the hearing, appearances were made by attorneys representing the Claimant and the Employer. The Hearing Transcript is referred to herein as ("TR"). At the hearing the parties offered documentary evidence which was admitted as Claimant's Exhibits ("CX") 1-6 and Employer Exhibits ("EX") 1-9. Claimant submitted CX 7 through CX 11 after the hearing and before the record closed. Administrative Law Judge Exhibits ("ALJX") 1-4 were admitted. The Claimant testified as did three EBC supervisors--Darryl McClinton, Robert Gannon, and Ronald Dion. The parties also offered deposition testimony from Martha Jove-D'Amato, Dr. Stanley Friedman, and Jean Tuneski. The Claimant and Employer filed post-hearing briefs.

Upon consideration of the evidence of record and arguments presented I find the Claimant has met his burden of establishing his entitlement to benefits under the Act. My findings of fact and conclusions of law are set forth below.

II. STIPULATIONS AND ISSUES PRESENTED

The parties stipulated to the following: (1) The Act applies to this claim; (2) An employer/employee relationship existed at all relevant times; (3) The claim was timely filed; (4) The Notice of Controversion was timely filed; (5) The informal conference was conducted on July 20, 2011; (6) The Claimant's average weekly wage at the time of the injury was $2,758.95, so the applicable compensation rate is $1,256.84; (7) The Claimant retired from Electric Boat on January 31, 2011. TR 5-6; Cl. Br. 1-2; Er. Br. 2-3.

The issues in dispute are: (1) Whether the Claimant's hearing loss was causally related to his work at EBC; (2) The extent of disability and impairment sustained by the Claimant due to hearing loss and tinnitus; and (3) Whether the Employer is responsible for the payment of any benefits to the Claimant.

III. FINDINGS OF FACT

A. Testimony of Paul Losacano

The Claimant testified at the hearing. He is currently sixty-nine years old and was employed by EBC from May 1963 until his voluntary retirement on January 31, 2011. TR 24-25. The Claimant was hired to work at the Groton, Connecticut facility and over the course of his forty-eight year career with EBC he served as an inspector, draftsman, designer, and union liaison. TR 25; CX 1 at 16-30.

In 1963, the Claimant was hired as an Ultrasonic Testing Inspector ("U.T.I".) where he was responsible for testing of the piping on ships, ensuring they were properly fitted. TR 50. While performing this job the Claimant was exposed to construction-related noises from the steel trades including, "burning, grinding, chipping, [and] back-gouging." TR 50. The Claimant testified that as a U.T.I. he was required to spend about eighty percent of his work day aboard ships. TR 51. In 1964 the Claimant was promoted to structural inspector, a job that required him to spend an average of eighty percent of his work day onboard the ships surrounded by the steel trades. TR 52-53.

In August of 1966, the Claimant transferred to the EBC design department where, as a draftsman, he was responsible for making minor revisions to drawings. TR 53-54. Eventually the Claimant was assigned to the overhaul group that supported the construction of vessels. As part of his job in the overhaul group he would, on occasion, go down to the "boat", *i.e.* a submarine, they were working on to examine the design firsthand. TR 55. During these visits to the boat, the Claimant estimated he spent from two to five hours onboard, depending on the severity of the design problem. TR 55. He testified that while he was there he was again surrounded by the various steel trades engaged in loud construction work. TR 55.

The Claimant remained part of the overhaul group until a union strike at EBC in 1979. TR 26. During the one year strike period the Claimant worked for Ace Job Shop in Claymont,

CA as a designer, a job that required him to go onboard ships a total of three or four times during the course of the year. TR 26-27. The Claimant returned to work at EBC in 1979 and resumed his job in the overhaul group. TR 58.

In 1982, the Claimant's job title changed to "Senior Designer." TR 38. From 1983 through 1986 EBC experienced another union strike. TR 25,TR 38. During that three year strike period, the Claimant worked at nuclear power plants at Millstone Point in Waterford, Connecticut and at Niagara Mohawk in Oswego, New York. TR 48-49. He worked as a field engineer resolving design problems associated with the construction of the power plants, especially the piping. TR 48.

When the Claimant returned to EBC following the strike, he was assigned to the CGN group working on missile-firing nuclear frigates. TR 57. In this position the Claimant worked on cruise guidance and overhaul of ships; however, none of the ships involved with the project were housed at EBC. TR 58.

From 1986 through 1992, including being promoted to supervisor in 1988, the Claimant remained with the CGN group and did no work onboard any vessels. TR 59. The Claimant's duties, with the exception of two ship checks, were limited to work in an office. TR 61. In 1996, he transferred to the Virginia class submarine mockup group. TR 60.

As part of his work on the Virginia class, the Claimant drafted drawings for portions of the submarine that were then used to construct a full scale wooden mockup of the submarine. TR 62-63. While the mockup was being constructed at EBC, the Claimant testified he rarely went down to the mockup shop, averaging only about once a week for two to three hours. TR 63-64. The Claimant may have been exposed to some construction noise while he was down at the wooden mockup; however, the vast majority of his work was done within the office, away from the construction. TR 64.

In May of 2000, the Claimant was assigned to the Avondale project, which focused on designing a portion of a surface ship that was not being built at EBC's shipyard. TR 64-65. The

Claimant testified that during the course of his work on the Avondale project he had no reason to go to the shipyard. TR 65.

In March of 2002, the Claimant transferred back to the Virginia class working on designs for the attack submarines. TR 65. The Claimant testified that during this period he would go down to the subs anytime a problem arose, which he estimated to be one or two times a week for a "couple of hours" at a time. TR 66. During his visits to the shipyard he reported being in the presence of several steel trades including the ship fitters, grinders and welders. TR 66. He worked on this project from 2002 to 2006. TR 67.

From 2006 through 2010, the Claimant served in an elected position as recording secretary for the Marine Draftsmen's Association, United Auto Workers, Local 571. TR 67. While serving in this union position the Claimant was responsible for investigating any problems that arose or were reported by the union members in his assigned area of the shipyard. TR 67. As recording secretary he was down in the shipyard three to four times a week; however, those visits only lasted about fifteen minutes, as most union business took place in the EBC offices. TR 68-69.

In 2010, the Claimant returned to his design position with the Virginia class for four weeks. TR 69. The Claimant then transferred to a Bath Iron Works destroyer design group until his retirement on January 31, 2011. TR 70. The destroyer was not based in the EBC shipyard and the Claimant made no visits to the shipyard while serving in this position. TR 71.

During the course of Claimant's career he served as a ship checker, whereby he traveled around the world to make design modifications on various ships. TR 29. The Claimant went on between thirty and thirty-two ship checks between 1976 and 1995.[1] TR 45. While on those ship

[1] The Claimant states he went on three ship checks in 1977, two in 1981, three in 1982 and 1986, five in 1987, three in 1988, two in 1992, two in 1994, and one in 1995. TR 45.

checks, which he noted lasted between two weeks and four months,[2] the Claimant worked aboard the ships surrounded by the steel trades and loud noises. TR 30-31, 41.

B. Employer's Witness Testimony

i. Darryl McClinton

Darryl McClinton is a Design Project Supervisor for EBC and served as the Claimant's direct supervisor on the Virginia class submarine forward end project from late 1998 through 2001. TR 119-121. McClinton was responsible for supervising eighteen to twenty workers, all of whom were generally seated in the same area of the building. TR 134. Claimant acted as a "checker" and a "charge man" for McClinton, assigned work to others and assisted McClinton in running the group. TR 121. He also served as second in charge when McClinton was not in the building. TR 135. McClinton testified the Claimant was "extremely trustworthy." TR 135. During this project there was no submarine present at EBC and the wooden mock-up being created was only of the aft end, not the forward end, of the Virginia class submarine. TR 124.

McClinton testified that there was generally no reason for a member of his team to go down to the wooden mock-up and his employees would have asked him for permission prior to doing so. TR 124. McClinton testified he has no recollection of the Claimant requesting to go down to the mock-up nor does he recall ever being aware of the Claimant going there. TR 125-27. According to McClinton's testimony, the majority of the design work for this project was accomplished through three dimensional visual mockups rather than visiting the construction or wooden mockup. TR 131. The electronic mockup was done using electronic computer assisted design (CAD) software, allowing a three dimensional replication of the submarine being designed. TR 131-133. McClinton acknowledged it was not always possible for him to know exactly where all the twenty workers in his group were on a given day. TR 135.

[2] The Claimant reports he was sent on his longest ship check to Bremerton, Washington for a ship check from October 1993 through February 1994. TR 38-40.

ii. Robert Gannon

Robert Gannon, a Design Supervisor for the piping discipline at EBC, worked as a supervisor in the design department since 1995. TR 137. He testified the Claimant was part of a "checker pool" that he used as part of the Virginia class project for a few weeks in 1997, checking forward end drawings. TR 138-139. Gannon testified there was no Virginia class submarine nor a mockup of its forward end at EBC during that time period. TR 140.

Gannon testified there was no reason for a member of his crew to go down to the wooden mockup, nor does he recall being asked by any member of his crew, including the Claimant, to go down to the mockup. TR 141-42. However, Gannon conceded the Claimant was a member of a "checker pool" and could have been working on other projects during the same period; therefore, Gannon could not testify to the exact whereabouts and daily acts of the Claimant. TR 143-45.

iii. Ronald Dion

Ronald Dion has been a Design Supervisor in the piping discipline for EBC since 1998. TR 147. The Claimant acted as the "charge man" of Dion's approximately fifteen person Virginia class crew from 2003 until 2006 when Claimant began his term as a union recording secretary. TR 147, 151. Dion testified there was no reason for a member of his crew to go down to the shipyard, nor does he recall being asked by a member of his crew, including the Claimant, to go down to the shipyard. TR 152-53. Dion testified there was no reason for the Claimant to be in the shipyard on average of one to two times a week. TR 154. Dion stated that during his time as supervisor he found the Claimant to be a good worker, and one who was responsible and trustworthy. TR 156. The Claimant did not wander off and he clearly listened to instructions. TR 156. Dion testified that in 2004 he gave the Claimant an award for outstanding performance and dedication for his ability to resolve numerous urgent problems in design work. TR 160.

If a construction problem arose with the design work, Dion relied on the liaison team to communicate with the construction staff. TR 157. The liaison group would be responsible for going to the shipyard aboard the boats to try to resolve the problem. TR 157-158. There were three members of the liaison group in Dion's crew in 2004; however, the Claimant was not one of them. TR 158.

C. Medical Evidence

i. Audiograms

The Claimant underwent a hearing evaluation in 1963 when he first began working for EBC. CX 5. When he retired from EBC in 2011, he was again evaluated. TR 94. Both Claimant and the Employer submitted audiograms conducted in 2011 by their respective expert medical witnesses. CX 3; EX 2. The Employer also submitted EX 9, an "Individual Hearing Evaluation Letter," purporting to show results of a 1997 audiogram and other audiograms administered to Claimant by EBC. EX 9 at 1. Further discussion of EX 9 is listed below. The Claimant testified he had no recollection of a hearing test in 1997. TR 93-94.

ii. Report and Deposition Testimony of Martha Jove-D'Amato

Martha Jove-D'Amato is an audiologist who examined the Claimant on June 2, 2011 at the request of the Employer. CX 10 at 5. Jove-D'Amato has both a master's degree in audiology and a doctorate of audiology. CX 10 at 4, 9. Jove-D'Amato currently works as a Clinical Audiologist at Lawrence & Memorial Hospital in New London, Connecticut three days a week, primarily focusing on pediatric audiology, and operates her own practice three days a week in Norwich, Connecticut where she focuses on adult audiology testing. TR 41-42.

Jove-D'Amato conducted several tests during her examination of the Claimant after a reported sixteen hours free of noise. TR 34. Jove-D'Amato testified the testing results indicated an asymmetrical sensorineural hearing loss, with poorer hearing in Claimant's right ear. The Claimant's current audiometric configuration is consistent with a history of noise exposure. EX

2 at 2. Relying on the current AMA formula for percentage impairments, Jove-D'Amato finds the Claimant has a 24.38% monaural impairment in the right ear, a 9.38% monaural impairment in the left ear, and a 11.88% binaural impairment. EX 2 at 2. Jove-D'Amato also found the Claimant's tinnitus to be a Grade 2 or "Mild" based on his answers to the Tinnitus Handicap Inventory--she assigned a 2% final binaural percentage impairment of 13.88% as a result. EX 2 at 2.

Through her testing, Jove-D'Amato also found the Claimant's current speech discrimination was "good," with an 84% correct response in the right ear and 80% in the left ear at normal conversational levels. EX 2 at 2. However, when tested with recorded speech the Claimant's speech discrimination dropped to "fair" (60% correct), and to "poor" (32% correct) when there was competing background noise. EX 2 at 2. In her final report, Jove-D'Amato states the Claimant's current hearing loss in both ears is the combination of loud noise exposure at EBC, non-occupational noise exposure outside of EBC, and presbycusis, or age-related hearing loss. EX 2 at 2.

Jove-D'Amato testified her overall findings were based on information reported by the Claimant prior to the tests. CX 10 at 43. She later discovered that information was contradicted by statements made by Claimant in his deposition. CX 10 at 44-45. She said her findings were based on the assumptions the Claimant was aboard the boats once or twice daily from 1986 through 2006 and two to three times weekly from 2010 through 2011. CX 10 at 50-52. Jove-D'Amato said the Claimant reported he wore ear protection during the latter part of his career but in his deposition he stated he never wore ear protection. CX 10 at 55-56.

Jove-D'Amato testified that if the Claimant had not been at the shipyard on a regular basis from 1986 through 2010, as she had originally been led to believe, her report would be different. CX 10 at 31, 65-66. Based on the Claimant's employment history as stated in his deposition, Jove-D'Amato believes that no hearing loss demonstrated after the 1997 hearing test[3] could likely be related to EBC. CX 10 at 72-73. In order to substantiate the continued demise of the Claimant's hearing, Jove-D'Amato testified the Claimant would have had to be exposed to hazardous noises on a consistent and regular basis. Overall, Jove-D'Amato found the Claimant

[3] See discussion *infra* about the unreliable findings of this purported test found in EX 9.

suffers from a hearing loss far greater than is expected from age alone and the multiple sources of noise exposure inside and outside of EBC are contributing factors to his current hearing loss. CX 10 at 16, 20, 31.

iii. Report and Deposition Testimony of Jean Tuneski

Jean Tuneski is an audiologist who examined the Claimant on February 4, 2011 at his request. CX 3 Tuneski has a master's degree in audiology and works as an audiologist for the U.S. Navy at the Submarine Base in Groton, Connecticut, where she performs comprehensive audiologic evaluations on active duty service members, their dependents, and retirees. CX 6; 8 at 5. Additionally, Tuneski has a private practice, Thames Hearing Services, in East Lyme, Connecticut, where she serves as President and Clinical Audiologist. Id. Thames Hearing Services provides hearing conservation and comprehensive hearing evaluations to local businesses and doctors, and provides advice regarding when the baseline for determining permanent hearing loss should be adjusted. CX 8 at 8.

Tuneski is a member of the Council of Accreditation of Occupational Hearing Conservation where she conducts training courses for persons providing or overseeing hearing tests in their workplace. CX 10 at 9.

In 2009, Tuneski was hired by EBC for six months to do some consultation and to provide hands on audiology services after the departure of the EBC audiologist. CX 8 at 8. Tuneski testified that during her time at EBC she reviewed four to six hearing evaluations a week. CX 8 at 19. Tuneski noted that when she arrived at EBC she found their audiology equipment was not properly calibrated to the current requirements[4] nor did the equipment appear to have been used recently. CX 8 at 11. EBC replaced the machines to provide proper

[4] Tuneski stated that the calibration was set to the 1969 standards rather than the current 1981 standards of the American National Standards Institute. CX 8 at 12.

calibration. CX 8 at 12. Tuneski testified that during her time at EBC she found the company procedures regarding hearing tests to be inconsistent among employees.[5] CX 8 at 17-19.

Tuneski's February 12, 2011 report noted the Claimant suffers from mild to severe sensorineural hearing loss in the left ear at 2,000, 3,000, and 4,000 Hz and moderate to severe sensoriuneural hearing loss in the right ear at 2,000, 3,000, and 4,000 Hz. CX 3 at 1. The percentage of hearing loss using the AMA formula is 18.4375% (26.25% right ear and 16.875% left ear) plus a maximum 5% rating for tinnitus totaling 23.4375%. CX 3 at 1-2

Tuneski believes the reports to be of excellent reliability because of the consistency of the Claimant's responses during the tests.[6] CX 8 at 27-28. Tuneski testified the Claimant's hearing loss is greater than what would be expected from aging alone and the Claimant shows cochlear involvement, meaning noise induced loss is likely. CX 8 at 19, 42, 45. Considering the test results and the assumptions based on Claimant's stated work history, Tuneski testified the Claimant's hearing loss is consistent with a history of chronic exposure to loud noises. CX 8 at 42. She opined that all of his noise exposure from 1963 through 2010 had a cumulative impact in bringing about his hearing loss. CX 8 at 41-43, 60-62.

iv. Report and Deposition of Dr. Stanley Friedman

Dr. Stanley Friedman is a board certified otolaryngologist who is the Director of the Yale Otolaryngology and ENT Clinic at Cornell Scott-Hill Health Center in New Haven, Connecticut. CX 2 at 1. Friedman is an Assistant Clinical Professor of Surgery at Yale Medical School, and has served on the medical staff of various hospitals. CX 2 at 2-3.

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[5] In the deposition, Tuneski stated that the Hearing Conservation Act provides that an employer perform a hearing test at the start of an employee's employment to determine their baseline levels, the levels at which all future hearing tests are compared to. The employer is then to test employees annually and if they demonstrate a shift in their hearing, OSHA requires the employee undergo another test in thirty days to determine if it is a consistent shift. If it is determined to be a consistent shift that becomes the new baseline for the employee. CX 8 at 16-17.

[6] The Claimant underwent several tests in addition to a pure tone test to determine the extent and likely cause of his hearing loss. The Acoustic Reflex test confirmed that the Claimant suffered from a sensorienural impairment. CX 8 at 35. The DPOAE Data or Otoacoustic Emissions test resulted in a failure in both ears, confirming a cochlear loss. CX 8 at 36-37. Finally, a Speech Discrimination Test showed in a quiet setting the Claimant had a 76% success rate in both the right and left ears, but that his success rate dropped to between 44% and 30% when background noises were introduced at varying decibel levels. CX 8 at 40.

Dr. Friedman testified that intermittent exposure to loud noise over the course of many years can cause hearing loss since the noise damages the infrastructure of the inner ear by causing degeneration of various components of the hearing mechanism. CX 9 at 7. Ending the exposure to loud noises does not stop hearing loss; further damage is likely to occur because the inner ear is more readily injured by further noise exposure. CX 9 at 7. Tinnitus can occur when the ear is damaged and thus unable to suppress a baseline noise that normally can be suppressed. CX 9 at 8.

Dr. Friedman evaluated the Claimant on November 30, 2011 and ordered three tests--a pure tone threshold test, a speech reception threshold test and a phonetically balanced discrimination test. CX 1 at 1; CX 8 at 14. As a result of the Claimant's reported daily[7] exposure to "loud background noise from sandblasting, welding, grinding, back gouging and burning," he found the Claimant's hearing losses and handicaps are 27.5% in the right ear and 28.75% in the left ear with a binaural hearing handicap of 27.7% according to AMA guidelines.[8] CX 1 at 1-3. In his deposition, Dr. Friedman indicated a reasonable rating for Claimant's tinnitus would be 2.5% to 3%. CX 9 at 60. Overall, Dr. Friedman points to the excessive noise exposure over the course of the Claimant's employment with EBC as the cause of his hearing loss, because the loss displayed by the Claimant exceeds that which is expected merely from aging. CX 1 at 2.

[7] In the deposition, Dr. Friedman said that Claimant did not specifically state he was on boats daily, but rather that he served as an inspector and he spent most days being exposed to loud noises. CX 9 at 40.

[8] Dr. Friedman believes the AMA guidelines are not reflective of the true handicap of hearing loss, especially with additional tinnitus. He notes a more realistic formula for determining Claimant's hearing loss is the formula adopted by the National Institute of Occupational Safety and Health. That would establish a hearing loss of 38% in each of the Claimant's ears and a binaural hearing handicap of 38%. CX 1 at 2.

IV. CONCLUSIONS OF LAW

A. Causation

i. The Claimant's *Prima Facie* Case

A claimant seeking workers' compensation benefits under the Act must establish that he suffered an "accidental injury…arising out of and in the course of employment…" 33 U.S.C. §902(2). In determining whether an injury arose out of and in the course of employment Section 20(a) of the Act establishes a presumption, in the absence of substantial evidence to the contrary, that the claim comes within its provisions. 33 U.S.C. §920(a). A Claimant establishes a *prima facie* case by proving that he suffered some injury and that conditions existed at work which could have caused the harm. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999); *Rainey v. Director, OWCP*, 517 F.3d 632, 634 (2d Cir. 2008) (*citing Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2d Cir. 2001)); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991). In presenting his case, "the claimant is not required to show a causal connection between the harm and his working conditions, but rather must show only that the harm could have been caused by his working conditions." *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004). Claimant has set forth the two necessary elements for establishing a *prima facie* case. First, he has provided evidence that he suffered a harm—namely a hearing loss/impairment. CX 1, CX 3. Secondly, I find he provided evidence the hearing loss was related to his exposure to hazardous noise levels while employed at EBC. This is demonstrated through his testimony about noise exposure, and the findings by the three medical experts, Dr. Friedman, Ms. Tuneski and Ms. Jove-D'Amato that the hearing loss was causally related to workplace exposure.

Mr. Losacano credibly testified to the types of jobs he held at EBC, where those jobs were physically located, and what duties he was required to perform. It is clear from his testimony that he worked in close proximity to the steel trades for long periods of time where he was exposed to loud noise from burning, gouging, welding, etc. There is no serious dispute that Claimant was exposed to hazardous noise levels at EBC for at least twenty years. Claimant also

had intermittent contact with hazardous noise levels during the remaining time at EBC. It is clear that Claimant's condition was caused by, aggravated by, or made worse by his employment at EBC.

Employer's expert, Martha Jove-D'Amato, testified that Claimant suffers from a hearing loss far greater than is expected from age alone and the multiple sources of noise exposure, inside and outside of EBC are contributing factors to his current hearing loss.

Jean Tuneski testified that Claimant's hearing loss is consistent with a history of chronic exposure to loud noises, and intermittent noise exposure had a cumulative impact in bringing about his hearing loss.

Dr. Friedman described the anatomical changes and damage that can occur based on hazardous noise exposure. He concluded that the overall excessive noise exposure over the course of Claimant's employment is the cause of his hearing loss because his loss exceeds what could be expected merely from aging.

Claimant's pre-employment hearing test in 1963 shows normal hearing and his 2011 retirement and post retirement evaluations show a significant hearing loss. While there are some differences in the opinions of the three medical experts, they all agree Mr. Losacano has a binaural hearing loss that was caused, at least in part, by his exposure to noise at EBC.

Having met his *prima facie* burden, Claimant is entitled to the § 20(a) presumption. *See* 33 U.S.C. §920(a).

ii. <u>The Respondent's Rebuttal</u>

Once a *prima facie* case is established, the burden shifts to the respondent to "rebut the presumption with substantial evidence that the [claimant's hearing loss] . . . was not caused or aggravated by his employment." *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997); *Rainey*, 517 F.3d at 634; *Merrill*, 25 BRBS at 144. At the rebuttal stage, the

respondent bears a burden of production, not persuasion. *Rainey,* 517 F.3d at 637 (citation omitted). Evidence is "substantial" if it is the kind a reasonable mind might accept as adequate to support a finding that workplace conditions did not cause the injury. *Preston*, 380 F.3d at 605 n.2; *Rainey,* 517 F. 3d at 637 (citation omitted); *see Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under the substantial evidence standard, a respondent does not have to exclude any possibility of a causal connection to employment; it is enough that it produce medical evidence of "reasonable probabilities" demonstrating lack of causation. *Bath Iron Works Corp. v. Director, OWCP,* 137 F.3d 673, 675 (1st Cir. 1998); *see Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003) (rejecting requirement that an employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that "the evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to contrary.'"). A respondent may sufficiently rebut the presumption by introducing testimony of a physician who unequivocally states with a reasonable degree of medical certainty that the harm suffered by the claimant is not related to his employment or working conditions. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000). When a respondent offers sufficient evidence to rebut the presumption, only then is the presumption overcome. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999) (*citing Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir.1986).

In furtherance of trying to rebut the presumption, the Employer relies on the testimony and reports of Ms. Jove-D'Amato, Employer's Exhibit 9 and the in-court testimony of three EBC supervisors.

Ms. Jove-D'Amato, the Employer's audiologist, tested Claimant and provided her testing results and expert testimony. Her reports show that Claimant had a hearing loss which she attributed to a combination of work exposures, non-work exposures and the aging process. She testified it was unclear how Claimant's years of exposure to hazardous noise levels affected the progression of the deterioration of his hearing loss. CX 10 at 71-78. She said he had more hearing loss/damage than would be expected from just aging alone.

The Employer offered EX 9 attempting to show Claimant had several hearing tests at EBC between 1986 and 1997 and that those tests established a base line showing Claimant's hearing was stable in 1997. The Employer attempted to show, through the testimony of three EBC supervisors to show that Claimant had not been exposed to hazardous noise levels at EBC after 1997. The Employer posited that any hearing loss post 1997 was not related to Claimant's employment at EBC.

Employer's Exhibit 9 consists of two documents, the "Individual Hearing Evaluation Letter," and a second document, "Hearing Loss Calculations." Those documents purportedly show results of a hearing test Claimant had in 1997 at EBC along with results from previous hearing exams in 1986, 1993, and 1995. EX 9 at 1-2. Although I admitted EX 9 into evidence, I ultimately accord it little to no weight for the reasons stated below.

Under the Act, 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, or by a Board-Certified otolaryngologist or by a technician under the supervision of an audiologist or physician, who 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 with a copy of the audiogram and the accompanying report within thirty (30) days from the time that the audiogram was administered;
>
> (3) No one has provided a contrary audiogram of equal probative value within thirty days of the subject audiogram where a claimant continues to be exposed to excessive noise levels or within 6 months if such exposure ceases;
>
> (4) The audiometer used must be calibrated according to current American National Standard Specifications; and
>
> (5) The extent of a claimant's hearing loss must be measured according to the most currently revised edition of the American Medical Association's (AMA) Guides to the Evaluation of Permanent Impairment.

20 C.F.R. § 702.441(b)(1)-(3) & (d).

Assuming *arguendo* that Claimant underwent a properly conducted audiogram in 1997, the information provided in the "Individual Hearing Evaluation Letter" fails to meet the regulatory criteria. Exhibit 9 fails to identify the administrator of the test, fails to identify if the examiner was certified, fails to verify if the testing equipment was calibrated properly, and fails to provide an accompanying report setting forth the standards used to evaluate the hearing loss. The Exhibit also fails to verify that the Claimant was provided with a copy of the audiogram in 1997. Since I have no confidence in the reliability of the information provided in the Individual Hearing Evaluation Letter, I can give it little value or weight.

I have additional concerns about the overall reliability of EX 9 because of the obvious inconsistencies found in the second document, the "Hearing Loss Calculations." While it was offered as a document pertaining to the Claimant, the identifying information on the form refers to another person. The typewritten name on the document is "Edward Gleason" along with Claim Number 174875 and has the date of 8/16/2010 typed at the top of the page. On the proffered EX 9 those typewritten entries (name, claim number and date) were all separately crossed out and in handwriting someone wrote "Losacono" (sic) and wrote and circled "1997." There was no explanation offered who made the alterations or why they were made.

Although the "Hearing Loss Calculations" document contains a table of values and percentages purportedly related to a hearing test, it does not establish the source of, or basis for, those numeric values. There is no reliable indication when such test(s) establishing said values was given, nor any indication of the administrator of the test(s), or what their qualifications were for administering the test. Based on the obvious alteration of the document with no explanation for the alterations, I have no confidence in the reliability of this document or its relevance. Due to the unreliability of both documents contained in EX 9, I have no confidence in the reliability of the exhibit, and therefore I give EX 9 no weight. I believe the Employer has failed to provide sufficient evidence to rebut the Section 20(a) presumption.

iii. Weighing the Evidence

Although I find the Employer has failed to rebut the § 20(a) presumption, I will, purely in contemplation of an appeal, move to the third prong of the burden shifting analysis and weigh the evidence.

If Section 20(a) presumption is rebutted, it no longer controls and I must weigh all of the evidence as a whole and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-287 (1935); *Sprague v. Dir., OWCP*, 688 F. 2d 862, 865 (1st Cir. 1982); *Rainey*, 517 F.3d at 634; *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2d Cir. 1982); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995); *Merrill*, 25 BRBS at 144. The Claimant ultimately bears the burden of persuasion in establishing causation based upon the record as a whole, and he meets this burden if a preponderance of the evidence establishes the requisite causal connection. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-280 (1994); *Rainey*, 517 F.3d at 634.

In evaluating the evidence, the administrative law judge is entitled to weigh the medical evidence and draw inferences therefrom, but the judge is not bound to accept the opinion or theory of any particular medical expert. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his or her judgment. *Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390, 395-96 (1979); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

Claimant contends his employment at EBC caused/aggravated his hearing loss. He testified about working around the steel trades and the attendant noise; he testified about the various times he conducted ship checks; and testified about various other opportunities when he may have been subjected to loud noise at EBC. More than twenty years of undisputed hazardous noise exposure can set the stage for further injury/aggravation. Dr. Friedman testified to the anatomical damage that can occur with exposure to loud noise and spoke about the predisposition for further damage and hearing loss because of that exposure.

The Employer attempted to discredit Claimant's testimony about how often he may have been exposed to noise in the shipyard through the testimony of three supervisors. All three supervisors testified about Claimant's work duties and opined Claimant had a good reputation for honesty and integrity and was a good worker. Each of the three supervisors spoke in general terms about their work projects and Claimant's presence and role on their respective crews. After direct examination and cross examination it was clear to me the supervisors did not always know where Claimant was at all times and they could not say for certain that Claimant never went down to the boats or to the shipyard. The supervisors are busy men, working in a complex industrial setting supervising eighteen to twenty workers on a daily basis. I was not convinced by their testimony that Claimant did not have intermittent exposure to hazardous noises while he worked on their crews.

The Employer attempted to portray Claimant as a person who was not credible and whose testimony should not be believed or relied upon. I believe Claimant testified credibly to his working conditions and his exposure to noise. I recognize Claimant may not be the best historian for remembering precise details on particular items or instances that occurred during his more than forty years of service at EBC. His failure to remember something or remember it out of time sequence does not totally negate his testimony.

Putting the Claimant's credibility aside, there is nothing else from the Employer that I can consider. Since I give no weight to EX 9, for the reasons cited above, the only hearing tests that are relevant are the 1963 pre-hiring test and the retirement/post retirement tests in 2011. The 1963 test shows normal hearing and the 2011 tests show a hearing loss.

Based on the differences between the 1963 and 2011 hearing tests as well as Claimant's testimony and the testimony of the medical experts, Claimant has met his burden of proof by a preponderance of the evidence. I find that Claimant's hearing loss is related to his employment at EBC.

iv. Extent of the Claimant's Hearing Loss

The Claimant is seeking permanent partial disability benefits under Section 8(c)(13)(B) of the Act, which governs compensation for occupational hearing loss. 33 U.S.C. § 908(c)(13). The extent of a claimant's hearing loss must be made in accordance with the *AMA Guidelines*. 33 U.S.C. § 908(c)(13)(E). A 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). Under the aggravation rule, an employer is precluded from making any deduction for the portion of the worker's hearing loss that may be attributed to aging, and the employer is liable for a claimant's entire hearing loss. *Port of Portland v. Director, OWCP [Ronne]*, 932 F.2d 836, 838-40 (9th Cir. 1991); *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344, 348 (1989).

Credibility determinations fall within the purview of the trier-of-fact, and an administrative law judge is free to accept or reject any (or all) medical testimony proffered. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66, 68 (1992). In hearing loss cases, the judge is not required to credit the lowest audiogram rating. *Id.* An administrative law judge may average the results of the reliable audiograms to determine the extent of a claimant's hearing loss. *Green v. Ceres Marine Terminals, Inc.*, Ben. Rev. Bd. Nos. 09-0294, 09-0294A, 2010 WL 387189, at *3 (Jan. 12, 2010) (*citing Steevens*, 35 BRBS 129 (Board approved the ALJ averaging the results of claimant's two most recent audiograms and excluding two earlier audiograms that did not conform to statutory and regulatory requirements)).

The parties have submitted results from numerous audiograms performed on the Claimant. The results vary somewhat, but overall they show a significant hearing loss after the Claimant's retirement. All three medical experts rely on audiograms from credible testing facilities, and the hearing loss in all exams was determined according to *AMA Guidelines.*

Therefore, I will average the results. Based on the foregoing, I conclude that the Claimant sustained a 22.59%[9] binaural hearing loss as a result of his work at Electric Boat.

V. COMPENSATION AND BENEFITS DUE

i. Compensation

Permanent partial disability resulting from the loss of a worker's hearing is governed by Section 8(c)(13)(B) of the Act which provides for compensation at 2/3 of the worker's average weekly wage for 200 weeks. 33 U.S.C. § 908(c)(13)(B). In a case such as this where the loss of hearing is partial, compensation is based on the proportionate hearing loss. 33 U.S.C. § 908(c)(19). That is, the percentage of a claimant's hearing loss must be applied to the number of weeks set forth in Section 8(c) to arrive at the proportionate number of weeks of compensation. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391-92 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon. en banc*, 782 F.2d 513 (5th Cir. 1986). The Claimant's hearing loss benefits shall commence on the date of his last exposure to injurious noise, which in this case is the date of retirement, January 31, 2011. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 905 n.3 (5th Cir. 1997); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993) (*citing Bath Iron Works Corp. v. Director, OWCP*, 113 S.Ct. 692 (1993)).

ii. Interest

Although not specifically authorized in the Act, the Benefits Review Board and the courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991); *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42, 47 (1989), *rev'd in part*, 907 F.2d 1552 (5th Cir. 1990), *aff'd en banc*, 927 F.2d 828 (5th Cir. 1991), *aff'd*, 505 U.S. 469 (1992); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 269 (1984), *on*

[9] The computation for binaural loss is: 11.88% + 18.4375% + 27.7% = 58.017%. 58.017% ÷ 3= 19.339% or 19.34%. The additional rating for tinnitus is also averaged: 2% + 5% + 2.75% =9.75%. 9.75% ÷ 3= 3.25%. Adding the two averaged values equals 22.59% (19.34% + 3.25% =22.59%).

recon., 17 BRBS 20, 23 (1985). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). Interest is mandatory and cannot be waived in a contested case. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). Interest is computed from the date each compensation payment becomes overdue. The first installment of compensation under the Act becomes due fourteen days after a claimant gives notice to the employer of an injury or the employer has knowledge of the injury. 33 U.S.C. § 914(b). Since compensation payments were not timely made, I find that the Claimant is entitled to an award of prejudgment interest. The interest shall be assessed as of the date the Claimant's compensation became due. *Wilkerson*, 125 F.3d at 907-08 (5th Cir. 1997). The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. § 1961, which is periodically changed to reflect the yield on United States Treasury Bills. *Grant*, 16 BRBS at 270. The compensation incorporates 28 U.S.C. § 1961 by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

iii. Medical Care

An employer found liable for the payment of compensation is additionally responsible pursuant to Section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. 33 U.S.C. § 907; *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94 (1989) (*citing Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 53 9 (1979)). Accordingly, EBC, as the responsible employer, shall remain liable for all reasonable and necessary medical care as required by the Claimant's for treatment of his work-related binaural hearing loss.

iv. Attorney's Fees

Having successfully established his right to compensation, Claimant is entitled to an award of attorney fees under Section 28 of the Act. 33 U.S.C. § 928; *American Stevedores v. Salzano*, 538 F. 2d 933, 937 (2d Cir. 1976).

VI. ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, the following order shall enter:

1. Pursuant to 33 U.S.C. § 908(c)(13), Electric Boat Corporation shall pay to Claimant compensation for a 22.59% binaural hearing loss pursuant to 33. U.S.C.§ 908(c)(13) based on a weekly compensation rate of $1,256.84;

2. Electric Boat Corporation shall pay to Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. § 1961, computed from the date each payment was originally due until paid;

3. Pursuant to 33 U.S.C. § 907, Electric Boat Corporation shall pay all reasonable and necessary medical care for treatment of Claimant's work-related hearing loss;

4. If Claimant's counsel seeks an award of attorney's fees and costs pursuant to 33 U.S.C. § 928, an application conforming to the requirements of 20 C.F.R. § 702.132(a) (2008) shall be filed within **30 days** of the date on which this order is filed in the office of the District Director. Should EBC object to any fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve any objections. Any agreement reached between the parties as a result of these discussions shall be filed in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, EBC's objections shall be filed not later than **30 days** following service of the fee application. **The objection must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues prior to the filing of the objection**; and

5. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts