

BRB No. 04-0653

RANDALL M. HAMEL)
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Claimant-Respondent)
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v.)
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BATH IRON WORKS CORPORATION) DATE ISSUED:APR 29, 2005
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Self-Insured)
Employer Respondent)
)
and)
)
BIRMINGHAM FIRE INSURANCE)
)
)
Carrier-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton,
Administrative Law Judge, United States Department of Labor.

G. William Higbee (McTeague, Higbee, Case, Cohen, Whitney & Toker,
P.A.), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & Detroyn, LLC), Portland, Maine, for
self-insured employer.

Nelson J. Larkins (Preti Flaherty Beliveau Pachios & Haley, L.L.P.),
Portland, Maine, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals
Judges.

PER CURIAM:

Employer and its carrier Birmingham Fire appeal the Decision and Order (2002-LHC-2248) of Administrative Law Judge Daniel F. Sutton rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial

evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sought benefits under the Act for a noise-induced 17.8 percent binaural hearing loss. Claimant worked as a tinsmith for employer from February 10, 1988, until he resigned on October 18, 1990, to work in non-covered employment. Claimant alleged that during his employment with employer he was exposed to high levels of noise, even though he consistently wore hearing protection.

The parties stipulated that Birmingham Fire insured employer for claims under the Act from the date of claimant's hire in 1988 through August 31, 1988, and that employer has been self-insured since September 1, 1988. Employer conceded the compensability of claimant's work-related hearing loss. The issues to be resolved at hearing included the extent of claimant's compensable hearing loss, whether the self-insured employer or Birmingham Fire is liable for any benefits awarded, and whether employer is entitled to relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).

The record contains four audiograms, three of which were administered by employer. The first, claimant's February 10, 1988, pre-employment audiogram reflected a 3.8 percent monaural loss in claimant's right ear. Claimant underwent a second audiogram on September 12, 1988, which revealed a 13.8 percent binaural loss, and an October 4, 1989, audiogram revealed a 3.8 percent binaural loss. Subsequent to his employment with employer, claimant underwent audiometric testing on June 28, 2001, which reflected a 17.8 percent binaural loss.

In his Decision and Order, the administrative law judge found that claimant was last exposed to injurious stimuli prior to September 1, 1988, when claimant suffered a traumatic exposure in the "acute chipper incident."¹ Thus, the administrative law judge found that Birmingham Fire is the responsible carrier. Decision and Order at 6. The administrative law judge then considered the evidence regarding the extent of claimant's compensable hearing loss. The administrative law judge found that Dr. Haughwout's 2002 opinion is the most credible evidence regarding the extent of claimant's compensable hearing loss, which the doctor assessed at 17.8 percent based on claimant's 2001 audiogram. *Id.* Consequently, the administrative law judge awarded claimant

¹ Claimant testified that another employee unexpectedly used a chipping hammer in claimant's vicinity while claimant was eating lunch and had removed his hearing protection. Tr. at 26-28. The administrative law judge found that the results of the September 12, 1988, audiogram are consistent with claimant's recitation of this incident and that it occurred prior to September 1, 1988.

permanent partial disability benefits for a 17.8 percent binaural hearing loss under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). The administrative law judge denied employer's petition for relief under Section 8(f) of the Act.

On appeal, employer challenges only the administrative law judge's crediting of Dr. Haughwout's opinion regarding the extent of claimant's hearing impairment. Claimant responds, urging affirmance of the administrative law judge's decision.²

Employer alleges that the administrative law judge erred in finding Dr. Haughwout's opinion to be the most reliable evidence of the extent of claimant's work-related hearing loss, based on the 2001 audiogram. Employer contends that the administrative law judge should have credited one of the audiograms administered closer in time to claimant's last injurious exposure to noise. Employer suggests that the most credible evidence of the extent of claimant's work-related hearing loss is the 3.8 percent binaural impairment demonstrated by the October 4, 1989, audiogram.

We agree with employer that this case must be remanded for further consideration. The Board has held that in the absence of credible evidence regarding the extent of the claimant's hearing loss at the end of covered employment, the administrative law judge may rely on other credible evidence in determining the extent of the work-related impairment. *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991); *see also Steevens v. Umpqua River Navigation*, 35 BRBS 27 (2001); *Labbe v. Bath Iron Works Corp.*, 25 BRBS 159 (1991). The import of these cases is that claimants may receive benefits for their work-related hearing losses even if their losses are not credibly quantified at the time they leave covered employment. The administrative law judge, however, is not absolved of the responsibility of reviewing the credibility of the evidence contemporaneous with claimant's leaving covered employment. In this case, the administrative law judge did not specifically address the credibility of the audiograms administered while claimant was still employed by employer. Rather, he found the 2001 audiogram to be the most credible evidence of the "totality" of claimant's hearing loss, based on Dr. Haughwout's opinion. Decision and Order at 6. The administrative law judge stated that Dr. Haughwout was the only expert to review the body of claimant's hearing test results and to provide an opinion as to the extent of claimant's hearing loss.³

² Employer in its self-insured capacity filed a response brief arguing solely that substantial evidence supports the administrative law judge's finding that Birmingham Fire is the responsible carrier.

³ Dr. Haughwout, an otolaryngologist, evaluated claimant on April 4, 2002. In addition to examining claimant, Dr Haughwout stated in his report that he also reviewed claimant's audiograms from Bath Iron Works dated 2/10/88 and 9/12/88, as well as the one administered at Yarmouth Audiology on 6/28/01. Dr. Haughwout opined that these

As the administrative law judge acknowledged, however, Dr. Haughwout did not review claimant's October 4, 1989 audiogram, which showed a reduction in claimant's hearing loss. Decision and Order at 5 n 4.

In *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993), the Supreme Court held that hearing loss due to noise exposure does not progress in the absence of such exposure. In view of this holding, and the administrative law judge's finding that claimant was not exposed to injurious noise after September 1, 1988, the administrative law judge must reconsider on remand the extent of claimant's work-related hearing loss. He should specifically address the credibility of the audiograms more proximate in time to claimant's last covered exposure, as well as Dr. Haughwout's opinion regarding the progressive nature of claimant's hearing loss in view of the fact that the doctor had not reviewed the October 1989 audiogram showing a diminished hearing loss.

three audiograms reveal a progressive sensorineural hearing loss mostly in the high frequencies and worse in the left ear. He stated that the most recent audiogram demonstrates a 17.8 percent loss. CX 6A. Dr. Haughwout did not evaluate claimant's October 4, 1989 audiogram, which showed a 3.8 percent binaural loss.

Accordingly, the administrative law judge Decision and Order awarding benefits for a 17.8 percent binaural impairment is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge