No. 14-71512

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES E. FENSKE,

Petitioner

v.

SERVICE EMPLOYEES INTERNATIONAL, INC. and HOMEPORT INSURANCE COMPANY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal arises from a claim filed by James Fenske (Fenske or Claimant), against his former employer Service Employees International, Inc. (Employer or SEII), for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or Act), as extended by the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq*. The

Administrative Law Judge (ALJ) had jurisdiction to hear the claim under 33 U.S.C. §§ 919(c), (d), and issued three separate orders. His final order, denying Claimant's motion for reconsideration, was dated August 28, 2013, ER 23,[1] and became effective on August 29, 2013, when it was filed in the office of the district director.[2] 33 U.S.C. § 921(a).

Fenske filed a notice of appeal with the Benefits Review Board (Board) on August 31, 2013, within the thirty-day period provided by 33 U.S.C. § 921(a), thereby invoking the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On March 31, 2014, the Board issued a final Decision and Order, affirming the ALJ's decision in all aspects relevant to this appeal.

Fenske was aggrieved by the Board's decision, and filed a petition for review with this Court on May 29, 2014, within the sixty days allowed under 33 U.S.C. § 921(c). Board DBA decisions are judicially reviewed by the United States Court of Appeals for the circuit in which the office of the district director who filed and served the compensation order is located. 42 U.S.C. § 1653(b); *Pearce v. Director, OWCP*, 603 F.2d 763, 770 (9th Cir. 1979). Here, the district director's office is located in San Francisco, within

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[1] References to Claimant's Excerpts of Record are cited as "ER."

[2] The official identified in the statutes as the "deputy commissioner" is now called the "district director." 20 C.F.R. § 701.301(a)(7).

this Court's territorial jurisdiction. Consequently, under 33 U.S.C. § 921(c) and 42 U.S.C. § 1653(b), this Court has jurisdiction over this appeal.

STATEMENT OF THE ISSUE

Fenske's hearing loss occurred on his last day of work in Iraq, the same day he sustained a serious back injury when his truck was rammed during an attack on his convoy. His back injury resulted in a total loss of wage-earning capacity, and Fenske obtained an award for permanent total disability.

Did the ALJ and Board correctly find that Fenske is not entitled to receive a second, concurrent compensation award for hearing loss when the permanent total disability award fully compensated him for the entirety of his lost wage-earning capacity?

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The Act defines "disability," in pertinent part, as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10).

The Act compensates four types of disability: permanent total disability; temporary total disability; permanent partial disability; and temporary partial disability. 33 U.S.C. § 908(a), (b), (c), (e); *Potomac Elec.*

Power Co. v. Director, OWCP [*PEPCO*], 449 U.S. 268, 273-74 (1980). "This statutory structure indicates two independent areas of analysis – *nature* (or duration) of disability and *degree* of disability. Temporary and permanent go to the nature of the disability. Total and partial go to the degree of the disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990) (emphasis in original).

A claimant is totally disabled when the work-related injury "renders him or her unable to return to prior employment, and [ ] the employer subsequently fails to establish the availability of suitable alternative employment. . . ." *Haw. Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 652 (9th Cir. 2010) (internal quotations omitted). A totally disabled employee is entitled to weekly compensation amounting to two-thirds of his pre-injury average weekly wage for as long as he remains totally disabled. 33 U.S.C. § 908(a), (b); *Roberts v. Sea-Land Serv., Inc*., 132 S.Ct. 1350, 1354 (2012). The compensation payable for temporary total disability remains fixed at that two-thirds figure, while weekly compensation for permanent total disability is annually adjusted to reflect the national average weekly wage. 33 U.S.C. § 910(f); *see Bowen v. Director, OWCP*, 912 F.2d 348, 350-51 (9th Cir. 1990).

The Longshore Act recognizes two types of permanent partial disability. One, like total disability, is based on the employee's actual loss of wage-earning capacity, and is compensated at two-thirds of the difference between the employee's average weekly wage at the time of injury and his post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21). The other, commonly referred to as scheduled compensation, covers the loss of hearing, vision, and other specified body parts, and pays a fixed number of weeks of compensation at two-thirds of the employee's average weekly wage. 33 U.S.C § 908(c)(1)-(17), (20). *Roberts*, 132 S.Ct. at 1361 n.9.[3] These scheduled amounts compensate for a presumed (not actual) loss of wage–earning capacity. *Barker v. U.S. Dep't of Labor*, 138 F.3d 431, 435 (1st Cir. 1998), citing *Rupert*, 239 F.2d at 275-76 (9th Cir. 1956); *Korineck v. Gen. Dynamics Corp. Elec. Boat Div.*, 835 F.2d 42, 43-44 (2d Cir. 1987).

As relevant here, a claimant suffering total binaural hearing loss (the total loss of hearing in both ears) is entitled to two hundred weeks of compensation at two-thirds of his average weekly wage. 33 U.S.C. § 908(c)(13)(B). For partial binaural hearing loss, the number of weeks is

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[3] Compensation for disfigurement of the face, head, neck, addressed in 33 U.S.C. § 908(c)(20), is also scheduled compensation, *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273, 275-76 (9th Cir. 1956), but is paid in a single lump sum up to $7,500.

multiplied by the percentage of loss. 33 U.S.C. § 908(c)(19); *PEPCO*, 449 U.S. 268, 271 n. 4. Thus, for instance, a 50% hearing loss would result in 100 weeks of compensation (200 x 50% = 100).

II. STATEMENT OF FACTS

Fenske worked for the Employer as a truck driver in Iraq for fourteen months. On October 9, 2005, his convoy was attacked, and his truck rammed head-on. The impact seriously injured Fenske's back. ER 4.

Fenske first learned of his hearing loss when he had his hearing checked on June 4, 2009, nearly four years after his back injury. The parties stipulated that his binaural hearing loss was 9.7%. ER 2.

III. DECISIONS BELOW

The ALJ determined that Fenske had been totally disabled since October 9, 2005, the date of the suicide bomber attack that seriously injured his back. He accordingly awarded Fenske compensation for temporary total disability from October 9, 2005 to July 27, 2008 (the date of maximum medical improvement); and for permanent total disability from July 28, 2008 forward. The parties stipulated that Fenske's average weekly wage at the time of injury was $1,850. ER 2. Because two-thirds of that wage ($1,233.95) exceeded the applicable statutory maximum compensation rate ($1,073.64), the ALJ found that he was limited to the maximum rate during

his temporary total disability. ER 15-16, 20; *see* 33 U.S.C. § 906(b), (c). Upon reaching maximum medical improvement, and thus permanency, Fenske became entitled to compensation for permanent total disability. 33 U.S.C. § 908(a). That status entitled him to annual adjustments (increases) in compensation, *see* 33 U.S.C. § 910(f), and also meant that he was "currently receiving compensation for permanent total disability" under 33 U.S.C. § 906(c).[4]

The ALJ also found that Fenske was regularly exposed to injurious noise while in Iraq from a variety of sources, including gunfire and bomb and rocket explosions, trucks and heavy equipment, and jets and helicopters. ER 18. The ALJ determined that Fenske's 9.7% binaural hearing loss was

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[4] Fenske received the following compensation for his back injury: (1) for temporary total disability, $1,073.64 per week from October 9, 2005 to July 27, 2008, Op. Br. 7; and (2) for permanent total disability, $1,160.36 per week from July 28, 2008 to September 30, 2008; $1,200.62 per week from October 1, 2008 to September 30, 2009; $1,224.66 per week from October 1, 2009 to September 30, 2010; $1,256.84 from October 1, 2010 to September 30, 2011; $1,295 per week from October 1, 2011 to September 30, 2012; $1,325 per week from October 1, 2012 to September 30, 2013; $1,346 per week from October 1, 2013 to September 30, 2014. ER 29-30. For fiscal year 2015, he will receive $1,377 per week. *See* http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (reporting annual maximum compensation rates); *see also* 33 U.S.C. § 906(b)(3) (requiring increases in the maximum compensation rate to go into effect October 1 of each year).

permanent and work-related, and the ALJ awarded medical benefits for the loss.[5] But the ALJ refused to award compensation for it. He explained that because Fenske was already receiving total disability compensation for his back injury, a second award for hearing loss would impermissibly overcompensate him – Fenske would end up receiving compensation at a rate higher than the Act allows for total disability. ER 19.

On appeal, the Board affirmed the ALJ's denial of compensation for the hearing loss. ER 29. It explained that "a claimant is not entitled to receive scheduled permanent partial disability benefits for one injury concurrently with total disability benefits for a separate injury." ER 29.

SUMMARY OF ARGUMENT

Fenske's hearing loss and back injury occurred contemporaneously on his last day of work in Iraq, when he was both attacked by a suicide bomber and last exposed to injurious noise. On that day, Fenske's back injury caused him to lose his entire wage-earning capacity, and as a result, Fenske is currently receiving permanent total disability compensation for his back

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[5] Fenske's 9.7% binaural hearing loss, if found compensable, would amount to 19.4 weeks of compensation (200 weeks x 9.7%). 33 U.S.C. § 908(c)(19).

injury. Because Fenske is being compensated for the entirety of his lost wage-earning capacity, any presumed lost wage earning capacity from his hearing loss (which Fenske first learned of four years after the suicide bomber attack) has already been accounted for, or subsumed within, the permanent total disability award. An additional scheduled award for hearing loss would thus constitute an impermissible double recovery. The Board and ALJ correctly refused to award Fenske scheduled permanent partial disability compensation for his hearing loss while he receives permanent total disability compensation for his back injury.

Fenske clearly would be overcompensated if he received both awards. During the period of overlapping compensation, not only would he receive more compensation than permitted for permanent total disability alone, but he also would receive $300 more per week *in compensation* than he was earning in wages at the time of his injuries. The Act does not mandate this incongruous windfall, and the Court should not endorse it.

STANDARD OF REVIEW

This appeal raises a question of law. The Court reviews legal questions *de novo*, but affords respect to the Director's position under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *U.S. v. Mead Corp.*, 533 U.S. 218 (2001). *Price v. Stevedoring Serv. of Am.*, 697 F.3d 820, 824-33

(9th Cir. 2012) (en banc). The Board's interpretations are not entitled to any special deference. *Id*.

ARGUMENT

I. THE ALJ AND BOARD CORRECTLY DENIED FENSKE PARTIAL DISABILITY COMPENSATION FOR HEARING LOSS WHEN HE WAS ALREADY RECEIVING TOTAL DISABILITY COMPENSATION FOR HIS BACK INJURY.

A. Because the date of injury for hearing loss is the date of last exposure to injurious noise, Fenske's hearing loss and back injury occurred contemporaneously.

Underlying Fenske's argument that he is entitled to concurrent compensation for both his back injury and hearing loss is the assertion that his hearing loss predated his back injury. But this premise is incorrect. The two injuries were contemporaneous.

In *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 165 (1993), the Supreme Court ruled that the effective date of injury for hearing loss is the date of last exposure to injurious noise. The Court reached that conclusion in determining the proper method for calculating hearing loss compensation in a claim brought by a retiree (who learned of his hearing loss post-retirement). It acknowledged that there were two possible methods. The first method used the schedule of permanent partial disabilities under Section 908(c)(1)-(20), which includes hearing loss (subsection (c)(13)); whereas the second utilized the system applicable "to

retirees who suffer from occupational diseases that do not become disabling until after retirement," namely under Sections 910(d), (i) and 908(c)(23).

In deciding that the Section 908(c) schedule governs, the Court explained that "[t]he injury, loss of hearing, occurs simultaneously with exposure to excessive noise." *Id*. at 699. "Moreover," the Court added, "the injury is complete when the exposure ceases." *Id*. It therefore held that "*the date of last exposure* – the date upon which the injury is complete—is the relevant time of injury" for calculating compensation benefits. *Id*. at 699-700 (emphasis added).[6]

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[6] Fenske entirely ignores this holding, instead relying on an unrelated *Bath Iron Works* passage contrasting occupational hearing loss with long-latency occupational diseases such as asbestosis. Op. Br. 23-24. Explaining the difference, the Court observed that a worker exposed to excessive noise suffers immediate injury and disability, "whereas a worker who has been exposed to harmful levels of asbestos suffers no injury until the disease manifests itself years later." 506 U.S. at 164. The Court thus concluded that hearing loss is not compensable under Section 910(i), which requires that the "occupational disease . . . not immediately result in death or disability." *Id.* Nowhere in this discussion does the Court intimate that it was establishing the relevant time period for, or date of onset of, hearing loss disability. Its purpose was merely to differentiate occupational hearing loss from long latency, occupational disease.

As a statutory (and common sense) matter, disability simply cannot precede the actual date of injury. *See* 33 U.S.C. § 902(10) (defining "disability" as employee's "incapacity *because of injury* to earn the wages which the employee was receiving *at the time of injury*") (emphasis added).

Relying on *Bath Iron Works*, this Court has likewise utilized the date of last exposure to injurious noise to establish the date of injury for hearing loss. And the Court has used this date not only to calculate compensation but also to identify the liable employer. *Ramey v. Stevedoring Serv. of Am.*, 134 F.3d 954, 961-62 (9th Cir. 1998) (endorsing "Board rule that for occupational hearing loss claims, the date of last exposure prior to the determinative audiogram should be used for purposes of calculating benefits"); *id*. at 134 F.3d at 959-60 (liability for hearing loss rests with last employer to expose worker to injurious noise); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 840 (9th Cir. 1991) (same). In doing so, this Court was particularly persuaded by the value of using the date of last exposure as a "bright line rule . . . [that would] avoid[] unnecessary administrative difficulties and delays that might accompany a less definitive rule." 134 F.3d at 962 (internal quotations omitted).[7] In short, Fenske has provided no basis for disregarding the well-established date of last exposure rule.

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[7] Without the bright-line, last exposure rule, Fenske cannot establish the extent of his hearing loss before his last day of work, because he was exposed to injurious noise daily and did not first undergo an auditory examination until mid-2009, almost four years after he stopped working. Further, because his employment in Iraq covered three different fiscal years with three different maximum allowable statutory rates of compensation, Fenske cannot establish which rate applies to his level of hearing loss, and thus there is no way to accurately set his compensation. To avoid this

Applying the date of last exposure rule confirms that Fenske's hearing loss and back injury were contemporaneous. The ALJ found that Fenske was exposed to excessive noise each day while working for Employer in Iraq. ER 18. His last exposure, therefore – and consequently the date of injury for his hearing loss – was October 9, 2005, his last day of work for the Employer, and the same day as the suicide bomber attack that injured his back and left him totally disabled. Fenske is therefore wrong in assuming his partial disability due to hearing loss preceded his total disability due to his back injury.

Because the injuries were contemporaneous, and because Fenske concedes that compensation for a scheduled injury is improper when the injury does not predate permanent total disability, Op. Br. 14-15, 29, the Court need go no further in order to deny Fenske's petition for review.

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problem, Fenske uses the applicable rate on his last day of employment – which is inconsistent with his assertion that his disability occurred before that. Op. Br. 31 n. 8.

B. Fenske had, and completely lost, a single earning capacity when his hearing loss and back injury occurred. He is being fully compensated for that complete loss of wage-earning capacity by the permanent total disability award for his back injury.

On his last day of employment in Iraq, Fenske had only one wage-earning capacity, and he lost all of it when the attack on his convoy seriously injured his back. He is currently receiving permanent total disability compensation for the total loss of earning capacity resulting from his back injury. Thus, any possible reduction in wage-earning capacity – presumed or actual – from Fenske's contemporaneous hearing loss injury has already been accounted for in the permanent total disability award. Under these circumstances, additional compensation for hearing loss constitutes an impermissible double recovery.

Disability under the Longshore Act is an economic concept, not a medical one. *E.g.*, *Rupert*, 239 F.2d at 276 (recognizing that the Longshore Act is "intended to compensate for loss of earning capacity"). Partial disability reflects a reduction or diminution in wage-earning capacity. Permanent total disability, however, "presupposes a permanent loss of all earning capacity," *id*. at 276-77, and a permanent total disability award "serves as a full replacement for [that] lost earning capacity." *Korineck v. General Dynamics Corp*., 835 F.2d 42, 43-44 (2d Cir. 1987). Consequently,

superimposing an award of compensation for scheduled permanent partial disability on an award for permanent total disability is contrary to the Act. *Rupert*, 239 at 276-77. Generally speaking, a worker simply may not receive a disability award that compensates him "for a loss of earning capacity that is accounted for in another award." *Stevedoring Serv. of Am. v. Price*, 382 F.3d 878, 885 (9th Cir. 2004) (collecting cases). Double compensation for the same loss of earning capacity comprises an impermissible double recovery or "double dipping." *Id*.

Applying these principles, this Court held in *Rupert* that a claimant could not concurrently receive scheduled compensation for disfigurement in addition to his compensation for permanent total disability, ruling the permanent total disability award fully compensated the worker for the entirety of his lost earning capacity. 239 F.2d at 276-77. Fenske does not contend that *Rupert* was incorrectly decided, but attempts to distinguish it on the ground that his hearing loss and back injury did not arise from the same accident, although the facial disfigurement and back injury in *Rupert* did. Op. Br. 14. Fenske is wrong about the timing of his injuries, *supra* Argument A, but the relevant fact in *Rupert* was not that the injuries resulted from the *same accident*, but that they occurred at the same time when the claimant had a *single earning capacity* to lose. Indeed, *Rupert's* legal

analysis regarding the propriety of concurrent awards focused exclusively on the fact that Rupert's total disability award fully compensated him for his lost earning capacity. *Rupert*, 239 F.2d at 276-77. It placed no emphasis on the fact that the injuries resulted from a single accident, mentioning it only when recounting the facts of the case. *Id.* at 274.

The Second Circuit in *Korineck* likewise focused on the loss of a single earning capacity, rather than a single accident, to preclude scheduled compensation for hearing loss in addition to permanent disability compensation. *Korineck*, 835 F.2d 42. Despite specifically recognizing that the claimant's hearing loss was due to an injury distinct from his totally disabling back injury, 835 F.2d at 43, the court held that denying additional benefits "serves to avoid double recoveries and accords with the purpose of the statute to provide work benefits *for lost earning capacity*. Where a worker receives total permanent disability benefits under the statute, *that award serves as full replacement for lost earning capacity*." *Id*. at 44 (emphasis added).[8]

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[8] Notably, in *Price*, this Court cited *Korineck* as an example of an improper double recovery. This was not because the claimant's two injuries resulted from the same accident – they did not – but because the award for hearing loss would have compensated him "for a loss of earning capacity that is accounted for in another award," namely, the award for total disability due to a back injury. 382 F.3d at 887.

The *Korineck* court thus found unpersuasive the argument (which Fenske makes here) that additional scheduled compensation for hearing loss was proper because it was payable regardless of any actual loss of wage-earning capacity. The court found that the mere existence of a schedule prescribing benefits did not justify their payment in all cases. *Id*. at 43. It reasoned that the schedule only "sets a presumptive loss of earning power, thus freeing the injured worker from the inconvenience of having to litigate and prove a loss of earning power each time he or she is injured." *Id*. at 43-44. But that administrative purpose, according to the court, "does not mandate that this predetermined amount must be paid when the claimant is already compensated for a total permanent disability." *Id*. at 44.[9]

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[9] Korineck, like Fenske here, relied heavily on the Supreme Court's *PEPCO* decision. 449 U.S. 268. The Second Circuit, however, correctly found that reliance misplaced and overbroad. *PEPCO* addressed the narrow issue whether a claimant permanently partially disabled from a scheduled injury is limited to scheduled compensation or may elect to demonstrate his actual loss of wage earning capacity (and thereby obtain greater compensation) under Section 908(c)(21). The *PEPCO* court ruled that where the schedule applied, it was the exclusive remedy for permanent partial disability. The Second Circuit thus correctly commented that "[a]ny language in [*PEPCO*] indicating that benefits 'shall be paid' under the schedule must be read in this context and thus simply does not support Korineck's position." 835 F.2d 44.

Finally, calculating Fenske's potential concurrent compensation leaves no doubt that he would be overcompensated if both awards were permitted. Because Fenske was highly paid, he would receive compensation at the maximum allowable statutory rate. *See supra* at 6-7 and n. 4. Accordingly, during the proposed period of concurrent compensation, he would receive *two* maximum payments – one for each award. His total weekly compensation package would thus *exceed his wages at the time of his injury* ($1,073. 64 for hearing loss + $1,073.64 for back injury = $2147.28, or $297.28 more than Fenske's $1,850 average weekly wage at the time of injury).[10]

Because the Act is designed to pay a maximum of 66⅔ % of an employee's actual economic loss, 33 U.S.C. 908(a), paying Fenske more than his loss – 132% of his average weekly wage to be precise – is clearly inconsistent with the statutory scheme. *PEPCO*, 449 U.S. at 281-82 and n.23. Such a result constitutes a windfall and is unreasonable.

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[10] The $1,073.64 allocated for Fenske's hearing loss and back injury represents the maximum allowable rate on October 9, 2005, the date of his injuries.

C. This Court correctly ruled in *Price* that an employee who suffers a prior partial disability and is subsequently permanently totally disabled may receive concurrent awards if the permanent total disability award is based on a diminished earning capacity resulting from the prior injury. But that did not occur here because the hearing loss and back injury were contemporaneous and Fenske's permanent total disability award was not based on a previously-diminished earning capacity.

This Court correctly ruled in *Price*, 382 F.3d 878, that an employee who suffers a prior partial disability and is subsequently permanently totally disabled may receive concurrent awards if the permanent total disability award is based on a diminished earning capacity resulting from the prior injury. Fenske tries to support his claim with *Price*, but his reliance is misplaced – Fenske's hearing loss did not precede his back injury (the two were contemporaneous), and his permanent total disability award was not based on a diminished earning capacity resulting from his hearing loss.

In *Price*, the claimant sustained two injuries nineteen years apart. In 1979, he injured his back and received an award for an unscheduled permanent partial disability in the amount of $196.01 per week. That award compensated him for the reduction in his wage-earning capacity by paying him two-thirds of the difference between his average weekly wage at the time of the injury ($627.88) and his residual wage-earning capacity after the

injury ($333.87). *See* 33 U.S.C. § 908(c)(21) (addressing the compensation payable for unscheduled permanent partial disability).

After suffering another back injury in 1991, after which he returned to work, his pain gradually increased until, on his doctor's advice, he retired in 1998. He filed a claim, and was awarded compensation for permanent total disability, beginning the day after his 1998 retirement. The ALJ and Board reduced the total disability compensation by the amount of Price's earlier award of permanent partial disability benefits for his 1979 injury, because the combined awards exceeded the amount payable for total disability alone.

This Court reversed on that issue, holding that Price's permanent total disability compensation should not have been reduced because each award compensated him for a different reduction in wage-earning capacity. It explained that the 1979 award compensated Price for an initial partial loss of his wage-earning capacity, and because his wage-earning capacity had not increased between 1979 and 1998, the 1998 award compensated him only for the loss of the residual wage-earning capacity that remained after his 1979 injury. Were the claimant not paid both awards, the Court found, he would be undercompensated. 382 F.3d at 886-89.

The D.C. Circuit employed identical reasoning in *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 91 (D.C. Cir. 1980). There, the claimant

suffered a work-related stroke in 1971, convalesced for 10 months, and then returned to work, but only part-time. In 1974, he was hospitalized for pulmonary emboli and stopped working completely. The ALJ awarded him compensation for temporary total disability during the period of convalescence, permanent partial disability for his period of part-time work, and permanent total disability after the pulmonary emboli. *Id*. at 87-88. But he found that compensation for the permanent partial disability should be terminated when the compensation for permanent total disability began. *Id*. at 88.

The Board reversed on that aspect of the decision, finding that "the claimant's average weekly wages at the time of the second injury, upon which the award of permanent total disability is based . . . presumably already reflect a reduced earning capacity resulting from the previous injury." *Id*. at 89. In agreeing with the Board, the court gave the following explanatory example:

> Consider a worker earning $10,000 per year. An accident permanently reduces his earning capacity to $6,000. He is awarded compensation based on the $4,000 diminution in his earning capacity. A second accident disables him totally. The second compensation award is based on the $6,000 in earning capacity remaining after the first accident. Terminating the first award at the onset of the second would deprive the worker of compensation for the permanent loss of $4,000 in earning capacity. Paying the two awards concurrently, however,

> compensates him fully. The sum of the two awards reflects the full $10,000 diminution in earning capacity.

Id. at 91; *see Price*, 382 F.3d at 886-88 (also providing hypotheticals).

Unlike Price or Hastings, Fenske had no reduction in his wage-earning capacity prior to the day he became totally disabled. His entire earning capacity was lost on a single day, and the award for total disability fully compensates him for that loss. Fenske, unlike Price and Hastings, is double-dipping, attempting to obtain compensation for a loss of wage-earning capacity that is already "accounted for in another award." *Price*, 382 F.3d at 885 (*citing, inter alia*, *Korineck*, 835 F.2d at 43-44, and *Rupert*, 239 F.2d at 276).[11]

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[11] At times, Fenske seems to argue that because a scheduled loss results in a *presumed* loss of wage-earning capacity, it can never be subsumed in an award for permanent total disability (which is based on an *actual* loss of wage earning capacity) . But this highly theoretical and abstract proposition, which was expressly rejected in *Korineck*, is clearly overbroad and would lead to incongruous results. For instance, as applied here, Fenske would end up receiving more in compensation than he was actually earning in wages at the time of his injuries. *See supra* at 17-18; *see also Price*, 382 F.3d at 886 (discussing possibility of impermissible double-dipping when full amount of two awards are combined and first award overestimates negative impact on claimant's wage-earning capacity). In rejecting Fenske's categorical position, however, the Director is not advocating the contrary categorical rule, namely, that a scheduled permanent partial disability must always be subsumed within a permanent total disability award. There are simply too many factual variables involved in establishing compensation, such as the timing, extent, and type of injuries involved; the nature of the claimant's

Finally, because Fenske extensively quotes *Henry v. George Hyman Constr. Co*., 749 F.2d 65 (D.C. Cir. 1984), a brief discussion of the decision is necessary. Op. Br. 28-29. As an initial matter, the Director agrees with Fenske that *Henry* presents a question different from the one here and is "readily distinguishable." Op. Br. 29-30. *Henry* involved a claim by the surviving widow of a deceased diabetic worker whose foot injury led to partial leg amputation and then to death by cardiac arrest. The worker received temporary total disability compensation from the date of injury until death, but his widow sought scheduled benefits for the partial leg amputation that remained unpaid at the time of the employee's death. The court found 33 U.S.C. § 908(d)(2) to be dispositive. 749 F.2d 75-76. That section mandates distribution of unpaid scheduled awards to employees' survivors (and obviously has no application at all to the present case). Further, because the scheduled benefits were paid after the employee died, they were not paid *concurrently* with his compensation for temporary total

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work and wage earning capacity, to warrant the adoption of a rigid rule. Rather, as this Court did in *Price*, the basic principles of compensation – among them, full compensation for lost wage earning capacity, but no double recovery – must be carefully applied on a case-by case basis using the particular facts at hand to ascertain the correct amount of compensation. As argued throughout this brief, the "particulars" here foreclose a second concurrent award.

disability, but *consecutively*, after his entitlement to compensation for total disability had ended. Last, the court noted that section 908(c) allows scheduled awards to be paid "in addition to" compensation for *temporary* total disability, but not where, as here, the claimant was permanently totally disabled. *Id*. at 71, 74 (*citing Rupert*).[12]

CONCLUSION

For the foregoing reasons, the Court should affirm the agency determination that Fenske is not entitled to receive scheduled permanent partial disability compensation for hearing loss concurrently with ongoing compensation for permanent total disability.

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[12] A claimant may receive concurrent compensation for a scheduled permanent partial disability and an unscheduled permanent *partial* disability, provided the combined amount does not exceed the amount payable for total disability *See ITO Corp. v. Green*, 185 F.3d 239 (4th Cir. 1999); *Padilla v. Signal Mut. Indem. Assoc*., 34 BRBS 49 (2000) (same). If, in the future, the disability attributable to Fenske's back injury becomes partial, he may then seek modification of his award under 33 U.S.C. § 922 to collect compensation for his hearing loss. As that has not occurred, the Court need not address it.

Respectfully submitted,

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STATEMENT OF RELATED CASES
Pursuant to Ninth Circuit Rule 28-2.6

The Director is aware of no related cases.

/s/ Matthew W. Boyle
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CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Ninth Circuit Rule 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 4,423 words.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2014, I electronically filed the foregoing Brief for the Federal Respondent through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
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