

BRB Nos. 92-2695
and 92-2695A

GARY HENZE)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
) DATE ISSUED: _____
 INGALLS SHIPBUILDING,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent)
 Cross-Petitioner) DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision and Order on Motions for Reconsideration of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits and the Decision and Order on Motions for Reconsideration (90-LHC-1131) of Administrative Law Judge A. A. Simpson, Jr., 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On March 27, 1987, claimant underwent an audiological evaluation at Dr. McClelland's office, the results of which revealed a "moderately severe mixed hearing impairment in his right ear and a slight-to-moderately severe mixed hearing impairment in his left ear." Cl. Ex. 1. Dr.

McClelland determined that claimant has a 61.9 percent impairment in the right ear and a zero percent impairment in the left ear, pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides); however, he stated that "the audiometric configuration of [claimant's] left ear is consistent with noise-induced hearing loss." *Id.* Dr. McClelland concluded that claimant is a "good candidate for binaural amplification" and that he should undergo annual hearing evaluations. *Id.* Based on these results, claimant filed a claim for a work-related hearing loss, and employer timely controverted the claim.

On March 14, 1990, claimant underwent a second evaluation, conducted by Dr. Lamppin, the results of which revealed "a conductive hearing loss in the right ear and a nerve type hearing loss in the left ear with a small conductive component at 3000 Hz." Emp. Ex. 6. The results revealed impairments of 67.5 percent (air score) and zero percent (bone score) in the right ear and zero percent impairment in the left ear. In his report, Dr. Lamppin stated:

the right ear loss is a conductive type (not the type due to noise) and in all probability is related to [claimant's] history of ear problems and the ear surgery, [whereas] in the left ear there is the type of curve that one could see from noise, [but] there is no calculated percentage impairment.

Id. Dr. Lamppin prescribed hearing aids for both ears and suggested claimant consider having surgery on his right ear. *Id.* Dr. McClelland reviewed both evaluations, concluded they were valid, and agreed with Dr. Lamppin's analysis. Emp. Ex. 7.

The administrative law judge conducted a formal hearing on February 21, 1991, wherein claimant and employer disputed the cause, nature, and extent of disability, as well as claimant's entitlement to disability and medical benefits, and counsel's entitlement to an attorney's fee. After discussing the two audiograms of record, the administrative law judge found that claimant has a noise-induced hearing loss in the left ear but has no ratable impairment and is not entitled to disability benefits. However, because of the doctors' recommendations for hearing aids and further evaluations, the administrative law judge awarded claimant medical benefits and, consequently, also awarded claimant's counsel a fee payable by employer. Claimant and employer filed motions for reconsideration, which were denied. In a Supplemental Decision and Order, the administrative law judge awarded counsel an attorney's fee in the amount of \$908.63, plus expenses in the amount of \$39.

Claimant appeals the administrative law judge's decisions, contending he erred in failing to apply the aggravation rule to this case because claimant's noise-induced hearing loss in his left ear combined with his prior hearing problems in his right ear and created a greater loss. Claimant relies on *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986), to support his argument. Employer responds, urging affirmance and arguing that the aggravation rule is inapplicable to this case. In its cross-appeal, employer challenges the findings that it is liable for

medical benefits and an attorney's fee.¹ Claimant has not responded to the cross-appeal.

In determining whether an injury is caused or aggravated by conditions of employment or a work accident, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the presumption is invoked, the burden shifts to employer to rebut it by producing facts to show that a claimant's employment did not cause, aggravate or contribute to his injury. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Under the aggravation doctrine, if a work-related injury aggravates, accelerates, or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), *aff'g in part. part Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980).

In *Worthington*, 18 BRBS at 200, the claimant had a 65.62 percent hearing loss in his right ear caused by a birth defect as well as a 15 percent work-related noise-induced hearing loss in his left ear. Citing *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980), the Board noted that, because of the pre-existing loss, *Worthington's* right ear was not able to compensate for the loss caused by exposure to noise. Therefore, it stated that *Worthington's* work-related hearing loss combined with his pre-existing hearing loss to produce a greater loss than that which would have been caused by the work injury alone, and it held that the administrative law judge properly awarded benefits for the entire impairment under the aggravation rule. *Worthington*, 18 BRBS at 201-202; *see also Morgan v. General Dynamics Corp.*, 15 BRBS 107 (1982).

The United States Court of Appeals for the Ninth Circuit also has addressed the issue of the applicability of the aggravation doctrine. In *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT), the Ninth Circuit affirmed the Board's holding that claimant Ronne, whose audiometric evaluation revealed an 8.75 percent impairment, was entitled to benefits for his entire hearing loss despite the fact that the parties did not agree on what portion of it was attributable to presbycusis. The court reasoned that the aggravation rule, to warrant compensation for the full disability, does not require that the work injury interact with the pre-existing condition to cause a worsening of the pre-existing condition or that it combine in more than an additive way. *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 140-141 (CRT). It then concluded that an impaired employee:

suffers a level of disability more severe than would an unimpaired worker sustaining the same injury on the job. [Therefore, it] would undercompensate the impaired worker to limit his or her award to that available to the unimpaired.

¹Employer has not challenged the amount of the fee awarded.

Id., 932 F.2d at 839, 24 BRBS at 141 (CRT). Further, the Ninth Circuit quoted *Nash*, a decision rendered by the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, and noted that the aggravation rule applies "even though the worker did not incur the greater part of his injury with that particular employer." *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 141 (CRT), quoting *Nash*, 782 F.2d at 519 n.10, 18 BRBS at 51 n.10 (CRT).

In light of case precedent, we hold that the administrative law judge erred in failing to apply the aggravation rule, and in not giving claimant the benefit of the Section 20(a) presumption. Under Section 20(a) it is presumed, in the absence of substantial evidence to the contrary, that claimant's harm, *i.e.*, his entire hearing loss, is related to his employment. The Section 20(a) presumption applies to causation issues involving the aggravation rule. *See, e.g., Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Contrary to employer's contention, there is no basis for holding the aggravation rule inapplicable merely because claimant's hearing loss due to noise is not ratable under the *AMA Guides*, as both physicians of record state that there is a noise-induced component to the left ear loss. The aggravation rule does not permit apportionment between work-related and non work-related causes merely because the percentage of impairment attributable to each cause may be ascertained from the record. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982).

As claimant has established a *prima facie* case, the burden shifts to employer to put forth evidence that exposure to noise at work did not aggravate or combine with claimant's pre-existing hearing loss. *See generally Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989). Furthermore, employer has failed to offer any evidence that claimant's work-related hearing loss in his left ear did not aggravate, accelerate, or combine with the hearing loss in his right ear. Although employer asserts that the work-related portion of claimant's hearing loss is unmeasurable, and therefore incapable of aggravating a pre-existing condition, employer has not put forth medical evidence to this effect. As stated by the Ninth Circuit, an actual worsening of the condition is not required; mere combination in an additive way is sufficient. *Port of Portland*, 932 F.2d at 838-839, 24 BRBS at 139-141 (CRT). As the Board noted in *Worthington*, a pre-existing loss in one ear prevents that ear from compensating for damage to the other ear resulting from exposure to noise. The fact that the loss in one ear cannot be measured affects the extent of disability; it is uncontested that a loss exists and there is no evidence in the record that it has no effect on claimant's hearing.

Based on the cited case precedent, we believe that our dissenting colleague misses the mark when she asserts that benefits must be denied because the noise-induced portion of claimant's hearing loss measures zero percent under the *AMA Guides*. This view fails to address the significance of the aggravation rule in establishing causation and confuses concepts relating to disability with causation. There is no evidence that claimant has no work-related, noise-induced hearing loss; the medical evidence consistently found a work-related loss, albeit one that is not measurable at frequencies recognized under the *AMA Guides*. Under the aggravation rule, claimant's work-related loss combined with the pre-existing loss results in disability. This entire disability is compensable. There is no precedent under the Act supporting apportionment between work-related and non work-related causes. It is a long-standing rule that the relative contributions of

a work-related accident and a prior disease are not weighed. *See, e.g., Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), *citing* 1 A. Larson, *Workmen's Compensation Law*, §12.20. Our decision thus rests not on legal fiction but on well-established legal principles regarding the aggravation rule and causation which are consistently applied in cases under the Act. *See Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 140-141 (CRT); *Nash*, 782 F.2d at 517-518, 18 BRBS at 49-50 (CRT).

We also disagree with our dissenting colleague that our decision conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993). The cases cited by our colleague do not address causation or the aggravation rule, as this issue was neither raised nor briefed by the parties in those cases. *See Tanner*, 2 F.3d at 143, 27 BRBS at 113 (CRT); *see also Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27 (CRT)(4th Cir. 1994); *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT)(2d Cir. 1993). The aggravation rule is a rule of compensability in that it applies to a determination of the work-relatedness of claimant's hearing loss, whereas *Tanner* and the other cases provide the method of computation once the work-relatedness of the hearing loss has been determined. Furthermore, Section 8(c)(13)(E), 33 U.S.C. §908(c)(13)(E), providing that determinations of loss of hearing are to be made in accordance with the *AMA Guides*, does not apply to causation issues, nor can it be invoked to prevent the aggravation rule from being applied when properly raised.

In this case, claimant does not have a work-related monaural hearing loss. He has a work-related loss in his left ear which results in no measurable impairment and a pre-existing, non work-related measurable loss in the right ear. The loss in both ears combined results in the compensable loss in this case. By contrast, in *Tanner*, claimant's wholly work-related loss was measurable in one ear and zero percent in the other ear, and could, in theory, be compensated based either on a monaural or a binaural calculation; on those facts, the Fifth Circuit held that claimant is to be compensated for a monaural impairment under Section 8(c)(13)(A). *Tanner*, 2 F.3d at 146, 27 BRBS at 115 (CRT). Since, however, claimant's hearing loss in this case is compensable based on the aggravation rule and due only to a combined loss in both ears, *Tanner* does not apply.² On

²Contrary to the opinion of our dissenting colleague, the fact that claimant's work-related hearing loss in his left ear is not measurable under the *AMA Guides* does not mean that he has no loss of hearing at all. The opinions of both doctors of record are that claimant has a noise-induced hearing loss in his left ear albeit at frequencies not measurable under the *AMA Guides*. Dr. McClelland stated the audiometric configuration of claimant's left ear is consistent with noise-induced hearing loss. Cl. Ex. 1. Dr. Lamppin stated the audiogram demonstrates a nerve type loss in the left ear, and is the type of curve one could see from noise. Emp. Ex. 6. Claimant thus has a work-related hearing loss injury. In computing the disability due to that loss, work-related and non work-related causes are not apportioned and claimant is entitled to compensation for his combined loss. We thus cannot accept the dissent's theory which mixes concepts of work-related injury and the measure of disability.

appeal, moreover, claimant asserts his right to benefits for a binaural hearing loss. *See Nash*, 782 F.2d at 519, 18 BRBS at 51 (CRT).

In summary, employer has failed to disprove aggravation or combination and thus the Section 20(a) presumption is not rebutted. The presumption therefore controls and we hold, as a matter of law, that claimant's hearing loss is work-related. *Obert*, 23 BRBS at 160. Therefore, we vacate the administrative law judge's denial of disability benefits, and we remand the case for him to determine the extent of claimant's disability.

In its cross-appeal, employer contends the administrative law judge erred in holding it liable for medical benefits. Contrary to employer's argument, the Fifth Circuit has held that Congress did not intend to bar medical benefits from claimants who have work-related hearing losses but no ratable impairments. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993); *see also Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), *affirmed and vacated on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, No. 94-40066 (5th Cir. Jan. 12, 1995). Accordingly, because claimant has a work-related hearing loss in his left ear, and because the doctors prescribed future medical treatment for this loss, we reject employer's argument and affirm the administrative law judge's award of medical benefits. *See generally Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT).

Additionally, we reject employer's argument that it is not liable for an attorney's fee for work performed before the administrative law judge. Our affirmance of the award of medical benefits clearly establishes that claimant's counsel successfully prosecuted this case and is entitled to a fee. *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *Biggs*, 27 BRBS at 241; *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987). As employer has not challenged the amount of the fee awarded, we affirm the award.

Accordingly, the administrative law judge's denial of disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, his decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

Although I concur in my colleagues' decision to affirm the award of medical benefits and an attorney's fee, I respectfully dissent from their decision to vacate the denial of benefits and to remand the case to the administrative law judge for a determination of the extent of claimant's disability. Instead, I would affirm the administrative law judge's decision *in toto*, as claimant has not established the existence of a compensable disability.

To obtain benefits under the Act, a claimant must establish that he sustained a compensable work-related disability. *See* 33 U.S.C. §§902(2), (10), 908(c)(13) (1988). Failure to demonstrate such a disability precludes an award of disability benefits. *See generally Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). In the instant case, claimant concedes that the measurable hearing loss in his right ear is not work-related. Additionally, claimant does not dispute that the record supports the administrative law judge's findings that in his left ear claimant has a zero percent hearing loss under the American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA Guides)*, *i.e.*, his hearing in his left ear is within the normal range (*AMA Guides*, 3d ed., Ch. 9 at 2), although it may have been affected by noise.³ Cl. Ex. 1, report of Dr. K.D. McClelland. I believe the issue before the Board to be whether a claimant, who has sustained no disability as a result of a work-related ear injury, can receive compensation under the Act. The statute is very clear.⁴

³Dr. Douglas V. Lamppin's report reflects: "In the left ear there is the type of curve that one can see from noise. At this time there is no calculated percentage impairment." Cl. Ex. 6 at 4.

⁴The statute provides in pertinent part:

Compensation for disability shall be paid to the employee as follows:

* * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66^{2/3} per centum of the average weekly wages, . . . and shall be paid to the employee, as follows:

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two hundred weeks.

* * *

Claimant can receive no compensation without proof of disability resulting from a work-related injury. 33 U.S.C. §902(2), (10). In this case claimant must prove he has sustained a measurable, work-related hearing loss. 33 U.S.C. §908(c)(13).

In the majority's view, however, the issue before the Board is whether claimant is entitled to compensation under the Longshore Act on the theory that there can be an aggravation of a pre-existing hearing loss when claimant has no measurable, work-related impairment. Indeed, contrary to my colleagues' repeated insistence that the medical evidence establishes a work-related hearing loss, there is, in fact no evidence of any work-related hearing loss; the only evidence is that there is no measurable impairment although a curve in the audiometric examination *may* reflect the effect of noise. My colleagues accept claimant's arguments and agree that the administrative law judge erred in finding rebuttal of the Section 20(a) presumption and in summarily rejecting application of the aggravation rule. They conclude, as a matter of law, that claimant has suffered a compensable, work-related hearing loss. This is legal fiction, contrary to the Act.⁵ I find claimant's arguments unpersuasive and conclude that he is not entitled to an award of benefits because the Act does not authorize such an award in the absence of a disability resulting from a work-related injury. 33 U.S.C. §902(2), (10). This is a *workers'* compensation act paid by employers.

The majority's judgment directly conflicts with *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993), a decision of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises. In *Tanner*, the court reversed the Board's holding that the monaural hearing impairments should be converted to binaural hearing percentages because that is the way hearing loss should be measured according to the *AMA Guides*, and the Act declares that hearing loss should be determined in accordance with the *AMA Guides*. 33 U.S.C. §908(c)(13)(E). (It is noteworthy that the *Guides* reflect the same rationale as the aggravation rule, that is, that because hearing loss in one ear affects overall hearing capacity, it is best measured binaurally). The Fifth Circuit reversed the Board, holding that because the statute specifically provides that "compensation under subsection (A) is for `loss of hearing *in one ear*' while subsection (B) is for `loss of hearing *in both ears*' 33 U.S.C. §908(c)(13)(A) and (B)," *Tanner*, 2 F.3d at 146, 27 BRBS at 115 (CRT)(emphasis in court's opinion), "it was clearly the intent of Congress that [a]

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated . . . by the American Medical Association.

33 U.S.C. §908(c)(13).

⁵The majority states "The fact that the loss cannot be measured affects the extent of disability." Decision and Order at 4. There is here zero percent disability. Since there is no disability, there can be no award under this Act. *See* 33 U.S.C. §908(c)(13). Again, I must point out, the alleged work-induced hearing loss is a finding made by the majority, not by the doctors or the administrative law judge below.

monaural impairment should be compensated according to the specific language of subsection (A)." *Id.* The court explained that under subsection (13)(E), the *Guides* should be used to determine the amount of the hearing loss and then "subsection (A) should be used to determine how this loss should be compensated." *Id.* Applying the court's instructions to the case at bar, the evidence is that claimant has a zero percent impairment in one ear and either a 61.9 or a 67.5 percent impairment in the other. Therefore he has a monaural impairment, which is not work-related and thus, not compensable. Given the Fifth Circuit's statutory analysis, it is clear that the majority errs in holding that claimant has a compensable binaural hearing loss.

The Fifth Circuit fortified its decision with discussion of the Fourth Circuit's decision in *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 955 F.2d 41 (4th Cir. 1992) (unpublished) (*accord Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27 (CRT) (4th Cir 1994)) and the Second Circuit's decision in *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT) (2d Cir. 1993), holding that a monaural impairment must be compensated in accordance with the specific language of Section 8(c)(13)(A). The court held it cannot be converted into a binaural award for purposes of compensation, and further, that the amount of hearing loss should be determined in accordance with the *Guides* as provided in subsection (13)(E). It is then clear from these decisions that there can be no award for a zero percent impairment. Furthermore, where there is a monaural impairment, only a monaural award is authorized if the disability is work-related.

I disagree with my colleagues' reliance on *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986), to support their conclusion that a work-related impairment of zero percent can aggravate a pre-existing injury. The facts of *Worthington* are clearly distinguishable from the case at bar. In that case, the claimant sustained a measurable hearing loss in *both* ears (a 15 percent work-related loss and a 65.62 percent non work-related loss), thereby entitling him to an award for a binaural impairment. *Worthington*, 18 BRBS at 201-202. Application of the aggravation rule, therefore, resulted in an award which properly compensated the claimant for his work-related impairment as well as for the impact the work-related impairment had on his pre-existing disability. *Id.*

The majority's holding that the aggravation rule applies in the case at bar and that claimant is entitled to compensation for a binaural hearing impairment defies both logic and the law. The majority and claimant do not dispute the administrative law judge's findings that claimant has no measurable impairment in his left ear and that the impairment in his right ear is not work-related; therefore, claimant has not shown that his prior condition has been aggravated or affected by his work-related condition. Because zero, combined with anything, cannot increase it, it cannot combine in the "additive way" which the Ninth Circuit held in *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), justified application of the aggravation rule.⁶

⁶The issue in *Portland of Portland* was whether claimant was entitled to compensation for the full amount of his hearing loss when his work-related hearing loss combined with his age-related hearing loss. The court held that because the impairments combined "in an additive way" employer was liable for the overall impairment. 932 F.2d at 839, 24 BRBS at 141 (CRT).

For this reason the majority's reliance on *Port of Portland* is entirely misplaced. Thus, there can be no aggravation created by the combination of a zero percent impairment with a measurable impairment.

I am puzzled by the majority's argument that the *Tanner* decision does not apply to the case at bar:

In this case, claimant does not have a work-related monaural hearing loss. He has a work-related loss in his left ear which results in no measurable impairment and a pre-existing, non work-related measurable loss in the right ear. The loss in both ears results in the compensable loss in this case. By contrast, in *Tanner*, claimant's wholly work-related loss was measurable in one ear and zero percent in the other ear, and could, in theory, be compensated based either on a monaural or a binaural calculation; on those facts, the Fifth Circuit held that claimant is to be compensated for a monaural impairment under Section 8(13)(A). [cite omitted]. Since, however, claimant's hearing loss in this case is compensable based on the aggravation rule and due only to a combined loss in both ears, *Tanner* does not apply.

Decision and Order at 5-6.

I am surprised by the majority's clear implication that *Tanner* cannot apply to the instant case because its application would result in a denial of benefits to claimant. My response is best expressed in the words of Justice Scalia, writing for the Supreme Court in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S.Ct. 1278, 1288, 29 BRBS 87, 93 (CRT)(1995): "That is not a form of reasoning we are familiar with." Apparently the majority believe that claimant should be compensated for the *possible* injury he sustained, although it has long been recognized that "it is not the injury for which an employee is compensated but the disability therefrom." *United States Fidelity & Guaranty Co. v. O'Keeffe*, 240 F. Supp. 813 (S.D. Fla. 1962). The Act plainly authorizes compensation only for "loss of hearing," as measured by the *Guides*. 33 U.S.C. §908(c)(13)(E). Since claimant has suffered zero percent work-related hearing loss, he is entitled to zero compensation.

I am also surprised by the majority's suggestion that the *Tanner* court's determination that a monaural hearing loss must be compensated as a monaural impairment pursuant to Section 8(13)(A) is insignificant because the three claimants in that case would have been awarded compensation whether the court had affirmed or reversed the Board's determination that claimants were entitled to binaural awards. The majority seeks to evade the force of the court's decision by refusing to address its rationale, based upon straightforward statutory construction.

The Fifth Circuit in *Tanner*, like the Fourth Circuit in *Baker* and the Second Circuit in *Rasmussen*, declared that the explicit language of the Act reveals that a measurable, impairment in one ear with no measurable impairment in the other ear could be compensated *only* as a monaural impairment. The Second Circuit succinctly summarized its holding in *Rasmussen* as follows: "If a

claimant has a monaural impairment rating under the AMA Guides of 0 percent in the better ear, she has a `loss of hearing' within the meaning of §8(c)(13) in only one ear and is to be compensated accordingly under §8(c)(13)(A)." 993 F.2d at 1017, 27 BRBS at 23 (CRT). The majority's opinion is devoid of the discussion of statutory construction which is at the heart of the decisions of the Fifth, Fourth and Second Circuits. Moreover, in applying the aggravation rule to convert a monaural impairment into a binaural impairment, the majority is effectively doing what the Board did previously in applying the *Guides*, for which the Board was reversed by all of the circuit courts which have considered the issue.

The majority's judgment has put the administrative law judge in a quandary. It requires that employer pay claimant, who has a zero percent work-related hearing impairment, compensation for a binaural impairment, resulting in payment exclusively for non work-related injuries. If, on remand, the administrative law judge denies benefits, he will thereby defy the Board's authority; if he complies with the majority's decision and issues a binaural award, he will thereby defy the clear mandate of the Fifth Circuit in *Tanner*, as well as contravene the Act. 33 U.S.C. §908(c)(13)(A), (E). *See Tanner*, 2 F.3d at 146, 28 BRBS at 115 (CRT); *see also Baker*, 24 F.3d at 634, 28 BRBS at 29-30 (CRT); *Rasmussen*, 993 F.2d at 1017, 27 BRBS at 22 (CRT). Hence, I would affirm the administrative law judge's denial of disability benefits, as claimant has not shown that he suffers from a compensable disability.

REGINA C. McGRANERY
Administrative Appeals Judge