

## **Benefits Review Board Approves Compensation for Tinnitus in cases involving Monaural Hearing Loss**

On July 26, 2022, the Benefits Review Board published its decision in *Robert Tower v. Total Terminals International and Signal Mutual Indemnity*, 56 BRBS \_\_ (BRB No. 2021-0319), addressing for the first time whether an award of compensation for hearing loss may be increased to account for bilateral tinnitus even where the claimant has measurable (ratable) hearing loss in only one ear. The Board vacated an ALJ’s grant of summary decision to the employer which had found that the claimant was entitled to compensation only for a monaural (loss in one ear) loss under 33 U.S.C. § 908(c)(13)(A). Instead, the Board majority held that a worker need not have measurable hearing loss in both ears to be entitled to add additional compensation for tinnitus; compensation in such cases is properly made under 33 U.S.C. § 908(c)(13)(B), and the amount of impairment is calculated by first converting the monaural loss to a bilateral measurement and then adding the appropriate percentage loss for tinnitus to derive the total amount. The employer/carrier has moved for reconsideration of the decision by the Board. That motion remains pending.

### **MEDICAL BACKGROUND**

Tinnitus is a constant ringing sound in the ear in the absence of an external source. It describes perceived sounds that originate within the person rather than in the outside world. Tinnitus is not a disease itself but is a symptom of disease or injury. It can occur in one or both ears. Once permanent hearing loss occurs, ongoing tinnitus can combine with the hearing loss to impact communications. Tinnitus also impacts a person’s ability to distinguish sounds and can cause discomfort when in quiet areas, interfering with moments of rest and impacting overall function. It can even interfere with sleep. In the worst cases, tinnitus may cause psychological distress and dysfunction.

### **LEGAL BACKGROUND**

#### **Hearing Loss Generally**

Under the Longshore Act, “[d]eterminations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the [...] AMA.” 33 U.S.C. § 908(c)(13)(E). The regulations clarify that the extent of a claimant’s hearing loss must be measured according to “the most currently revised edition” of the AMA’s Guides. See 20 C.F.R. § 702.441(d). “The *Guides to the Evaluation of Permanent Impairment, Sixth Edition, 2021* (AMA Guides Sixth 2021)” are the most recent and current

version of the AMA Guides.<sup>1</sup> When the claimant in *Tower* was evaluated for hearing loss and when the ALJ decided the case, the applicable version of the Guides was the Sixth Edition (2008). The Benefits Review Board has recently defined the phrase “the most currently revised edition” of the AMA Guides to mean the edition in effect as of the date the doctor assessing impairment renders their medical opinion. *Pierce v. Electric Boat Corp.*, 54 BRBS 27 (2020) citing, *Alexander v. Triple A Mach. Shop*, 34 BRBS 34 (2000), rev’d on other grounds *sub nom. Alexander v. Director, OWCP*, 297 F.3d 805 (9th Cir. 2002).<sup>2</sup>

## **Monaural versus Binaural Impairment**

The LHWCA awards differing amounts of compensation depending on whether a claimant’s hearing loss is in one or both ears. See 33 U.S.C. §§ 908(c)(13)(A)-(B). For hearing loss in one ear (monaural loss), a claimant is entitled to two-thirds of their average weekly wage (AWW) for up to 52 weeks (where the loss is partial, 52 is divided by the percentage of hearing impairment and scheduled compensation is payable for that number of weeks). 33 U.S.C. § 908(c)(13)(A); see also 33 U.S.C. § 908(c)(19) (where the loss is partial, the percentage impairment is proportionately applied to the number of weeks in the schedule); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 271 n.4 (1980); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234, 237 n.4 (1988). For hearing loss in both ears (binaural), a claimant is entitled to two-thirds of their AWW for up to 200 weeks (200 is divided by the percentage loss). See 33 U.S.C. § 908(c)(13)(B).

According to the AMA Guides, binaural impairment is hearing impairment of both ears and indicates a loss of hearing of greater than 25 deciBel (dB) in both ears at frequencies of 500, 1000, 2000, and/or 3000 hertz (Hz). See AMA Guides, Sixth Edition, § 11.2f at 251. If the average is 25 dB or less, no impairment rating is assigned because “there is no change in the ability to hear everyday sounds under everyday listening conditions.” See AMA Guides, Sixth Edition, § 11.2e at 250. Consequently, it is possible for a worker to have a loss of hearing but for that loss to be lower than the threshold for rating the impairment, i.e., for a loss to exist but be non-ratable.

Importantly, in addition, the AMA Guides provide a method to convert monaural loss to binaural loss, i.e., “when only 1 ear exhibits hearing impairment...allowing 0% impairment for the unimpaired ear...” *Id.* at 251. To calculate binaural impairment when there is only hearing

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<sup>1</sup> Effective July 1, 2021, the American Medical Association released a new edition of the AMA Guides called the Sixth Edition, 2021. A new editorial process for the Guides was launched in 2019, after lawsuits challenged the validity of the Sixth Edition on the ground that that version resulted in much lower impairment ratings for some injuries than previous editions.

<sup>2</sup> Although the Sixth Edition (2008) applies to *Tower*, it does not appear that the Sixth Edition, 2021 altered the Sixth Edition (2008) regarding tinnitus in any event.

impairment in one ear, multiply the impairment in the better ear by five, add the impairment in the worst ear, and divide by six. *Id.* The discrepancy between compensation payable under subsections 8(c)(13)(A) and (B) results from the manner in which the AMA Guides weighs the relative functional losses caused by binaural and monaural impairments and the relative remedies provided by the Act for the two classes of impairment. The relationship can be stated as a constant: compensation under subsection 8(8)(c)(13)(A) is always 1.56 times that payable under (B) and that payable under (B), after conversion, is always 0.64 of that payable under (A). Thus, it typically benefits employer/carriers to convert monaural loss to binaural loss for compensation purposes.

In a series of decisions, the Second, Fourth, and Fifth Circuits, and, eventually, the Board, held that where an injured worker suffers from only a monaural hearing impairment, he should ordinarily be compensated under Section 8(c)(13)(A) for hearing loss in one ear, as opposed to converting monaural to a binaural impairment as provided for in the Guides, and compensated under Section 8(c)(13)(B). *Rasmussen v. Gen. Dynamics Corp., Elec. Boat Div.*, 993 F.2d 1014 (2d Cir. 1993); *Baker v. Bethlehem Steel Corp.*, 24 F.3d 632 (4th Cir. 1994); *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143 (5th Cir. 1993).

Originally, a majority of the *en banc* Board reasoned that an employee sustaining an occupational, noise-induced, monaural hearing loss could not, as a matter of law, be compensated for a monaural loss at all but must instead always have his loss converted into a binaural loss for purposes of calculating his benefits under the Act. The Board reasoned that because the AMA Guides provide for such a conversion and the Guides govern the calculation of hearing loss entitlement under the Act, the Guides mandated conversion of monaural loss to binaural in all cumulative hearing loss cases (i.e., not those where a traumatic injury damaged hearing in only one ear). *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 173 (1991) (*en banc*).

Every circuit court of appeals to review that initial position of the Board disagreed and rejected it. *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43 (1992) (*en banc*) (Smith, Dolder, JJ., dissenting), *rev'd*, 2 F.3d 143 (5th Cir. 1993); *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 173 (1991) (*en banc*) *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992); *Rasmussen v. General Dynamics Corp.*, BRB No. 91-1396 (1992) (unpub.), *rev'd*, 993 F.2d 1014 (2d Cir. 1993). The courts held that the canon of statutory construction that a statute must not be interpreted to render a portion of the statute meaningless or without effect was violated by the Board's initial approach which effectively read subsection (A) out of the statute. The courts uniformly held that no irreconcilable conflict exists between the LHWCA's directive that monaural losses be compensated according to the criteria of subsection (A) and the directive of subsection (E) that determinations of hearing loss be made in accordance with the AMA Guides. Rather, the Guides provide the methods employed under the Act for measuring hearing loss,

whether monaural or binaural while the statute serves the different function of providing a formula for determining how such losses should be compensated.

Ultimately, the Board recognized the need to change its view of this monaural-binaural debate in *Bullock*, 28 BRBS 102, when it modified an award from binaural to monaural based on the Fifth Circuit's *Tanner* decision. *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994) (decision on recon. *en banc*), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). The Board has since confirmed that view in a case arising under the law of the Ninth Circuit. See *J.T. [Tracy] v. Global Int'l Offshore Ltd.*, 43 BRBS 92 (2009).

## **Tinnitus**

Nowhere in the Act itself or the LHWCA regulations is there any mention of tinnitus. Perhaps for that reason, compensability of tinnitus has been treated differently over the years under the Longshore and Harbor Workers' Compensation Act. Originally, in a 1988 decision, the Board held that compensation for tinnitus was to be made under 33 U.S.C. § 908(c)(21), as an injury not otherwise specifically listed in the schedule, rather than under section 8(c)(13), so long as the injured worker established that the tinnitus caused a loss in wage-earning capacity. *West v. Port of Portland*, 21 BRBS 87, *modifying in part on recon.* 20 BRBS 162 (1988). The Board reasoned that the then applicable version of the AMA Guides stated that there is one measurable form of impairment for hearing loss and a separate, distinct form of impairment for tinnitus which was then included in the category of equilibrium disturbances. Subsequently, the AMA Guides treatment of tinnitus evolved.

The first two editions of the AMA Guides included no discussion of tinnitus whatsoever. The Third Edition stated that tinnitus is a symptom and is not measurable and thus impairment should be based on tinnitus severity. The Fourth Edition stated that because tinnitus may impair speech discrimination, a rating of up to 5% maybe added to the rating for hearing loss. That edition, however, was silent about what to do if hearing is normal.

The *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, provided as follows regarding tinnitus: "tinnitus in the presence of *unilateral or bilateral* hearing impairment may impair speech discrimination. And, the Guides' Fifth Edition called for adding up to a 5% impairment rating for tinnitus in the presence of *measurable hearing loss* if the tinnitus impacts the ability to perform activities of daily living." *AMA Guides [Fifth Edition]*, p. 246 (emphasis added). Thus, under the Fifth Edition, the AMA Guides allowed for an award of tinnitus for either monaural or binaural hearing loss, so long as it was accompanied by underlying hearing loss which was measurable in one or both ears.

The more recent version of the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition [2008], devotes an entire section (section 11b) to tinnitus. It states that “the major problem with evaluating tinnitus is that it is primarily a subjective phenomenon” and thus, it is difficult to verify the presence of tinnitus and its consequences. *Id.* Nevertheless, “if the tinnitus interferes with [activities of daily living], including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well-being, up to 5% [permanent impairment rating] may be added to a measurable binaural hearing impairment.” *Id.* Thus, the Sixth Edition conditions the addition of up to 5% additional permanent impairment on “a measurable binaural hearing impairment.”

Thus, there are two aspects to consider in applying the AMA Guides impairment ratings for tinnitus: (1) whether it is permissible to add on “up to 5%” as monaural or binaural impairment – which the Sixth Edition resolves in favor of making it a binaural addition; and (2) whether the “up to 5%” add-on for tinnitus can validly be effectuated where the underlying ratable hearing loss is in both or only one ear – which is resolved as requiring binaural loss. What is not resolved, or even discussed directly in the AMA Guides, is whether the add-on is permitted where the binaural underlying hearing loss is derived by converting monaural loss to a binaural measurement. That is the issue addressed in *Tower*.

### **FACTUAL BACKGROUND**

Tower was injuriously exposed to noise from ship loading and unloading equipment while he worked at the Port of Seattle. Tower’s audiogram, under the AMA Guides Sixth Edition, established binaural loss but a ratable hearing loss only in his left ear. His hearing in his right ear, although impaired, was 15 dB short of being a ratable impairment. Thus, his hearing loss impairment was rated as 9.375% in left monaural hearing loss and 0% right monaural hearing. If, however, the ratings in each ear are converted or combined as provided for in the AMA Guides to reflect a binaural hearing loss, that overall rating is a 1.56% binaural hearing loss.

In addition to his hearing loss, Tower also has binaural tinnitus which the expert testimony found impaired his activities of daily living and caused psychological distress. Accordingly, the expert (ultimately) rated Tower’s tinnitus as adding a 4% binaural hearing impairment which would result in an overall binaural impairment rating of 5.56%.

Tower’s employer, however, contending that he had measurable impairment in only one ear, was only willing to pay compensation for that 9.375% monaural loss. The difference in the two calculations, and thus the amount at stake in the case, is \$3,395.58 (\$10,756.61 due under 8(c)(13)(B) - \$7,361.03 due under 8(c)(13)(A) = \$3,395.58). Although this amount seems trivial, any amount of compensation is important to an injured worker and in any given case a greater amount of compensation could be at stake, say, for example, with a claimant whose tinnitus entitled him to the full 5% add-on.

## THE ALJ'S DECISION

In a February 9, 2021 order granting the employer's motion for summary decision, the ALJ found that Tower had a monaural hearing impairment for which he is entitled to compensation under Section 8(c)(13)(A) but cannot recover for his tinnitus at all. The ALJ read the AMA Guides as requiring the underlying hearing loss to be binaural in nature before additional compensation may be added on for tinnitus, and thus concluded, as a matter of law, that Tower could not recover disability compensation for his monaural hearing impairment in combination with his tinnitus under Section 8(c)(13)(B). And, the ALJ found that because Tower had ratable hearing loss in only one ear, the law, specifically the *Rasmussen, Baker* line of cases, forbid him from converting that monaural loss into binaural loss and compelled an award only under Section 8(c)(13)(A).

The ALJ considered at length whether the AMA Guides Sixth Edition permitted compensation for tinnitus under the circumstances here. He explicitly recognized that the Guides were ambiguous and *may* require a claimant have an impairment in both ears before a physician can add on for tinnitus. The ALJ stated:

Because Claimant must rely on the AMA Guides' formula to convert monaural to binaural impairment, case law precludes compensating him for a binaural impairment. It is possible that the language of the AMA Guides, Sixth Edition also precludes awarding Claimant compensation for tinnitus. That is, the Sixth Edition may require a claimant have an impairment in both ears before a physician can add a tinnitus impairment. The intent of the Sixth Edition, however, is unclear.

ALJ D&O at 6.

Thus, the ALJ concluded that, while the meaning of "a measurable binaural impairment" in the AMA Guides Sixth Edition discussion of compensation for tinnitus is unclear, it is irrelevant. The ALJ found that, whatever the meaning of that phrase, the controlling law holds that the Act does not allow for converting monaural to binaural hearing loss for compensation. Thus, the ALJ concluded that, as a matter of law, Claimant is not entitled to additional compensation for tinnitus. ALJ D&O at 4. This left the Claimant's tinnitus uncompensated altogether.

In rejecting Tower's argument that the presence of tinnitus entitled him to compensation under 33 U.S.C. § 908(c)(13)(B), the ALJ conceded that Tower could be deemed to have a measurable binaural impairment using the formula set forth in Section 11.2f of the AMA Guides, which allows for the conversion of a monaural impairment into a binaural impairment, but found that

the Board has held that in the absence of a ratable hearing loss in the better ear, a “monaural impairment should not be converted to a binaural impairment for purposes of awarding compensation under the Act.” The ALJ reasoned that while the AMA Guides Sixth Edition directs that monaural hearing loss may be converted to binaural hearing loss, such a directive would effectively render Section 8(c)(13)(A) “meaningless” and that adding the tinnitus impairment would require that he violate the admonition against converting a “monaural impairment to a binaural impairment.”

### **THE BOARD DECISION**

The Board first decided that the Sixth Edition of the Guides makes clear that compensation for a tinnitus-related impairment must now be awarded under Section 8(c)(13) and not under 8(c)(21). The Board then held that the ALJ should have converted Tower’s monaural rating to a binaural rating in accordance with the AMA Guides, and then added the tinnitus rating to that binaural impairment. It explicitly held that a claimant need not have a measurable hearing loss in both ears to be entitled to compensation for tinnitus. All that is required is for a claimant to have a “measurable binaural impairment” after applying the AMA formula provided for that conversion in the most recent edition of the Guides. Then once that calculation is performed, an additional amount may be added to compensate for tinnitus – up to 5%. As the Board held: “When tinnitus affecting both ears is a factor in a claimant’s work-related hearing loss, benefits under the current AMA Guides are to be awarded under Section 8(c)(13)(B), even if there is measurable hearing loss in only one ear.” Accordingly, the Board vacated the ALJ’s grant of summary decision for the employer and remanded for the ALJ to enter an award of benefits including compensation for tinnitus.

The Board majority determined that the ALJ misapplied the legal principle from the *Rasmussen, Baker* line of cases. The Board found those cases distinguishable because none involved either the current edition of the AMA Guides or addressed compensation for tinnitus.

One member of the Board dissented. That member believed that the *Rasmussen, Baker* cases demanded that Tower be compensated under Section 8(c)(13)(A) because the measurable hearing loss (without considering tinnitus) was only monaural. Even the dissenting member agreed, however, that there should be a recovery for tinnitus. Thus, the dissent would have awarded compensation for a total of 13.375% monaural impairment after adding the 4% tinnitus rating to the 9.375% monaural rating.

### **DISCUSSION**

The Board majority’s result is eminently fair and fully supported by the statute. The Board’s holding is consistent with the *Rasmussen, Baker* line of authority’s holding that the Guides

provide the methods employed under the Act for measuring hearing loss, including directing an amount of impairment that should be credited for a person suffering from tinnitus, while the statute serves the different function of providing a formula for determining how such losses should be compensated. No provision of the statute provides that a monaural loss may never be converted to a binaural loss. It does not address in any fashion whether such a conversion might be appropriate in circumstances where such a conversion appears to be necessary to fully compensate the injured worker. Absent such a conversion, tinnitus would either go uncompensated as the ALJ found, or could only be added in a fashion completely at odds with the AMA Guides, as the dissenting Board member found.

The Board majority's approach in *Tower* ensures that tinnitus is fully compensated - and done so in accordance with the Guides – on a binaural basis. The Board correctly found that no court has ever prohibited an initial conversion from monaural loss to binaural loss before adding additional impairment for tinnitus to that binaural amount. Indeed, any other approach, either the ALJ's or the Board's dissenting member, deprives workers of a portion of the compensation to which they are entitled just as they were initially deprived of the appropriate amount of compensation in the cases involving solely monaural impairment, where a non-statutory mandatory conversion to binaural impairment was erroneously mandated by the Board's early decisions. The courts rejected the Board's initial determinations in the *Rasmussen, Baker* line of cases because it read section 8(c)(13)(A) out of the Act. In comparison, the Board's resolution in *Tower* does no such thing. As the Board noted, any claimant with monaural hearing loss and no tinnitus remains entitled to compensation under 8(c)(13)(A). That subsection, however, is not suitable for a worker like Tower who has binaural tinnitus.

In *Tower*, the Board recognized that its eventual epiphany regarding the compensability of monaural hearing loss under 8(c)(13)(A) does not mean that a monaural hearing loss may never be converted to a binaural loss for purposes of reaching a proper result under the Act. Indeed, in the context of Section 908(f), the Board has held that notwithstanding the *Rasmussen, Baker* line of cases, conversion to binaural impairment is also called for in certain circumstances. See *R. B. [Brewer] v. Electric Boat Corp.* (BRB No. 08-0162) (July 24, 2008) (unpubl.). There, the Board held that where a claimant's pre-existing hearing loss is monaural only, but his ultimate hearing loss is binaural, the pre-existing loss should be converted to a binaural loss to determine how to allocate liability between the employer and the Special Fund. The Board's rationale is that, in contrast to the question of how to compensate a worker for the amount of his hearing loss, the statute is silent as to how to allocate liability between the employer and the Special Fund under section 8(f). The most logical approach is to convert the pre-existing monaural loss to binaural so it can then be rationally compared with the ultimate degree of binaural loss. Failure to convert monaural hearing loss in this situation would force a comparison between apples and oranges.



Keep in mind also, that in the *Rasmussen, Baker* line of cases, the injured workers gained entitlement to a greater amount of compensation if they were compensated for monaural loss under Subsection 8(c)(13)(A), instead of a converted binaural loss under Subsection 8(c)(13)(B). Thus, the Board's preliminary forced conversion to binaural loss resulted in lesser compensation benefits than they were entitled under the statute. That the proper application of Section 8(c)(13), including Section 8(c)(13)(E)'s reference to the AMA Guides, does not mandate a conversion of monaural hearing loss to binaural loss in every instance, does not mean that such a conversion may never be allowed under any circumstances. This is particularly true in the completely distinct circumstances presented in *Tower* where such a conversion results in a greater amount of compensation and a fairer outcome for workers suffering from tinnitus.