

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 12 June 2012**

**CASE NO.: 2011-LHC-01837**

**OWCP NO.: 07-191802**

**IN THE MATTER OF**

**DENNIS H. RADFORD,  
Claimant**

**v.**

**ARCELORMITTAL LaPLACE, LLC  
f/k/a BAYOU STEEL, LLC  
Employer**

**and**

**ARCELORMITTAL USA, INC.  
Carrier**

**APPEARANCES:**

**BEN E. CLAYTON, ESQ.  
On behalf of Claimant**

**JOSEPH B. GUILBEAU, ESQ.  
On behalf of Employer/Carrier**

**BEFORE: CLEMENT J. KENNINGTON  
Administrative Law Judge**

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Dennis H. Radford (Claimant) against Arcelormittal LaPlace, LLC, (Employer) and Arcelormittal USA, Inc. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on April 2, 2012, in Covington, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions.<sup>1</sup> Claimant testified and introduced the following 8 exhibits which were admitted including Claimant's audiological records, Employer's answers to written discovery, Claimant's answers to written discovery, screenshots from Arcelormittal LaPlace, LLC website, satellite images of Arcelormittal LaPlace site facility, JAMA article: *Effects of Noise on Hearing*, Report of Dr. Jacques Peltier dated March 26, 2012, and the Report of Kathleen Bartels, Ph.D. dated March 27, 2012.

Employer introduced 20 exhibits which were admitted including various DOL forms (LS-202 and 207), Claimant's pay history, Employer's job description of position of Director of Engineering, Claimant's resume, Claimant's personnel file, Form LWC 77, noise level reports of Employer's facility from 2000, photographs of dock area of Employer's facility, Claimant's discovery responses, Claimant's deposition testimony (including deposition exhibits 1, 2A, and 2B), Claimant's audiograms, reports and audiogram testing by Michael Seidemann, Ph.D., affidavit of Carlos Hunter, Employer/Carrier's 908(f) claim, Director's approval of Employer/Carrier's 8(f) claim, and the CV of Michael Seidemann, Ph.D.

The parties also submitted joint stipulations.

The parties submitted post-hearing briefs on May 14, 2012. Accordingly, based upon the stipulations of the parties, the evidence introduced, my observation of the witness' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant suffered hearing loss on September 15, 2010 based on the date of the audiogram.
2. Claimant was employed by Employer from June 27, 2007 to January 30, 2009.
3. Employer was timely notified of the injury.
4. The claim was timely filed.
5. Notice of Controversion was timely filed.
6. Informal Conferences were held on June 16, 2011.
7. Claimant's Average Weekly Wage is \$2,346.38 yielding a maximum compensation rate of \$1,256.84.

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<sup>1</sup> References to the transcript and exhibits are as follows: Transcript: Tr. \_\_; Claimant's Exhibits: CX-\_\_; Employer/Carrier Exhibits: EX-\_\_; and Joint Exhibit: JX-\_\_.

8. Claimant's hearing loss is 49.7% with 25.9% pre-existing.
9. Employer has paid no disability benefits or medical benefits.
10. Claimant reached MMI on May 11, 2009.

## **II. ISSUES**

The following unresolved issues were presented by the parties:

1. Jurisdiction.
2. Entitlement to benefits.

## **III. STATEMENT OF THE CASE**

### **Claimant's Testimony**

Claimant, Dennis H. Radford, was born May 26, 1943 and graduated from the University of Michigan in 1968. (Tr. 8). Since that time, much of Claimant's work experience has involved mechanical engineering in the steel manufacturing and processing industry. He began as a mechanical trainee for National Steel in Encore, Michigan, later becoming a foreman and later, a supervisor. (Tr. 7-10). Claimant worked for National Steel for over 30 years. (Tr. 11). During that time, Claimant testified that he was continuously exposed to loud noises that originated from the steel rolling process, re-heat furnaces, fans, drains, shears, and hot saws. (Tr. 10-11).

On August 3, 1998, Claimant went to work for AK Steel in Ashland, Kentucky as a maintenance technology and services manager. (Tr. 11-12). At AK Steel Claimant was in charge of all the maintenance and planning in the central shops, railroad and the services for the integrated plant. (Tr. 12). During the two years that Claimant was employed with AK Steel he was exposed to loud noises from the turbans, boilers, and railroad operations. (Tr. 12).

From late 2000 until May 2003, Claimant did consulting work for National Steel and worked for CDI Engineering on projects for DOW Chemical. (Tr. 12-13). During this period, Claimant testified that his exposure to employment related loud noise was only occasional. (Tr. 13).

Claimant testified that his first audiogram was conducted sometime in 1998 while he was employed at National Steel. (Tr. 13). He was fitted for ear molds but did not get hearing aids until he was working at AK Steel. (Tr. 13). Claimant has paid for all of his hearing testing and hearing aids since that time. (Tr. 14).

In 2003, Claimant went to work for Republic Engineer Products in Buffalo, New York. His duties consisted of planning, inspecting, and supervising. In his role as engineering and maintenance manager, Claimant was responsible for the safety and environmental performance

of the facility. (Tr. 15). Claimant stated that the noise exposure was much louder than that which he had experienced on other jobs. He left Republic Engineer Products to accept the position of Director of Engineering at Bayou Steel in LaPlace, Louisiana in June 2007. (Tr. 15).

Claimant testified that he never saw a job description for his position but related that his duty was to plan, communicate, and develop improvement projects at the LaPlace facility as well as assist the maintenance department. (Tr. 17). Further, Claimant cannot recall ever receiving any written job description before or after he was hired by Employer. (Tr. 18). He recalled that most of his job duties were given to him verbally by Jerry Pitts, CEO and Alton Davis. (Tr. 18) Claimant could not recall whether there were discussions concerning what his role would be with respect to the dock at the LaPlace facility. (Tr. 18). Additionally, Claimant testified that he had support responsibilities at Bayou Steel facilities in Harriman, Tennessee, Mississippi River Recycling at the LaPlace location , and the Harvey, Louisiana location. (Tr. 19).

Claimant described the LaPlace facility as 400 acres adjacent to the Mississippi River. (Tr. 19). It included a dock for receiving and shipping from ocean-going vessels or river barges. (Tr. 19-20). The dock was separated from the rest of the rest of the facility by a “berm” or levee. (Tr. 20). The landward side of the facility was the main property, bounded by public roads and included office complexes, an outdoor scrap storage area, the Mississippi River Recycling facility, a slag processing area, and a mini-mill complex that housed the melt shop, caster, rolling mill, as well as shipping and handling. (Tr. 20).

Claimant testified that in his position with Employer he typically would spend 75% to 80% of his time in his office and he estimated that less than 5% of his time was spent on projects associated with the dock. (Tr. 21). The dock itself is T shaped with a roadway that runs from the top of the levee down to the mechanical structure that sits in the river which is approximately 200 yards long. (Tr. 21). Claimant stated that the dock was very narrow with a steel structure and concrete roadway. (Tr. 22). Sitting on top of the roadway are tracks that the Clyde crane, which is used for used for unloading vessels and barges, travels along. (Tr. 22-23). The crane will use either a grapple or magnet to unload docked vessels or barges. (Tr. 23). The dock also includes water intakes and a pump facility that draws in water from the river into the facility. (Tr. 22-23).

When asked whether he had any job duties with regard to the grapple Claimant replied that his activities were limited to giving instructions as to how to get better wear life out it when repaired. (Tr. 24). As it concerned any duties Claimant had regarding the Clyde crane, Claimant stated that he had no responsibilities except to observe maintenance, lubrication, and cable changes on the crane. (Tr. 24). Claimant testified that he did not alter anything on the crane, any involvement with the maintenance of the crane was supervisory; Claimant did not direct the actions of the younger engineers in conducting maintenance on the crane. (Tr. 25). Claimant mentored and advised the younger engineers when it came to issues of maintenance on the crane, specifically as it related to changing cables and lubricating. (Tr. 25-26).

Claimant was questioned regarding the structure of the dock. Claimant explained that huge wooden timbers were bolted to the sides in order to prevent damage to the structure from boats and barges bumping against it. (Tr. 26). When Claimant began working at the LaPlace

facility the timbers were so badly broken or missing that the steel structure was showing signs of mark up grinds. (Tr. 27). The dock also had badly damaged timbers bolted to the top surface as a safety measure in order to prevent trucks from backing off into the river. (Tr. 27). Claimant testified that Robert Crais, who was responsible for that facility, asked Claimant to submit some ideas on how to restore the dock. (Tr. 28). Claimant stated that he “came up with a couple of ideas and made some sketches and issues him some sketches in an email and [Crais] had a contractor implement that[.]” (Tr. 28).

Claimant was questioned about the handrails on the dock. Claimant testified that they were in disrepair and it was his opinion that they may violate OSHA regulations. (Tr. 28-29) When asked about his involvement with the handrails Claimant stated that he would make observations and communicate them to the department in charge of performing the work. (Tr. 29). Claimant reiterated the fact that he considered himself “a walk-around guy” in that he believed part of his duty was to continually observe and report things that appeared to be non-compliance issues. (Tr. 21, 30). Claimant was never told not to go to the dock and thinks that management was aware of those activities he was performing on the dock. (Tr. 30).

Claimant was shown a copy of Claimant’s Pre-Hearing Memorandum and directed to a section titled “Inaccuracies in the Affidavit of Carlos Hunter.” (Tr. 31). Claimant stated that he believed the 14 statements presented in that section to be accurate. (Tr. 32).

Claimant testified regarding his audiogram history reciting that his first was performed at Oakwood Hospital in 1998 before he retired from National Steel. (Tr. 34). Before he began his employment with AK Steel, Claimant had a pre-test. Later, while at AK Steel in 1999-2000, Claimant saw Dr. Tuma in Huntington, West Virginia from whom he bought in-ear hearing aids. (Tr. 34). Claimant had additional tests while employed at Republic but states that there was no requirement for pre-hearing testing nor did he ever receive hearing testing while employed with Employer. (Tr. 34-35). In late 2007 or early 2008, Claimant saw Dr. Peltier for a deviated septum at which time Claimant raised his hearing and ringing in his ears. (Tr. 35). Dr. Peltier referred Claimant to Dr. Bartels in April of 2008 for hearing tests. (Tr. 35). Dr. Bartels has tested Claimant approximately once a year since that time. (Tr. 35). At Employer’s request, Dr. Michael Seidemann conducted a hearing test in 2012. (Tr. 35).

Next Claimant testified about the types of loud noise exposure he experienced while working at Bayou Steel. Claimant identified the Electric Arc Furnace (EAF) located in the mill shop as being the greatest noise producer at the LaPlace facility. (Tr. 36). Claimant described the EAF’s functions and processes stating that it is like lightening when it melts the scrap metal. (Tr. 37). Claimant noted that that the melting process is very loud (estimates around 120 decibels) and that he wears hearing protection when in the melt shop. (Tr. 38). According to Claimant, he “spent a lot of [his] time in the melt shop” going into the facility “[a]t least once a day.” (Tr. 38-39).

Claimant stated that he typically did not go to the dock more than once a week and there were times when he wouldn’t visit the dock for two or three weeks. (Tr. 40). Claimant noted that there was some regularity to his dock visits either when he was specifically asked to look at something or as part of his “overall process” in checking the facility. (Tr. 40).

Aside from the EAF, Claimant stated that other loud noise producers in the mill facility landward of the levee included fans, crane sirens, combustion activities, and the ladle metallurgy facility (LMF). (Tr. 41-42). The only loud noises on the dock area were the dropping of scrap or the sound from heavy trucks driving down the road to the levee. (Tr. 42). Claimant testified that his personal life does not involve much noisy activity; he plays golf, cuts his grass, and does woodworking. (Tr. 42).

Claimant testified that maintenance to the Clyde crane's slewing bearing was part of his responsibilities stating that he observed the greasing of it. When asked to explain what he meant by observations at work Claimant acknowledged that these observations were to satisfy personal curiosity and some other purpose but that they were all work related as part of making things better at the LaPlace facility. (Tr. 44). Claimant stated that his engineering responsibilities covered the entire plant though the majority of it was landside. (Tr. 44-45).

On cross-examination, Claimant testified that, on average, he worked 9 hours a day or approximately 45 hours a week while employed at Bayou Steel. (Tr. 48). Claimant stated that he did not find the noise levels at the dock to be offensive and that he wore soft plug ear protection at all times, both in the plant and on the dock. (Tr. 49-50).

Claimant noted that during his examination by Dr. Bartels and Dr. Peltier he mentioned only industrial noise the cause of his hearing loss and never specifically mentioned the dock as a potential origin of loud noise. (Tr. 54). Claimant believes that his proximity and exposure to the EAF for forty minutes out of an hour on a regular basis added to his hearing loss despite wearing earplugs. (Tr. 54-55). Claimant further agreed that the noise level at the EAF was tremendously louder than anything he was exposed to on the dock. (Tr. 55).

Over the first several months of his employment with Bayou Steel, Claimant stated that he actively inspected various operations at the facility in order to learn about the maintenance procedures and advise on matters related to them. (Tr. 56). After the first three to six months on the job Claimant's duties shifted to become more project oriented. (Tr. 56). Claimant concedes that his position with Bayou Steel was considered white collar and that he did not perform any physical labor but instead observed and advised those people responsible for maintenance to the dock, railings, or timbers. (Tr. 56). Claimant is unsure whether such advice was followed as it concerned the replacement of timbers at the dock. (Tr. 58). Additionally, Claimant stated that another engineer, Anthony Nguyen, was in charge of overseeing the maintenance/greasing of the Clyde crane and Claimant did not actually supervise Nguyen concerning that project. (Tr. 59-60).

Claimant testified that he did not know of any association the LaPlace facility had with building or repairing vessels. (Tr. 61). Further, he admits that he had no duties associated with direct loading or unloading of barges or vessels while employed at Bayou Steel. (Tr. 61). It is Claimant's understanding that the overall function of the LaPlace facility is to convert scrap into marketable steel for general industrial use. (Tr. 62). Claimant stated that he would have no reason to be on the dock during a loading or unloading operation unless there was an observation that he needed to make. (Tr. 62-63). Claimant cannot recall ever being called out to the dock to observe a loading or unloading operation. Any reason for him to be on the dock during the

unloading of scrap would have been unrelated to that operation and would be because something else had drawn his interest there. (Tr. 63).

Claimant noted that the less-than five percent of his time spent associated with dock work included time spent in his office. (Tr. 64-65). He is unsure of the actual percentage of his time spent on the dock performing observations. (Tr. 65). With respect to the pumping system on the dock, Claimant testified that, while he would make occasional observations, it was the responsibility of Central Maintenance not the engineering department to oversee the pumps. (Tr. 65-66). Claimant stated that he drew up plans for increasing capacity and expanding the water treatment facility but he does not know whether those plans were implemented. (Tr. 67). He acknowledged that his supervisor, Carlos Hunter, would be able to answer that question. (Tr. 67).

Claimant stated that he had no involvement in the installation of safety railings on the dock. (Tr. 68). His connection was limited to making observations and bringing them to the attention of the rolling mill's department manager who was in charge of maintenance on the dock. (Tr. 68-69).

Claimant confirmed that there may have been times that he would visit the personal reasons. (Tr. 70). He admitted that the frequency of going to the dock for any and all reasons was somewhat less than once a week and typically lasted about a half hour. (Tr. 70). Claimant stated that it was not his role as director of engineering to investigate accidents on the dock. (Tr. 71). There was one instance where he made observations from a barge for approximately one hour the day following an accident. (Tr. 71-72). The loudest noise that Claimant was exposed to while out on the dock were the trucks loading and offloading; at all times Claimant wore hearing protection that he believed was adequate. (Tr. 73).

Claimant summated that the most he would have done would be observe and offer advice to those people who did the actual physical work connected with the repair and maintenance of the dock and machinery on the dock. (Tr. 78).

### **Testimony of Carlos Hunter**

Carlos Hunter is the current director of engineering for Arcelomittal, Inc. and was the vice-president of engineering and technical services when Claimant was employed for, what was then, Bayou Steel. (Tr. 83). Mr. Hunter was Claimant's direct supervisor and assumed Claimant's job title and responsibilities when Claimant was terminated as part of a workforce reduction. Mr. Hunter has 29 years of experience in the steel industry; he was employed by the former Bayou Steel facility in LaPlace from April 15, 2007 until June 1, 2011. (Tr. 84-85).

Mr. Hunter testified that he is 100% familiar with Claimant's job duties and although he did not keep track of the time minute-by-minute, he knew of Claimant's general whereabouts. As Claimant's supervisor, Mr. Hunter was in charge of assigning Claimant work. (Tr. 85).

Mr. Hunter discussed Claimant's experience and Bayou Steel's need to improve its maintenance systems. He noted that he was especially impressed by Claimant's maintenance background and while Bayou Steel had good mechanics, it lacked the system support. (Tr. 86).

Mr. Hunter stated that Claimant spent the first three or four months of his employment meeting with maintenance managers, as well as observing and researching the facilities maintenance systems. (Tr. 87). Within the first six months, Claimant prepared a report containing suggestions on how to improve Bayou Steel's maintenance systems. Mr. Hunter noted that due to the limited resources available in implementing the proposed changes, he is certain that Claimant was asked to be involved with specific assignments, especially in mentoring the engineering team and providing input concerning some of Bayou Steel's capital expenditures and investments. (Tr. 87-88). Mr. Hunter testified that Claimant was asked for his opinion on specific projects but contends that Bayou Steel did not have the resources to address issues that might be observed on a general "walk around" of the facility. (Tr. 88-89).

Mr. Hunter addressed specific projects in the dock area that might require Claimant's presence. Specifically, Mr. Hunter explained that Claimant's responsibilities as they related to the sidewall timbers were to mentor and train a new engineer, Anthony Nguyen, on how to assess and complete the paperwork on a project. (Tr. 90). The suppliers installed the wood for that project. (Tr. 90). Robert Crais asked how to install removable timbers on the edge of the dock in order to protect the concrete. (Tr. 91). Mr. Hunter testified that the handrails were a concern and they were cautious in installing them due to the fact that an open front was required to receive ships and the rails would be damaged when materials were moved on top of them. (Tr. 90-91). Mr. Hunter recalls being just as involved in the railing project as Claimant. (Tr. 92). Mr. Hunter stated that he would usually be on the dock anywhere from 15 to 20 minutes at a time for project. (Tr. 93). According to Mr. Hunter, there would be no reason for him to return to the dock during construction for one of these projects and only after, to see the finished product. (Tr. 93-94).

Mr. Hunter explained that Anthony Nguyen was put in charge of the greasing issues with the Clyde crane. (Tr. 94). Mr. Nguyen was also involved in maintenance to the Clyde crane after a burnt lifting ring which included some observations by Claimant. The engineering department had no other part in that project. (Tr. 95).

Much of what occurred on the dock was outside of the engineering department's involvement. (Tr. 96). Mr. Hunter testified that Claimant's direct involvement with any project on the dock was limited to mentoring less experienced engineers and offering his opinion, many of his specific assignments were in the melt shop. (Tr. 97-99).

Mr. Hunter disputes Claimant's testimony that part of his job duties was to regularly inspect the pumps. That responsibility lay with the water treatment department. (Tr. 99). Mr. Hunter also questions Claimant's assertion that he spent 5% of his time on the dock. Giving Claimant the benefit of the doubt, Mr. Hunter testified that assigning 1% of his time to work on the dock is doubtful. (Tr. 100-101). Mr. Hunter stated that other than a specific request by someone that's somewhat random and coincidental, nothing would require Claimant to go to the dock. (Tr. 101). Additionally, by December 2007, there would have been no reason to have

Claimant go to the dock area to fulfill his job duties on a regular basis because every aspect of dock operations was under the control and responsibility of other departments. (Tr. 101-102).

In March 2009, after Claimant's employment was terminated, Mr. Hunter assumed the duties of director of engineering and the central maintenance department came under the jurisdiction of the engineering department. (Tr. 103). Mr. Hunter testified that in 2009 and 2010, after assuming the duties of director of engineering, he visited the dock area 5 to 7 times a year on average for no more than a half hour. (Tr. 104-105). Mr. Hunter was surprised to hear through Claimant's testimony the amount of time that he spent at the dock area. According to Mr. Hunter, that time should have been minimal. (Tr. 107).

Mr. Hunter stated that any long term capital project involving dock expansion or improvements was only conceptual. (Tr. 108). He went on to affirm that all maintenance activities that involved the Clyde crane were the responsibility of the maintenance department. (Tr. 110). Mr. Hunter emphasized that Anthony Nguyen was the engineer most involved with any given projects in the dock area. (Tr. 113-114).

On cross examination, Mr. Hunter responded that Claimant may have gotten assignments from other people. (Tr. 118). Mr. Hunter testified that barges were cut up and broken down for scrap at the LaPlace facility but that those operations were carried out by a separate company, MMR, and Claimant had no responsibilities associated with that site or operation. (Tr. 119-121, 133). Mr. Hunter explained that Bayou Steel did not have a dock engineer because that role was not needed; if Claimant was assuming such a role, it was on his own initiative and not at the direction of a supervisor or in relation to his normal duties. (Tr. 124-125).

### **Testimony of Michael Seidemann, Ph.D.**

Dr. Michael Seidemann is a forensic audiologist with 20 years of experience in the field of forensic and industrial audiology. (Tr. 136). Dr. Seidemann was tendered without objection to the court as an expert in the specialty of forensic and industrial audiology. (Tr. 138-139). When called upon to offer his opinion in litigation concerning possible employment-related hearing loss, Dr. Seidemann stated that his protocol and procedures do not change based on which party retains him. (Tr. 139).

Dr. Seidemann testified that he is familiar with decibel levels at facilities similar to that of Bayou Steel and in the general office setting. (Tr. 146-147). He stated that office noise levels can range from 40 to 60 decibels and that, according to Bayou Steel's sound assessment from 2000 (EX-8), truck noise along River Road was measured at 85 decibels. (Tr. 147). Dr. Seidemann opined that, based upon his prior experiences, noise produced by the offloading of scrap from a barge to a truck would not be present at injurious levels for someone not standing next to the truck or on the barge. (Tr. 147-148). According to Dr. Seidemann, it is "very significant" Claimant testified he always wore hearing protection in the dock area because someone standing 100 to 200 feet from the offloading operations would likely be exposed to noise levels in the mid-70 dB range; these levels would further be reduced by approximately 30 dBs with the use of compressible disposable ear plugs. (Tr. 149-150).

As it relates to this case, Dr. Seidemann reviewed the six hearing tests of Claimant, the sound assessment at Bayou Steel from 2000, the written reports of Dr. Peltier, the written report of Dr. Bartels, and Claimant's deposition testimony. (Tr. 152). Dr. Seidemann summarized the results of Claimant's various hearing tests and percentages of impairment according to the AMA equation.

- June 29, 1998 – 25.9%
- May 25, 1999 – 23.5%
- June 23, 2000 – 30%
- January 18, 2008 – 51.6%<sup>2</sup>
- May 11, 2009 – 50.6%
- February 13, 2012 – 67.5% (Dr. Seidemann's testing)
- March 26, 2012 – 51.6%

(Tr. 152). Dr. Seidemann observed that the difference between the 1998 test of 25.9% and the 1999 test of 23.3% was negligible and insignificant and within the test/retest variability. (Tr. 153). Reviewing Dr. Peltier's report, Claimant's poor test results during Dr. Seidemann's testing on February 13, 2012 was likely the result of an acute upper respiratory infection. Dr. Seidemann stated that this explanation of the inconsistency is supported by the audiograms conducted prior to and following the testing performed on February 13, 2012 since the results from May 2009 and March 2012 are practically the same. (Tr. 154-155).

Dr. Seidemann testified with regards to the significance of these results. First, that it is "well accepted scientific fact that noise induced hearing loss ceases to progress once an individual is removed from the causative noise source. ... [T]here's no latency period to noise induced hearing loss." (Tr. 156). Accordingly, Dr. Seidemann stated that occupational or recreational noise was not a factor in Claimant's hearing loss between January 18, 2008 and March 26, 2012 because there is no change in his hearing. (Tr. 156).

Dr. Seidemann opined that it is highly improbable that there was a change in Claimant's hearing from June 27, 2007 until the date of the first audiogram while employed at Bayou Steel on January 18, 2008 because there was no change from January 18, 2008 until the date of his termination on January 30, 2009. (Tr. 156-157). In there was no change in Claimant's hearing during the 18 months of employment, then his hearing loss was not either caused or exacerbated by that employment according to Dr. Seidemann. (Tr. 157).

Due to the dramatic difference between his test results in February 2012 and those from 2008 and 2009, Dr. Seidemann suggested in his report that Claimant see another specialist to investigate a cause of hearing loss other than noise to which he was exposed at work. (Tr. 157). Dr. Seidemann testified that knowing now that the results of his test were an aberration caused by Claimant acute respiratory ailment; he would not have made the same recommendation to consult another specialist since no loss of hearing actually occurred. (Tr. 157-158).

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<sup>2</sup> The audiogram test conducted on January 18, 2008 was wrongfully identified by Dr. Seidemann to have taken place on May 18, 2008, this was later corrected at Tr. 155 and EX-15.

Dr. Seidemann stated that injurious noise level is a combination of factors that include both intensity and duration of exposure. 90 decibels for eight hours a day is a threshold of damage and that exposure below that intensity, 85 decibels for 8 to 12 hours a day, is not sufficient to rise to the level of being potentially hazardous. (Tr. 160). In order to have the same threshold of damage at 85 decibels, exposure would need to be for approximately 16 hours. Dr. Seidemann further explained that threshold level of damage requires these types of exposure over many years. (Tr. 160). It was Dr. Seidemann's opinion that if Claimant was wearing hearing protection as claimed, the intensities and durations to noise exposure at the dock would not have even approached being sufficient to cause noise damage. (Tr. 161). The configuration of Claimant's audiogram is not one that is well recognized as typical of noise damage. Additionally, the severity of his hearing loss is not consistent with damage from noise and the progression of his hearing loss over time is not consistent with causation during that time. (Tr. 161-162).

Dr. Seidemann testified concerning his opinion of the reports submitted by Drs. Peltier and Bartels. Dr. Peltier's report did not particularly mention Bayou Steel or hearing loss at Bayou Steel. (Tr. 162). Dr. Seidemann expressed concern over Dr. Peltier's assumption "that the majority of the damage that has occurred was the result of noise induced hearing loss." (Tr. 163; CX-G, p. 1). Particularly, that it appears that Dr. Peltier's determination is based on Claimant's subjective patient reports and not on actual supporting data; it is unknown whether Dr. Peltier had knowledge of Claimant's use of hearing protection for instance. (Tr. 163). Dr. Peltier's statements regarding the significant deterioration of Claimant's hearing are based solely on the audiograms performed from 1998 to 2008. (Tr. 164).

Dr. Bartels' report also draws conclusions from subjective reports and lacks supporting data when stating that Claimant has an extensive history of occupational noise exposure. (Tr. 165). Dr. Seidemann noted that neither Dr. Peltier nor Dr. Bartels distinguished between noise levels at the dock versus noise levels anywhere else at the Bayou Steel facility. (Tr. 165). Dr. Seidemann conceded that a steel making facility is not a quiet place but that it is necessary to connect the dots between causation and result with actual data. (Tr. 165).

Dr. Seidemann agreed with the literature attached as CX-F stating that there is no significant disagreement among experts in the field that noise-induced hearing loss, in contrast to acoustic trauma, develops slowly over the years and is caused by an exposure regularly exceeding a daily average of 90 dB. (Tr. 165-166).

On cross-examination and redirect, Dr. Seidemann explained that, although Claimant is not currently a shooter, shooting firearms without the benefit of hearing protection can cause permanent hearing loss that will never go away. (Tr. 168-176). He distinguished between the sounds a shooter experiences from various-caliber rounds as opposed to the energy intensity of those rounds and the affect on hearing. (Tr. 172). When asked by the Court whether Claimant could have sustained hearing loss at the dock Dr. Seidemann stated that the noise levels would have had to be a lot higher than what was reported given the fact that Claimant testified that he used hearing protection. (Tr. 177-178). In order for Claimant to be exposed to damaging noise under these circumstances noise levels would need to be in the range of 120 dB which Dr. Seidemann noted would be unheard of in that type of environment. (Tr. 178). Further, based on

the sound assessment conducted at Bayou Steel in 2000, Dr. Seidemann testified that nowhere in the facility registered higher than 101 or 102 dB and, with hearing protection, the intensity would not be sufficient to cause damage regardless of the duration. (Tr. 179).

## **Claimant's Medical Reports**

### **A. Report of Dr. Jacques Peltier**

Claimant presented to Dr. Jacques Peltier with a long history of sensorineural hearing loss. Dr. Peltier noted that Claimant admitted to occupational exposure working in multiple industrial aptitudes with daily noise exposure for many years. (CX-G). After reviewing Claimant's prior audiologic test results, Dr. Peltier concluded that:

[I]t seems not only reasonable but probable that noise induced hearing loss is the most likely etiologic factor. ... [T]he fact stands up the patient was exposed to extremely large volumes of noise during the time period when his hearing rapidly deteriorated. As such it would be logical to assume the majority of the damage that has occurred was the result of noise induced hearing loss.

(CX-G). Dr. Peltier's report does not include any information related to him by Claimant with regard to any specific sources of injurious noise.

### **B. Letter of Kathleen Bartels, Ph.D.**

Kathleen Bartels, Ph.D. noted that Claimant "has experienced an extensive history of occupational noise exposure throughout the majority of his professional career and audiometric configuration meets all criteria for said noise induced hearing loss." (CX-H). It is Dr. Bartels' opinion that Claimant's hearing loss is noise induced in nature and that no current or prior medical conditions of Claimant could possibly contribute to the etiology of the hearing loss. (CX-H). Dr. Bartels did not include any specifics concerning the sources of injurious noise associated with Claimant's hearing loss.

## **IV. DISCUSSION**

It has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88, 98 L. Ed. 5 (1953). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of the rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

### **Contention of the Parties**

Claimant's legal arguments are primarily presented in his Pre-Hearing Memorandum. Claimant contends that processed steel was sometimes prepared for shipping via barge or ship in

the plant on the landward side of the Mississippi River levee and is the functional equivalent of a wharf or dock causing Claimant's injuries to have occurred in an "other adjoining area." Further, Claimant asserts that since the 1972 Amendments to the Act, the Fifth Circuit has recognized an emphasis on status over situs to avoid the anomaly of a worker walking in and out of coverage.

Claimant argues that he also meets the requirements for status under the Act by noting that "harbor workers" include those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities. Claimant's duties with regard to the dock and its appurtenances qualify as maritime employment within the contemplation of the Act.

Employer argues that the Section 20(a) presumption cannot be used to establish jurisdiction and that no injury occurred to Claimant in a maritime situs. Employer contends that just because Bayou Steel is a mixed use facility – separate areas for loading/unloading and non-maritime manufacturing – does not mean that the whole facility or, specifically, that the manufacturing portion is a covered situs. The fact that an employee may have maritime duties at the covered site will not bring the case within the Act's coverage if the injury occurred on the non-covered manufacturing facility.

Employer asserts that the weight of the evidence favors a finding that Claimant's hearing loss was not caused nor contributed to by his employment at Bayou Steel. Alternatively, if Claimant was exposed to injurious noise levels it was in the non-maritime section of the facility and is therefore not covered under the Act.

Employer maintains that Claimant does not have status under the Act in that he had no regularly assigned duties that could be considered maritime in nature. By Claimant's own admission, Employer notes that he spent a minimal amount of time on the dock and for none of that time was Claimant involved, at least in some part, in "indisputably longshoring operations" in order to have status.

## **Jurisdiction and Coverage under The Longshore and Harbor Workers' Compensation Act**

### **A. Situs**

The threshold issue in this case is whether there is jurisdiction under the Act in order for Claimant to be covered by its provisions. To be covered under the Act, a claimant must meet both the *status* requirement of Sections 2(3) and the *situs* requirement of Section 3(a). 33 U.S.C. §§ 902(3), 903(a). Section 3(a) states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Melerine v. Hunter Constr. Co.*, 26 BRBS 197 (1992). To be considered a covered situs, a site must have a maritime nexus, but need not be used exclusively or primarily for maritime purpose. See *Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980)(*en banc*), *cert. denied*. 452 U.S. 905 (1981); *Melerine*, 26 BRBS at 197; *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, and that court has adopted a broad view of the situs test, refusing to restrict it by fence lines or other boundaries. Specifically, the court stated that the perimeter of an “area” is to be defined by function and that the character of the surrounding properties is but one factor to be considered. An area can be considered “adjoining area” within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d at 514-16, 12 BRBS at 726-29; see also *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Thus, the geography and the function of an adjoining area are of utmost importance. *Stroup*, 32 BRBS at 154.

In *Winchester*, the Fifth Circuit held that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in the loading process. *Winchester*, 632 F.2d at 514-16, 12 BRBS at 726-729. It can be argued that a remote nexus to the waterfront can be articulated because some steel scrap is unloaded at the dock and taken to the mill while finished steel may be brought from the mill for loading on barges and other vessels.<sup>3</sup> However, the fact that some scrap is received at the dock and transported to the mill is not dispositive; a critical factor in defining an area is its functional relationship to maritime activity. Claimant argues that the facility landward of the levee which includes the mill facility is an “adjoining area” or that at least some of Claimant’s hearing loss occurred at the dock area which is clearly a covered situs. The main facility at Bayou Steel and in particular, the rolling mill and melt shop, are geographically separated by a public road and levee. (EX-12, 13, 14). Additionally, these areas where Claimant testified he was exposed to the most noise are functionally distinct from the dock area. The purpose of the landward areas of the facility is the processing of scrap and manufacturing of steel which does not have a sufficient nexus to maritime activity. Accordingly, the landward facility is not an “adjoining area” within the meaning of the Act and is therefore not a covered situs.

Claimant argues that situs can be met since he sustained at least some of his hearing loss from exposure to noise in the dock area. Based on the testimony and reports submitted, there is substantial evidence to show that Claimant was not exposed to injurious noise levels at the dock. Claimant testified that he always wore hearing protection in the form of compressible disposable ear plugs and that noise levels at the dock were not offensive. Similarly, Dr. Seidemann testified that damage due to injurious noise levels would require that Claimant be exposed to 90 dB for eight hours a day and based on the sound assessment conducted at Bayou Steel in 2000, the highest recorded levels anywhere near the dock were 85 dB from passing trucks on River Road. Dr. Seidemann’s opined that hearing loss could not be sustained from exposure to the levels of

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<sup>3</sup> Claimant could not accurately or generally testify as to the amount of scrap received from the vessels at the dock. (Tr. 81-82). Mr. Hunter believed that 15-20% of all scrap received at the LaPlace facility was brought in by barge. (Tr. 97).

noise present at the dock when Claimant was using hearing protection of approximately 30 dB and when exposed to the dock noise for the 30 minutes once a week as described by Claimant. Further, neither Dr. Peltier nor Dr. Bartels opined that Claimant's hearing loss was due to noise exposure at the dock or even by exposure in any other area of the Bayou Steel facility. It is therefore not supported by the evidence that Claimant's hearing loss was sustained by noise exposure at the dock.

## **B. Status**

The Act confers maritime status on "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3) (2006). An employee may qualify for maritime status based on either (1) the nature of the activity in which he is engaged as the time of the injury or (2) the nature of his employment as a whole. *Coastal Prod. Services Inc. v. Hudson*, 555 F.3d 426, 439 (5th Cir. 2009). Occupations in addition to those enumerated in the statute will be covered as maritime employment if the occupation entails activities that are an integral or essential part of the loading, unloading, building, or repairing of a vessel. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 47, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989). Additionally, the employee's maritime activities must be more than episodic, momentary, or incidental to his non-maritime work. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980). "[P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 267, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Likewise, the intent of Congress was to cover those persons whose employment is such that they spend at least some of their time in indisputably longshoring operations. *Id.* at 273, 97 S.Ct. at 2362.

As Claimant was not employed in any of the occupations enumerated in the statute, his work must have been integral or essential to the loading, unloading, building, or repairing of a vessel to be covered under the LHWCA. Claimant cites *Boudloche* and *Caputo* in support of his claim that he meets the status requirement even though Claimant admits to spending less than five percent of his time in arguably maritime employment. These cases are distinguishable from the case *sub judice* in that the claimants in *Boudloche* and *Caputo* were involved directly and indisputably in traditional stevedoring and longshoring activities albeit in limited amounts but as part of their regularly assigned job duties. Claimant here argues that his work associated with the dock was unquestionably maritime. Claimant testified that he never performed any physical work in connection with the repair and maintenance of the dock or machinery and that his role was limited to observing, mentoring, and advising on various projects. These types of activities are not "an integral or essential part of the loading, unloading, building, or repairing of a vessel" nor are they "indisputably longshoring operations." Claimant's connection to activities covered under the Act is not only indirect but so far removed from what can be considered to be maritime employment in order to have status under the Act.

## **Conclusion**

In light of the foregoing, I find that the Act's jurisdictional requirements of situs and status have not been satisfied. Therefore, the remaining issues are rendered moot and any ruling thereon is unwarranted.

## **V. ORDER**

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

Claimant's claim for benefits under the Act is hereby **DENIED**.

**ORDERED** this 12<sup>th</sup> day of June, 2012, at Covington, Louisiana.

**A**

**CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**