8.13 HEARING LOSS

8.13.1 Section 8(c)(13) Introduction and General Concepts

Section 8(c)(13), as amended in 1984, and its accompanying regulations, provide definitive guidelines for analyzing hearing loss claims. Under this section, a claimant may receive compensation for up to 52 weeks for a loss of hearing in one ear or up to 200 weeks for a loss of hearing in both ears.

Under the LHWCA as amended, and the implementing regulations, an audiogram provides presumptive evidence of the extent of a claimant's hearing loss if the following conditions are met:

> (1) The audiogram was administered by a licensed or certified audiologist, or by a Board-Certified otolaryngologist or by a technician under the supervision of an audiologist or physician;
>
> (2) The employee was provided with a copy of the audiogram and the accompanying report within thirty (30) days from the time that the audiogram was administered;
>
> (3) No one has provided a contrary audiogram of equal probative value within thirty days of the subject audiogram where a claimant continues to be exposed to excessive noise levels or within 6 months if such exposure ceases;
>
> (4) The audiometer used must be calibrated according to current American National Standard Specifications; and
>
> (5) The extent of a claimant's hearing loss must be measured according to the most currently revised edition of the American Medical Association's (AMA) Guides to the Evaluation of Permanent Impairment.

20 C.F.R. § 702.441(b)(1)-(3) & (d).

In Garner v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 345 (1990), the Board held that where the claimant had a hearing loss in one ear only, and the LHWCA explicitly provides for benefits for a monaural hearing loss, the judge properly awarded benefits pursuant to Section 8(c)(13)(A). See also Bullock v. Ingalls Shipbuilding, Inc., 28 BRBS 102, 103 (1994); Tanner v. Ingalls Shipbuilding, Inc., 2 F.3d 143 (**5th Cir.** 1993).

Upon reconsideration, however, a divided Board reversed this holding pointing out that the American Academy of Otolaryngology Guides for the Evaluation of Hearing Loss indicate that occupational noise-induced hearing handicap is a binaural assessment, and such guides contain the formula that Congress intended to be utilized pursuant to the 1984 Amendments to the LHWCA and incorporating Section 8(c)(13)(E).

Accordingly, where the audiogram reflected only a monaural loss and where the monaural values could be converted to a binaural hearing loss, benefits must be based upon such binaural loss, even though such award would result in the payment of lesser benefits to the claimant. Garner v. Newport News Shipbuilding & Dry Dock Co. (Garner II), 24 BRBS 173, 176 (1991) (en banc) (Decision and Order on Reconsideration), vacating 23 BRBS 345 (1990) (Garner I).

Nevertheless, on appeal, the **Fourth Circuit** accepted the Director's argument that the Board majority had erred by ignoring the formula provided by Section 8(c)(13)(A) for calculating benefits, where there is a rateable hearing loss in only one ear. Thus, a claimant is entitled to an award of benefits for his monaural hearing loss, an award which is greater than the monaural hearing loss after conversion to a binaural loss. Garner v. Newport News Shipbuilding & Dry Dock Co., 955 F.2d 41 (**4th Cir.** 1992) (table decisions without published opinions), reported unofficially at 25 BRBS 122 (CRT) (1992).

In Tanner v. Ingalls Shipbuilding, Inc., 26 BRBS 43, 46 (1992), the **Board declined to follow the Fourth Circuit, stating**:

> Initially, we note that the Board's decisions in Garner I and II are the only published legal precedents on the issue presented herein. By specifically providing that its opinion will not be published the **Fourth Circuit** has explicitly stated that the opinion is **not binding precedent** before that court. The court's decision not to publish its opinion cannot be viewed as inadvertent, moreover, as the court subsequently denied a motion to publish the opinion on March 12, 1992. The Board's Garner II decision thus remains the most comprehensive discussion of the hearing loss issue before us in a published case. (Emphasis added)

In an early decision interpreting a hearing loss claim pending at the time of passage of the 1984 Amendments, the Board held that a hearing loss is an **occupational disease**. Noack v. Zidell Explorations, 17 BRBS 36, 38 (1985). See also Machado v. General Dynamics Corp., 22 BRBS 176, 179 (1989); Cox v. Brady-Hamilton Stevedore Co., 18 BRBS 10 (1985).

[ED. NOTE: *However, although hearing loss is technically classified as an "occupational disease," it is not the type of occupational disease that is commonly contemplated by the LHWCA or jurisprudence and should be treated similarly to traumatic injuries . Examples of what the jurisprudence contemplates as "true" occupational diseases are the asbestos related illnesses. (i.e.,*

mesothelioma, asbestosis.) In distinguishing true occupational diseases from traumatic type injuries, the LHWCA itself references a true occupational disease as "an occupational disease which does not immediately result in a disability or death." See Section 12(a) and 13(b)(1). In Bath Iron Works Corp. v. Director, OWCP, 506 ***U.S.*** *153, 26 BRBS 151 (CRT) (1993), a* ***unanimous Supreme Court*** *followed the* ***First Circuit*** *and held that claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the LHWCA, ["the Schedule" for some traumatic injuries]* ***not*** *Section 8(c)(23) [the occupational disease retiree section]. Noting that hearing loss occurs simultaneously with the exposure to excessive noise, the* ***Court*** *found that hearing loss is* ***not*** *an occupational disease "which does not immediately result in ... disability," and therefore is not to be treated the same as, for example, asbestosis, where it takes years for the symptoms to manifest after the injurious exposure. This concept of a true occupational disease as requiring a gradual, rather than sudden, onset, is in line with most commentators. See, e.g., 1B A. Larson, Workman's Compensation Law § 41.31 (1992). For more on this topic, see Topic 2.2.13 Occupational Diseases: General Concepts.]*

Timeliness of Notice and Filing

Under Section 8(c)(13)(D) of the LHWCA as amended in 1984, the time for filing a notice of a hearing loss, pursuant to Section 12, or a claim for compensation, pursuant to Section 13, does not begin to run until the employee has received an audiogram and its accompanying report indicating a loss of hearing and is aware of the causal connection between his employment and his loss of hearing. See Mauk v. Northwest Marine Iron Works, 25 BRBS 118, 123 (1991) (an oral explanation of the results of an audiogram will not suffice as an accompanying report and claimant's actual physical receipt of the audiogram and accompanying **written** report is required by the LHWCA).

Although the claimant was given a report of an audiogram, the report was in a **sealed envelope** and he had been given instructions to take it directly to a hearing aid clinic. Thus, his **ignorance of the contents** of the audiogram precluded a finding that he had received it within the meaning of the LHWCA, and the provisions of Sections 12(a) and 13(a) of the LHWCA were not applicable until he received a copy of his audiogram and the report six years later. Alabama Dry Dock & Shipbuilding Corp. v. Sowell, 933 F.2d 1561, 24 BRBS 229, 233 (CRT) (**11th Cir.** 1991); Ranks v. Bath Iron Works Corp., 22 BRBS 302, 306 (1989); Grace v. Bath Iron Works Corp., 21 BRBS 244, 247 (1988); Swain v. Bath Iron Works Corp., 18 BRBS 148, 150 (1986).

In Vaughn v. Ingalls Shipbuilding, Inc., 28 BRBS 129, 131 (1994)(*en banc*), the Board held that the receipt of an audiogram by counsel is not constructive receipt by the employee and that, pursuant to Section 8(c)(B)(D), as intended by Congress, the statute of limitations period for filing a claim for hearing loss under the LHWCA commences only upon the physical receipt by the claimant of an audiogram, with its accompanying report, which indicates that the claimant has suffered a loss of hearing. However, in the **Ninth Circuit**, the court has held that the time for filing a notice of hearing loss commenced to run when the claimant's attorney received the audiogram. Jones Stevedoring Co. v. Director, OWCP, 133 F.3d 683 (**9th Cir.** 1997) ("[A] bedrock principle of

the American 'system of representative litigation' is that 'each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.").

[ED. NOTE: *Examining the legislative history of Section 8(c)(13(D) reveals that congress explained that the purposes of requiring the employee to receive the audiogram are to give the person time to file a claim and to allow the person to undertake steps in his/her job situation to prevent further exposure to loud noise. H.R.Rep No. 98-570, Part I, at 9-10 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2742-43. The Committee report indicates a desire that the audiogram report be "in a form which is clearly understandable to the employee," that "technical and medical terms should be explained," and that "employees should be apprised of their rights to seek compensation." The* ***Ninth Circuit*** *has interpreted this to not mean that the employee must be personally notified in order for prescription to run: "While it is true that this language contemplates that the audiogram report must be written for the lay person, it is by no means certain what the reason behind this requirement is–it could be because congress thought that most workers would not have an attorney at this stage and might not decide to hire one until they were told in explicit terms that they have been injured on the job."****]***

A hearing loss resulting from exposure to long-term, cumulative and prolonged loud noises is an occupational disease because it develops gradually, as opposed to the immediate effects of a single traumatic injury, thereby entitling claimant to the extended time limitations provided for occupational diseases in Sections 12 and 13 as amended in 1984. Cox, 18 BRBS 10; Ronne v. Jones Oregon Stevedoring Co., 18 BRBS 165 (1985), rev'd and remanded on other grounds sub nom. Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT) (**9th Cir.** 1991) (the last employer rule enunciated in Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**), cert. denied, 350 **U.S.** 913 (1955), was not disturbed by the 1984 Amendments).

Determining the extent of loss

Prior to the enactment of the 1984 Amendments, it was within the judge's discretion to employ any reasonable method to determine the extent of claimant's hearing loss. See, e.g., Linkous v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 158 (1984), and cases cited therein. In 1984, however, the LHWCA was amended to include Section 8(c)(13)(E), which requires that hearing loss determinations be made in accordance with the AMA Guides. See Reggiannini v. General Dynamics Corp., 17 BRBS 254, 256 (1985); Larson v. Jones Oregon Stevedoring Co., 17 BRBS 205, 208 (1985), overruled in part on other grounds by Good v. Ingalls Shipbuilding, 26 BRBS 159 (1992); Gentille v. Maryland Shipbuilding & Dry Dock Co., 17 BRBS 191, 193 (1985). In Steevens v. Umpqua River Navigation, 35 BRBS 129 (2001) the Board approved the ALJ's averaging the results of the claimant's two most recent audiograms and excluding two earlier audiograms that did not conform to statutory and regulatory requirements.

Appropriate benefits for the hearing loss are payable by the employer during the last maritime employment in which the claimant was exposed to the injurious stimuli, i.e., loud and excessive

noise, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment. Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (**2d. Cir.** 1955), cert. denied, 350 **U.S.** 913 (1955); Ramey v. Stevedoring Services of America, 134 F.3d 954 (**9th Cir.** 1998) (Held: there was sufficient evidence in this hearing lost case to apply last employer rule; claimant's benefits would be based on his average weekly wage as of last day of employment rather than date of first audiogram.). The "awareness" component of the Cardillo standard is in essence identical to the "awareness" requirement in Sections 12 and 13 of the LHWCA.

The Board has consistently held that the **time of awareness** for purposes of the last employer rule must logically be the same as awareness for purposes of the provisions of Sections 12 and 13 of the LHWCA. See, e.g., Grace v. Bath Iron Works Corp., 21 BRBS 244, 247 (1988).

As indicated above, in hearing loss cases, the responsible employer is the employer during the last employment in which the claimant was exposed to injurious stimuli prior to the date the claimant receives an audiogram showing a hearing loss, and has knowledge of the causal connection between his work and his hearing loss. Larson v. Jones Oregon Stevedoring Co., 17 BRBS 205, 208 (1985).

Where a claimant worked for a subsequent maritime employer but testified as to a denial of exposure to injurious noise there, which testimony was uncontradicted by the employer, the Board affirmed the judge's finding that the record lacked evidence of exposure to injurious noise stimuli with the subsequent employer. Lins v. Ingalls Shipbuilding, Inc., 26 BRBS 62 (1992). The employer was found to be responsible for payment of compensation due to the claimant's work-related hearing loss. Thus, the employer was the last maritime employer during the last maritime employment in which there was proof of the claimant's exposure to injurious noise stimuli.

In Avondale Industries v. Director, OWCP, 26 BRBS 111 (CRT) (**5th Cir.** 1992), the **Fifth Circuit** held that the Board correctly determined that the judge did not err in finding that the employer failed to meet its burden of proof concerning injurious exposure with a subsequent maritime employer. Finding that the judge correctly credited the claimant's testimony of personal experience as to the claimant's noise exposure, the **Fifth Circuit** stated that although a physician testified that the claimant may have been exposed to injurious noise at a subsequent employer, this testimony was a theoretical response to a hypothetical question by the employer of dubious accuracy and completeness.

Courts and the Board have consistently followed the Cardillo standard because apportionment of liability between several maritime employers is not permitted by the LHWCA. See, e.g., General Ship Serv. v. Director, OWCP (Barnes), 938 F.2d 960, 25 BRBS 22 (CRT) (**9th Cir.** 1991); Ricker v. Bath Iron Works Corp., 24 BRBS 201 (1991) (the last maritime employer is still responsible for benefits even if the firm is out of business and there may be no insurance coverage under the LHWCA); Brown v. Bath Iron Works Corp., 22 BRBS 384 (1989), aff'd in

pertinent part on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP, 942 F.2d 811, 25 BRBS 30 (CRT) (**1st Cir.** 1991), aff'd, 156 **U.S.** 153, 26 BRBS 151 (CRT) (1993).

The so-called Cardillo rule holds the claimant's last maritime employer liable for all of the compensation due the claimant, even though prior employers of the claimant may have contributed to the claimant's disability. This rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since "all employers will be the last employer a proportionate share of the time." General Ship Serv., 938 F.2d at 962, 25 BRBS at 25 (CRT).

The purpose of the last employer rule is to avoid the complexities of assigning joint liability and it is apparent that Congress intended that the last employer be completely liable because of the difficulties and delays which would inhere in the administration of the LHWCA if attempts were made to apportion liability among several responsible employers. Todd Shipyards v. Black, 717 F.2d 1280, 1285, 16 BRBS 13, 16 (CRT) (**9th Cir.** 1983), cert. denied, 466 **U.S.** 937 (1984). Moreover, the last employer rule is not a valid defense where a subsequent employer not covered by the LHWCA also contributed to the occupational disease. Black, 16 BRBS at 17 (CRT).

The Board affirmed the judge's award of benefits based upon an earlier audiogram which showed a hearing loss, as opposed to a subsequent audiogram showing no hearing loss, since the employer failed to establish that this decision was inherently incredible or patently unreasonable. Norwood v. Ingalls Shipbuilding, Inc., 26 BRBS 66 (1992) (judge credited an earlier audiogram evaluated by an audiologist over a subsequent one evaluated by an audiologist with a Ph.D. in audiology). See Uglesich v. Stevedoring Servs. of America, 24 BRBS 180, 183 (1991).

The Board noted that credibility determinations fall within the purview of the trier-of-fact and that the judge is free to accept or reject all or any part of any medical testimony according to his judgement. Norwood, 26 BRBS 66. See Perini Corp. v. Heyde, 306 F. Supp. 1321 (**D.R.I.** 1969). The Board further noted that the judge is not required to credit the lowest audiogram rating. Norwood, 26 BRBS 66. See Uglesich, 24 BRBS 180.

The Board approved the holding of a judge who found, as more reliable, the 1988 medical evidence because it included an audiogram and the identity of the test administrator, a certified audiologist, who opined that the 1988 test was more complete since it reflected all of claimant's hearing impairment. Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991); Labbe v. Bath Iron Works Corp., 24 BRBS 159 (1991); Brown v. Bath Iron Works Corp., 24 BRBS 89 (1990), aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP (Brown), 942 F.2d 811, 25 BRBS 30 (CRT) (**1st Cir.** 1991), aff'd, 506 **U.S.** 153, 26 BRBS 151 (CRT) (1993), Steevens v. Umpqua River Navigation, 35 BRBS 129 (2001)(ALJ correctly relied on audiograms conducted 23 years after claimant's retirement–ALJ averaged the results).

***[ED. NOTE:** If the audiogram is not performed in compliance with Section 702.441(d) of the regulations, it may be found not to have any determinative weight by the Board. Bridier v. Alabama*

*Dry Dock and Shipbuilding Corp., 29 BRBS 84 (1995). But see, Maersk Stevedoring Co. v. Container Stevedoring Co., 210 F.3d 384 (**9th Cir.** 2000) a **Ninth Circuit** case wherein the court has reversed the Board on the "last employer" issue in a hearing loss claim. The Board (BRB No. 97-1409) had held that it is "perfectly clear" that an "actual causal relationship between the last exposure and the disability need not be established." and that there need not be "medical proof that the last exposure advanced the disability or worsened the condition." [In a strongly worded dissent, Judge McGranery reasoned that when an employer presented uncontradicted medical evidence that exposure did not worsen a claimant's condition, case law holds that such an employer cannot be the "last employer" for purposes of the LHWCA.].*

*In reversing the Board, the **Ninth Circuit** noted that there were four audiograms (first not administered in accordance with AMA guidelines but was only one claimant received prior to working for last maritime employer) and that **all the doctors agreed that the four audiograms were essentially the same**, with the first two conducted by the same physician. The **Ninth Circuit** found that these fasts established the requisite uniformity and predictability of results desired by Section 8(c)(13)(E). According to the court, the three subsequent audiograms, therefore, confirmed that the initial audiogram demonstrated the existence of a hearing loss while the claimant was employed by the second-to- last employer.]*

The employer is liable for the claimant's entire hearing loss where the claimant's exposure to injurious noise levels during his employment with employer combined with his pre-existing hearing loss to cause a greater degree of disability. Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1 (1986); 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). Moreover, although the claimant's work-related hearing loss was confined to the left ear, such loss, having combined with and aggravated his pre-existing right ear loss, constitutes a work-related loss and the employer is responsible for the entire binaural hearing loss. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200 (1986); Morgan v. General Dynamics Corp., 15 BRBS 107, 109 (1982); Primc v. Todd Shipyards Corp., 12 BRBS 190, 193 (1980).

The aggravation rule of compensation liability does not permit a deduction from the employer's liability in hearing loss cases for the effects of presbycusis (hearing loss due to age). Thus, the employer is liable for the claimant's entire hearing loss. Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344, 348 (1989), aff'd in pertinent part and rev'd on other grounds sub nom. Port of Portland v. Director, OWCP, 932 F.2d 836, 24 BRBS 137 (CRT) (**9th Cir.** 1991).

The **date of onset** for payment of the claimant's benefits is the date the evidence of record first demonstrates a permanent hearing loss. Howard v. Ingalls Shipbuilding, Inc., 25 BRBS 192 (1991); Fairley v. Ingalls Shipbuilding, Inc., 25 BRBS 61, 64 (1991) (Decision and Order on Remand).

Where claimants had work-related hearing losses but no impairments under Section 8(c)(13)(E) of the LHWCA, the **Fifth Circuit** found that Congress did not intend to bar medical

benefits. Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker], 991 F.2d 163, 27 BRBS 14 (CRT) (**5th Cir.** 1993). The **Fifth Circuit**, however, found that a worker who had suffered work-related hearing loss which did not qualify as disability, while entitled to medical benefits, could not receive an award for benefits absent evidence of medical expenses incurred in the past or treatment necessary in the future. The court further noted that a worker could file a claim for medical benefits if and when treatment became necessary. The claimants were eligible for reimbursement of any medical expenses incurred for their work-related hearing losses, and their attorneys were eligible for attorney fee awards if medical benefits were awarded.

8.13.2 Specific Issues

Section 8(c)(13) provides for compensation of two-thirds of an employee's average weekly wage for a maximum of 200 weeks in cases of permanent partial disability resulting from hearing loss. 33 U.S.C. § 908(c)(13). By contrast, Section 8(c)(23) provides continuing benefits to voluntary retirees, whose impairments become manifest after retirement, based on the percentage of permanent impairment of the whole person. See 33 U.S.C. § 902(10) (Supp. V 1987). The determination as to whether the retirement was "voluntary" or "involuntary" is based on whether the working conditions caused him to leave the work force, or whether his departure was due to other considerations. Morin v. Bath Iron Works Corp., 28 BRBS 205, 208 (1994).

Section 8(c)(23) was enacted in 1984 to provide relief for those claimants who otherwise would not be entitled to receive any compensation because they had voluntarily retired and because their occupational diseases became manifest after retirement. See Hoey v. Owens-Corning Fiberglass Corp., 23 BRBS 71 (1989). Section 8(c)(23) states that it applies "[n]otwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2)(B)...."

Section 10(d)(2) applies to any claim based on disability due to an occupational disease for which the time of injury, as determined under Section 10(i), 33 U.S.C. § 910(i) (Supp. V 1987), occurs after the employee has retired. Section 10(i) provides a time of injury for the purpose of calculating average weekly wage in cases involving "death or disability due to an occupational disease which does not immediately result in death or disability."

Section 10(i) of the LHWCA provides:

> **For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.**

33 U.S.C. § 910(i).

8.13.3 Section 8(c)(13) Versus Section 8(c)(23)

In Bath Iron Works Corp. v. Director, OWCP, 506 **U.S.** 153, 26 BRBS 151 (CRT) (1993), a **unanimous Supreme Court** followed the **First Circuit** and held that claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the LHWCA, **not** Section 8(c)(23).

Noting that hearing loss occurs simultaneously with the exposure to excessive noise, the **Court** found that hearing loss is **not** an occupational disease "which does not immediately result in ... disability," and therefore is not to be treated the same as, for example, asbestosis, where it takes years for the symptoms to manifest after the injurious exposure. In so holding, the **Supreme Court** has overruled the **Fifth and Eleventh Circuits** on this issue.

8.13.4 Responsible Employer and Injurious Stimuli

The **Ninth Circuit** has held that where it was factually impossible for a claimant's employment to have contributed in any way to his hearing loss, the employer could not be the last liable employer even if the claimant was exposed to industrial noise while working for that employer. Port of Portland v. Director, OWCP, 932 F.2d 836, 841, 24 BRBS 137, 144 (CRT) (**9th Cir.** 1991), aff'g in part and rev'g in part Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344 (1989). In Ronne, the claimant had worked as a winch and crane operator for various employers within the pertinent three-week period. The claimant, on June 19, 1981, was examined by a hearing specialist. An audiogram was performed on June 22, 1981, at which time the claimant was working for Jones Oregon (employer) and had been exposed to harmful noise levels. He went to work for the Port of Portland on June 26, 1981, and continued to be exposed to harmful noise levels. Carrier SAIF insured the Port of Portland until July 1, 1981, at which time it became a self-insurer under the LHWCA. The claimant received, on July 6, 1981, the doctor's report regarding his June 22, 1981 audiogram.

The judge imposed liability on the employer for payment of appropriate benefits as the claimant was last exposed to the injurious stimuli shortly before the June 22, 1981 audiogram. The Board reversed and imposed liability on the Port of Portland in its self-insured capacity as there is no requirement of a showing of an actual medical causal relationship between a claimant's exposure to the injurious stimuli and his occupational disease, a ruling which has been consistently maintained by the Board. See, e.g., Grace v. Bath Iron Works Corp., 21 BRBS 244 (1988); Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988), aff'd in pertinent part and rev'd on other grounds sub nom. Lustig v. U.S. Dep't of Labor, 881 F.2d 593, 22 BRBS 159 (CRT) (**9th Cir.** 1989).

In Ronne, the judge imposed liability on the employer in reliance upon Cordero v. Triple A Machine Shop, 580 F.2d 1331 (**9th Cir.** 1978), cert. denied, 440 **U.S.** 911 (1979). That court, in

interpreting Cardillo, 225 F.2d 137, held that the rule in successive injury cases places liability on the employer at risk "at the time of the most recent injury bearing a causal relation to the claimant's disability." Cordero, 580 F.2d at 1337.

According to the Board, under Cardillo the critical element in determining liability is the employee's exposure to the injurious stimuli; the Board noted that Cardillo and Cordero are not inconsistent in determining the responsible employer. Ronne was appealed, however, and the **Ninth Circuit** reversed the Board, holding that it was "factually impossible for Ronne's employment with Port of Portland, which began four days after the audiogram was administered, to have contributed in any way to Ronne's hearing loss." Port of Portland, 932 F.2d at 840, 24 BRBS at 143 (CRT).

The **Ninth Circuit** "agree(d) with the Board that Cordero does not require a demonstrated medical causal relationship between a claimant's exposure and his occupational disease. But Cordero does require that liability rest on the employer covering the risk at the time of the most recent injurious exposure **related** to the disability." Id. at 840, 24 BRBS at 143.

The court also "agree[d] with the Director that liability in this case must fall on Jones Oregon, the last employer who, by injurious exposure, could have contributed causally to Ronne's disability.... The fact that Ronne may have experienced subsequent exposure to industrial noise while working for Port of Portland is irrelevant because no part of the claim is based on any such exposure." Port of Portland, 932 F.2d at 840, 24 BRBS at 143 (CRT).

The **Ninth Circuit**, finding no support for the Board's conclusion, "reject[ed] the Board's view that the same date of 'awareness' must govern for purposes of fixing employer liability and for purposes of starting the running of limitations. See 33 U.S.C. §§ 908, 912-13 (1990)." Port of Portland, 932 F.2d at 841, 24 BRBS at 144 (CRT).

The Board followed Port of Portland in Mauk v. Northwest Marine Iron Works, 25 BRBS 118 (1991), a case arising within the jurisdiction of the **Ninth Circuit**. The Board pointed out that "(t)he instant case illustrates the different outcomes under the analysis previously used by the Board and that mandated by the court's decision in Port of Portland." Mauk, 25 BRBS at 124-25. See also Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203, 208 (1991) (the Board affirmed the judge's conclusion that claimant's May 1980 audiogram, rather than a subsequent audiogram, best reflected the loss of hearing caused by claimant's employment with the responsible employer).

Maersk Stevedoring Co. v. Container Stevedoring Co., 210 F.3d 384 (**9th Cir.** 2000) (Unpublished), is another **Ninth Circuit** case wherein the court has reversed the Board on the "last employer" issue in a hearing loss claim. The Board (BRB No. 97-1409) had held that it is "perfectly clear" that an "actual causal relationship between the last exposure and the disability need not be established." and that there need not be "medical proof that the last exposure advanced the disability or worsened the condition." [In a strongly worded dissent, Judge McGranery reasoned that when an employer presented uncontradicted medical evidence that exposure did not worsen a claimant's

condition, case law holds that such an employer cannot be the "last employer" for purposes of the LHWCA.].

In reversing the Board, the **Ninth Circuit** noted that there were four audiograms (first not administered in accordance with AMA guidelines but was only one claimant received prior to working for last maritime employer) and that **all the doctors agreed that the four audiograms were essentially the same**, with the first two conducted by the same physician. The **Ninth Circuit** found that these fasts established the requisite uniformity and predictability of results desired by Section 8(c)(13)(E). According to the court, the three subsequent audiograms, therefore, confirmed that the initial audiogram demonstrated the existence of a hearing loss while the claimant was employed by the second-to last maritime employer. Thus, the **Ninth Circuit** found that "The unique facts of this case, however, show that the purpose of Section 908(c)(13)(E) was effectuated."

It is an employer's burden to affirmatively establish that it did not expose a claimant to potentially injurious stimuli. Everson v. Stevedoring Services of America, 33 BRB 149) (1999)(Claimant testified that he worked for employer 90% of his time during his last 15 years of employment and "although claimant could not testify specifically that he was employed by employer when he last worked aboard a ship that used a steam winch (source of loud noise), it is employer's burden..."). Also, where employer sought to argue on appeal that another carrier was responsible, the Board observed that the ALJ "rationally found that since the claimant was alleging many years of exposure to injurious noise levels, [employer and the named carrier] should have been aware that an insurer other than the named carrier provided longshore coverage during some of those years..."

OSHA Regulations

In Damiano v. Global Terminal & Container Service, 32 BRBS 261) (1998), the Board upheld the ALJ's finding that **compliance with OSHA noise exposure standards constitutes relevant, but not determinative, evidence of the presence or absence of injurious stimuli in workplaces** which fall under the LHWCA. Further, the Board noted approvingly the ALJ's comment that the pertinent OSHA regulation, 29 C.F.R. § 1910.95, counsels against regarding the eight-hour time-weight average (TWA) exposure to 90 dBA (air-weight decibels) criterion as determinative of factual inquiries which fall outside of the OSHA context. In particular, the ALJ found that while the regulation notes that 90 dBA is permissible exposure for an eight-hour day, it nonetheless requires employers to adopt an effective hearing conservation program whenever it appears that any employee may be exposed to an eight-hour TWA of 85 dBA or more. 20 C.F.R. § 1910.95(c). The Board noted approvingly that , from this experience, the ALJ inferred that the 90 dBA is an outer limit, and as such, lower exposures are also cause for concern.

Further, the Board agreed with the ALJ that a finding that the OSHA standards are dispositive on the issue of causation of hearing loss would not be reconcilable with the purposes of the LHWCA, since such a conclusion would preclude any compensation for occupational hearing loss so long as the standards are met, even in cases where the claimant has overwhelming medical

evidence in his favor. Also, the ALJ noted that Section 1910.95 does not define "injurious stimuli" and thus the employer's noise exposure surveys cannot demonstrate the absence of a work-related injury. Moreover, the Board agreed that this evidence is insufficient to establish that the claimant was not exposed to loud noise at any time during his employment; rather, all it establishes is that during the time reflected in the studies, the levels of noise in the various places claimant worked did not exceed that allowed by OSHA.

8.13.5 Sections 8(c)(13) and 8(f)(1)

Section 8(f)(1) of the LHWCA provides, in part:

> **(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of Section 8(c)(1) - (20), the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13), the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of 8(c)(1) - (20), the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury or for one hundred and four weeks, whichever is the greater, <u>except that, in the case of an injury falling within the provisions of section 8(c)(13), the employer shall provide compensation for the lesser of such periods</u>.**

33 U.S.C. § 908(f)(1) (emphasis added).

An analysis of hearing loss claims as affected by Section 8(f)(1), as added by the 1984 Amendments, begins with the Board's decision in Primc v. Todd Shipyards Corp., 12 BRBS 190 (1980). In Primc, the Board affirmed the denial of Section 8(f) relief since compensation was to be paid for less than one hundred and four weeks.

The language of Section 8(f) of the LHWCA, as amended in 1972, provided that where an existing scheduled disability combines with a subsequent scheduled disability to result in a greater scheduled disability, the employer's liability will be for the full amount of the scheduled award for which the employer is responsible or one hundred and four weeks, **whichever is greater**. The Board rejected the employer's argument that the "judge's interpretation would deny Section 8(f) coverage to almost any scheduled disability which results from the combination of a work-related injury and an existing disability to the scheduled member, because most scheduled disabilities are compensated for less than one hundred and four weeks." Primc, 12 BRBS at 195.

According to the Board's analysis of the 1972 LHWCA:

> The first sentence of Section 8(f)(1) states a general proposition, but the application of that proposition is limited to the four specific sentences which follow. Because claimant's subsequent injury is a scheduled one and his greater disability is permanent and partial, the only specific sentence which impacts on this case is the third, quoted above. The crucial language in that sentence is "[T]he employer shall provide compensation for the applicable period of weeks provided for in that [scheduled] section for the subsequent injury, or for one hundred and four weeks, **whichever is the greater**." (Emphasis added) Employer's argument would require us to ignore this language, especially the emphasized language, and base a holding in its favor on the broad first sentence. This we cannot do. The third sentence clearly delineates employer's liability, where the subsequent injury is a scheduled one, as the full amount of the scheduled award for which employer is responsible or one hundred and four weeks, whichever is the greater. Here one hundred and four weeks is the greater. We agree with employer and the administrative law judge that employer's argument demonstrates a gap in the statutory scheme in which languish cases where existing scheduled disabilities combine with subsequent scheduled injuries to result in greater scheduled disability. However, the statute is clear, and we must interpret it as written, including the gap. Employer's argument is better addressed to the Congress.

Primc, 12 BRBS at 195.

The employers and carriers took their argument to Congress, and Congress, *inter alia*, in the 1984 Amendments, deleted the word "**greater**" from Section 8(f)(1) and substituted therefor the word "**lesser.**" At the present time, the employer's obligation is to provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, **except that, in the case of an injury falling within the provisions of Section 8(c)(13), the employer shall provide compensation for the lesser of such periods**. (Emphasis added) See also Epps v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 1, 3 n.2 (1986) (under the 1984 Amendments, employer is only liable for its contribution to the hearing loss, and the Special Fund is liable for the remainder, **even if** the total award is less than 104 weeks).

Primc and Epps are noteworthy in that those employees began their maritime employment with clearly documented pre-employment hearing losses.

In an early decision interpreting the change effected by Congress, the Board remanded to the judge a hearing loss claim because "the Act, as amended, distinguishes hearing loss cases from other scheduled claims and limits employer's Section 8(f) liability to the **lesser** of 104 weeks or the extent of hearing loss attributable to the employment." Reggiannini v. General Dynamics Corp., 17 BRBS 254, 257 (1985). Compare Strachan Shipping Co. v. Nash, 751 F.2d 1460, 17 BRBS 29 (CRT) (**5th Cir.** 1985), reh'g granted, en banc, 760 F.2d 569, aff'd, on reh'g en banc, 782 F.2d 513, 18 BRBS 45 (CRT) (**5th Cir.** 1986) (court agreed with Board that the second injury fund incurred no liability to employer and held that for situations in which Section 8(c), except 8(c)(13), provides for compensation for less than 104 weeks in second injury cases, the shorter period controls over the 104 weeks, a result which Section 8(f) demands by its plain language).

[ED. NOTE: *Nash involved an interpretation of Section 8(f)(1) as contained in the 1972 LHWCA.**]***

In Risch v. General Dynamics Corp., 22 BRBS 251 (1989), the claimant had no hearing loss at the time of hiring by the employer but an audiogram, done after 26 years of work-related exposure to loud noises, indicated a permanent binaural hearing loss. The Board affirmed the award of Section 8(f) relief and rejected the Director's argument that hearing loss cases should be distinguished from those involving other disabilities. The Board pointed out that a pre-employment audiogram is not required by Section 8(f) or by the legislative history of the amended version of Section 8(f).

In Risch, the employer retained the claimant for an additional sixteen years after the audiogram and after subsequent audiograms showed a worsening of the claimant's hearing loss. The Board agreed with the judge and the employer "that there is no rational distinction between **employing** a handicapped individual and **retaining** an employee who develops a handicap." C & P Tel. Co. v. Director, OWCP, 564 F.2d 503, 6 BRBS 399 (**D.C. Cir.** 1977), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (**9th Cir.** 1983); Alston v. United Brands Co., 5 BRBS 600 (1977) (emphasis added).

Thus, as the employer had actual knowledge of the claimant's work-related hearing loss and **retained** the claimant as a valued employee for sixteen years thereafter, the employer was eligible for Section 8(f) relief as the employment audiogram showed a permanent hearing loss which constituted a pre-existing permanent partial disability within Section 8(f)(1). Risch, 22 BRBS at 255-56. Accord McShane v. General Dynamics Corp., 22 BRBS 427 (1989) (in hearing loss cases, the 1984 LHWCA limits an employer's Section 8(f) liability to the lesser of 104 weeks or the extent of hearing loss **attributable to the work injury**).

Section 8(f) relief was granted in Balzer v. General Dynamics Corp., 22 BRBS 447 (1989), on recon. en banc, 23 BRBS 241 (1990), because a pre-employment audiogram reflected a 25.9 percent binaural hearing loss and subsequent employment audiograms showed a worsening of the claimant's hearing loss.

In Fucci v. General Dynamics Corp., 23 BRBS 161, 165 (1990), the Board reversed the award of Section 8(f) relief as the claimant's pre-employment audiogram reflected no binaural hearing loss. The Board remanded the claim, however, because such relief could be based upon subsequent audiograms taken during the course of the claimant's maritime employment.

In Brady v. J. Young & Co., 17 BRBS 47 (1985), the Board affirmed the ALJ's conclusion that an approved settlement, pursuant to Section 8(i), did not affect the employer's procedural capacity to obtain Section 8(f) relief. That agreement, however, is binding only between the claimant and the employer and not upon the Special Fund unless the Director participates in the settlement process. Id. at 54 n.2.

Section 8(i)(4) of the LHWCA, precluding Special Fund liability after a Section 8(i) settlement between the claimant and the employer, was added to the LHWCA by the 1984 Amendments and the Board has held that the provision will not be applied retroactively and will apply only to agreements entered into after the effective date of such provision, or September 28, 1984. Brady, 17 BRBS at 52.

The **absolute defense** provision of Section 8(f)(3) must be affirmatively raised by the Director's counsel before the judge. Emery v. Bath Iron Works Corp., 24 BRBS 238, 242 (1991); Marko v. Morris Boney Co., 23 BRBS 353, 359 (1990); Scott v. S.E.L. Maduro, Inc., 22 BRBS 259, 261 (1989).

[ED. NOTE:** An argument can be made that hearing loss cases have been treated differently by Congress in Section 8(c)(13) because the word "**lesser**" in Section 8(f)(1) applies only to hearing loss cases and the word "**greater**" applies to all other disabilities where the employer must pay at least 104 weeks of permanent benefits. If the former premise is granted, an argument can be made that the employer is responsible for hearing loss caused by the maritime employment, up to 104 weeks, **in the absence of a pre-employment audiogram showing a permanent hearing loss.]

Virtually overlooked in all of the analyses of hearing loss claims are the provisions of 20 C.F.R. § 702.441(c), which states:

> **In determining the amount of pre-employment hearing loss, an audiogram must be submitted which was performed prior to employment or within thirty (30) days of the date of the first employment-related noise exposure. Audiograms performed after December 27, 1984 must comply with the standards described in paragraph (b) of this section.**

In Skelton v. Bath Iron Works Corp., 27 BRBS 28 (1993), the Board held that where the claimant suffered a 2.8 percent binaural loss as indicated by a 1978 audiogram, and a 28.1 percent loss as indicated by a 1984 audiogram, the 2.8 percent loss constituted a manifest permanent partial disability aggravated by subsequent exposure to noise in the workplace. Accordingly, the Special Fund was liable for 2.8 percent of the claimant's pre-existing hearing loss and employer for 25.3 percent.

8.13.6 Duplicate Claims and Section 8(f)

The Board has consistently held that in cases of second injuries to the same part of the claimant's body, the credit for prior compensation paid should be for the dollar amount paid rather than for the percentage of disability previously paid. Brown v. Bethlehem Steel Corp., 19 BRBS 200 (1987), aff'd in pertinent part and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (**5th Cir.** 1989). The Board has reasoned that this approach will not reduce the claimant's total benefits and will result in all employees with a particular percentage of disability receiving the same amount of compensation regardless of what they have been paid in the past.

Thus, the claimant is entitled to compensation for the full hearing loss he has as of the date of the second filing, based upon the average weekly wage as of the date of such filing, and the employer is entitled only to a dollar credit for the compensation already paid to him for his previous hearing loss, and not for the particular percentage paid (i.e., percent binaural hearing loss).

Another important issue is whether the employer or the Special Fund is entitled to take the credit first. That issue was first resolved, at least within the jurisdiction of the **Fifth Circuit**, in Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT), wherein that court enunciated **"the fund-first rule"** and held that whenever a credit for previous compensation paid is available to offset the amount due the employee, that credit shall first reduce the total award before there is any allocation of liabilities under Sections 8(f)(1) and 8(f)(2).

The **Fifth Circuit** adopted "the fund-first rule," espoused by the Director, because (1) it is consistent with the express language of Section 8(f)(1), which clearly contemplates that, at the very least, the employer will compensate the employee for the entire second injury, and (2) the rule fits

more closely with the Congressional purpose in enacting Section 8(f). Bethlehem Steel, 22 BRBS at 50 (CRT); see also Blanchette v. O.W.C.P., 27 BRBS 58 (CRT) (1993).

The employer usually seeks access to the credit first, under the so-called **employer-first rule**, pursuant to the holding of the **Second Circuit** in Director, OWCP v. General Dynamics Corp. (Krotsis), 900 F.2d 506, 23 BRBS 40 (CRT) (**2d Cir.** 1990). But see Blanchette v. OWCP, 27 BRBS 58 (CRT) (1993) (Krotsis did not apply since neither claimant had a pre-employment hearing loss and therefore, there was no possibility that was not work-related).

***[ED. NOTE:** For a comparison of Krotsis and Blanchette, see infra, this subsection.]*

In Krotsis, the employer paid the claimant over $16,000, pursuant to a disapproved 1980 settlement for a hearing loss claim. The **Second Circuit** held that the Board properly found that the employer's 1980 payment was a payment in advance of an award for the claimant's second hearing loss claim. The court noted that if the employer's 1980 voluntary payment was credited not against its current liability of almost $5,400, but against the Special Fund's liability, the result effectively would be that the prior payment would be a "gift" or "windfall" to the Fund, which result would be unreasonable and unjustified. Accordingly, the **Second Circuit** affirmed the holding that the 1980 payment should be credited towards the employer's present liability for the 1983 claim and that the Special Fund was to reimburse the employer for any overpayment.

Krotsis does not, however, completely settle the credit issue because the Board thereafter had the opportunity to reconsider this issue in Balzer v. General Dynamics Corp., 23 BRBS 241 (1990) (Decision and Order on Motion for Reconsideration) (en banc) (Balzer II). The principal decision is reported at 22 BRBS 447 (1989) (Balzer I).

In Balzer I, the employee had filed a hearing loss claim in 1979 and the employer paid $15,000.00 in "settlement" of the claim. The record, however, contained no evidence indicating that the 1979 payment was a formal settlement under Section 8(i) of the LHWCA. The employee then filed a "second" claim for his increased hearing loss. As the 1979 claim remained open at the time of the hearing on the 1984 claim and as the "claims" were for the same injury, however, the Board held (1) that the judge properly treated the two applications as one claim, (2) that the employer was entitled to a $15,000.00 credit for its voluntary advance payment of compensation, and (3) that the employer remained liable for the remaining money due the employee, pursuant to Sections 8(c)(13)(B) and (E), subject to Section 8(f) relief.

As the employer overpaid its liability to the employee, due to the operation of Section 8(f), however, the Board also held that the Special Fund was liable for both the remaining benefits due the employee and the reimbursement to the employer of its overpayments to the employee. Balzer, 22 BRBS at 450-52.

The Director timely moved for reconsideration of the Board's adoption of the "employer-first rule" in view of the decision of the **Fifth Circuit** in Bethlehem Steel, 868 F.2d 759, 22 BRBS 47

(CRT), wherein on the issue as to who is first entitled to the credit, the **Fifth Circuit** adopted the **"fund-first rule."**

In Balzer II, the Board distinguished Brown by holding as follows:

> Contrary to Director's argument, the allocation of liability in our initial Decision and Order is consistent with the controlling statute and the reasoning in Brown. In Brown, claimant was injured on two occasions, and had been voluntarily paid compensation by employer for the first injury. The United States Court of Appeals for the **Fifth Circuit** found that the Special Fund should get credit for the voluntary payment of compensation made by the employer in order to insure that the employer fully compensate the employee for his second injury. Brown, supra, 868 F.2d at 762. The Court further found that this "fund-first" approach was consistent with the congressional purpose of Section 8(f) of the Act, 33 U.S.C. § 908(f) (Supp. V 1987), as it encourages employers to hire handicapped workers without causing employers to prefer disabled workers over able-bodied workers." Brown, supra, 868 F.2d at 763.
>
> In the instant case, however, there is only one claim for compensation for a 40.78 percent hearing loss, and the evidence of record established that claimant suffered 25.9 percent of this loss prior to his employment with employer. Pursuant to the operation of Section 8(f), the Special Fund was found to be liable for compensation for this pre-employment loss, while employer was held liable for compensation for the remaining 14.88 percent of claimant's hearing loss. Employer, however, made a voluntary advance payment of compensation to claimant in excess of the amount for which it was subsequently found to be liable. Unlike Brown, allowing employer a credit in this case does not result in employer's not being held liable for the full extent of the hearing loss due to claimant's employment with it. Employer in this case has fully compensated claimant for his second injury and is thus entitled to reimbursement for its overpayment from the Special Fund. See Balzer, 22 BRBS at 452; Phillips v. Marine Concrete Structures Inc., 21 BRBS 233, 239 (1988), aff'd, 877 F.2d 1231, 22 BRBS 23 (CRT) (**5th Cir.** 1989), vacated on other grounds, 895 F.2d 1033 (**5th Cir.** 1990) (en banc).
>
> If Brown is applied to the instant case, however, the Special Fund would receive credit for employer's advance payment of compensation. In order for claimant to be fully compensated for his hearing loss, employer would be forced to compensate claimant for

> portions of his disability that existed prior to the time that he came to work for employer. This is patently unfair and contrary to Section 8(f).

Balzer II, 23 BRBS at 242-43.

Although the results in Brown and Krotsis are different, relative to applying the credit for the employers' earlier payments of compensation benefits, the underlying rationale for each case is the same, and the principle to be drawn from Brown and Krotsis is that neither the employer nor the Special Fund is to obtain a "windfall" when both the Credit Doctrine and Section 8(f) apply. See also Blanchette v. OWCP, 27 BRBS 58 (CRT) (**2d Cir.** 1993)

In Brown, where hearing loss was not involved, if the employer received credit for its prior payment, it would have received a "windfall" since it would not have been liable for the full amount of disability attributable to the second injury, as required by Section 8(f)(1).

In Krotsis, which did involve a hearing loss, the **Second Circuit** pointed out that if the Special Fund received credit for the advance payment made by the employer, it would not have to pay the full amount it was required to pay under Section 8(f) and thus would receive a "windfall" to the detriment of the employer.

As is indicated above, Krotsis and Balzer involve one hearing loss claim and apparently the Board initially found that point to be most important and used it to distinguish Balzer II from the **Fifth Circuit's** decision in Brown, a claim which involved two orthopedic injuries, two claims for benefits, a prior payment for the first injury and competing claims by the employer and the Director, as custodian of the Special Fund, that each be allowed to take the credit first for the prior payment.

It is well to keep in mind that the 1984 Amendments to the LHWCA mandate that the employer pay to the claimant benefits for his second injury, cognizable under Section 8(c)(13)(B), for the applicable period of weeks provided for in that subsection for the subsequent injury, or for one hundred and four weeks, **whichever is the lesser**. See 33 U.S.C. 908(f)(1).

In Blanchette, the **Second Circuit** held that the Director's interpretation (that credit for previous payments of a work-related hearing loss by the employer should be applied first to the liability of the Special Fund) was reasonable as it was consistent with the express language of Section 8(f) and with an approach to the Special Fund discussed by the House Committee on Education and Labor. The **Second Circuit** specifically found that Krotsis was not controlling. In Blanchette, the judge had not merged the separate hearing loss claims, nor did the Director press for merger. The **Second Circuit** indicated that had that issue been properly presented it would probably have approved merger of the claims on the basis tat without an approved settlement pursuant to Section 8(i), the initial hearing loss claims were still open.

The Second Circuit noted that despite the conclusion in Krotsis that the initial payment was voluntary and made outside of the scope of the LHWCA, Section 8(f) was nonetheless applicable because in Krotsis the claimant had some hearing loss before he began working for the longshore employer, and therefore he had a partial disability prior to the injury on which he based his claim against the longshore employer. Accordingly his permanent partial disability was "not ... due solely to "the injury inflicted by the excessive noise at his workplace, and was "materially and substantially greater" as a result of the preexisting disability. Section 8(f)(1).

The **Second Circuit** in Blanchette, 27 BRBS at 68 (CRT), noted that, by contrast, if the successive claims submitted by the claimants in Blanchette **had been deemed to have been merged into single claims**, following Krotsis, no basis would have existed for the application of Section 8(f)(1) because neither claimant had a hearing loss prior to the injury on which each merged claim would have been based. Specifically, their permanent partial disabilities would have been "due solely" to their workplace exposure, precluding application of Section 8(f)(1). Thus the longshore employer in Blanchette would have been solely responsible for the merged, single claim in each instance, and Section 8(f)(1) being inapplicable, the Special Fund would have had no liability under Section 8(2)(A). The longshore employer would have been entitled to a credit for its prior payments to the claimants.

The claims, however, came to the Blanchette court in the posture of second injury claims and had to be dealt with accordingly. See, e.g., Strachan Shipping Co., 782 F.2d at 520 n.12 (reviewing court is not called upon to examine which construction of the credit doctrine furthers the aims of the LHWCA where party that would benefit from determination did not file cross-petition); Bath Iron Works Corp. v. White, 584 F.2d 569, 573 n.2 (**1st Cir.** 1978) (claimant who failed to file cross-petition precluded from attacking Board's decision in attempt to enlarge claimant's rights thereunder).

The **Second Circuit**, in Blanchette, compared the factual situation of Blanchette with what had transpired in Krotsis and found that Blanchette was analogous to Director, OWCP v. Bethlehem Steel Corp. ("Brown"), 868 F.2d 759 (**5th Cir.** 1989), in which the **Fifth Circuit** credited a prior payment by an employer to the Special Fund's liability. Blanchette at 69 (CRT):

> In Krotsis, however, [the employer] prevailed before the Board in having a prior payment applied in reduction of its liability for a subsequent claim by the same employee for an aggravated hearing loss "as a voluntary payment of compensation in advance of an award, pursuant to § 914(j)." 900 F.2d at 511 (quoting Board decision in Krotsis). On those facts, we viewed "the primary issue on appeal not [as] whether the Board properly applied the credit doctrine, but [rather as] whether it properly found that [the employer's] [initial] payment...was a payment of compensation in advance of an award for Krotsis [second] claim." Id. In affirming the Board's ruling, we stated that there was a "crucial distinction" between Krotsis and Director, OWCP v. Bethlehem Steel Corp. ("Brown"), 868 F.2d 759

> (**5th Cir.** 1989), in which the **Fifth Circuit** credited a prior payment by an employer to the Special Fund's liability. Krotsis, 900 F.2d at 511. The distinction was that Brown did not have a pre-employment disability, and the previous payments made by Bethlehem Steel had accordingly been "compensation for entirely work-related injuries." Id. In Krotsis, by contrast, the claimant's total hearing loss was 63.33 %, of which 56.9 % (for which the Special Fund was liable occurred prior to his employment by [the longshore employer], and only 6.4 % was employment-related. See id. at 507-8.

27 BRBS at 69 (CRT).

The Board has again visited this credit issue in Davis v. General Dynamics Corp., 25 BRBS 221 (1991) and the apparent distinguishing point between Brown and Krotsis became somewhat blurred.

In Davis, the claimant and the employer formally settled, pursuant to Section 8(i), a hearing loss claim for $7,500 in 1983. The claimant had a 60 percent hearing loss when he began work for the employer in 1952. The claimant filed a second hearing loss claim in 1988, based on a 1988 audiogram showing a 94.8 percent hearing loss. The Director conceded liability for an 88.4 percent loss represented by a 1981 audiogram; this loss became the "first injury" for purposes of Section 8(f) relief. The employer was liable for a 6.4 percent hearing loss, which was the "second injury" for purposes of Section 8(f). The sole issue was allocation of the credit of $7,500.

In Davis, the Director argued that whenever a credit for previous compensation paid is available to reduce the amount due to an employee, the credit should first be applied to the Special Fund's liability once liability is allocated. A second method, first applying the credit against a claimant's total recovery and then allocating liability between the employer and the Special Fund, yields the same result. See Director, OWCP v. Bethlehem Steel Corp. (Brown), 868 F.2d 759, 762 n.3, 22 BRBS 47, 50 n.3 (CRT) (**5th Cir.** 1989).

In Davis, the Board noted the "crucial distinction" found by the court in Krotsis between Brown, where there was no pre-employment disability, and Krotsis, where employer had overpaid its liability in view of its entitlement to Section 8(f) relief based on a pre-employment hearing loss. The Board held in Davis that the case was controlled by Brown rather than Krotsis because a portion of the hearing loss which represented the claimant's "first injury" for purposes of Section 8(f) relief was related to his work for employer, and allocation of the credit to employer would result in its escaping liability for the "second injury." The Board therefore ruled that the Special Fund was entitled to the credit for the compensation the employer had previously paid to the claimant in settlement of the first claim as "the facts are more similar to Brown than to Krotsis." Davis, 25 BRBS at 225-27.

It is also well to keep in mind that Section 8(i)(4) might impact upon these double claims and the entitlement to the credit for the prior payment.

The Board has already considered this issue in a very early case decided after the effective date of the 1984 Amendments. The Board held that Section 8(i)(4) (precluding post-settlement Section 8(f) relief) does not retroactively apply in cases pending on appeal before the Board and, by logical inference, before the Office of Administrative Law Judges. The Board held that this new provision should apply only to settlements entered into after the enactment date of the Amendments. Brady v. J. Young & Co., 17 BRBS 47 (1985), recon. denied, 18 BRBS 167. Moreover, the Board stated that the effective dates of the provisions, within subsection 28(e) of the 1984 Amendments to the LHWCA, Pub. L. No. 98-426, 98 Stat. 1639, Sept. 28, 1984, "should be determined in light of relevant policy considerations and the general rule of retroactivity of Bradley v. School Board of City of Richmond, 416 **U.S.** 696 (1974)." Brady, 18 BRBS at 170 n.5.

8.13.7 Hearing Loss/Monaural Versus Binaural

The **Second**, **Fourth** and **Fifth Circuits** have all ruled contra to the Board by decreeing that claimants are entitled to be compensated for loss of hearing in one ear as set forth in the LHWCA provision regarding calculation for compensation of monaural impairment where there was zero impairment in one ear and measurable impairment in the other.

The **Fourth Circuit** agreed with the Director's argument that the Board majority, in converting a monaural loss into a binaural loss, had erred by ignoring the formula found at Section 8(c)(13)(A) for calculating benefits where there is a rateable hearing loss in only one ear. Thus, the court reversed the Board's decision that found the claimant entitled to an award under Section 8(c)(13)(B), which provision converted the claimant's monaural hearing loss into a binaural percentage and a lesser award. Garner v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 122 (CRT) (**4th Cir.** 1992)((Unpublished), rev'g Garner v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 173 (1991) (en banc), vacating on recon. 23 BRBS 345 (1990).

The Fourth Circuit found that the interpretation of the Board runs afoul of the basic principal that a statute must not be interpreted to render a portion of the statute meaningless. It was the Fourth Circuit's opinion that the Board had effectively read subsection (A) out of the statute because neither the legislative history nor the statute provided any basis for the view that subsection (A) was limited to cases in which hearing loss was caused by traumatic injury. In Addition, the Fourth Circuit noted it could find no logical reason for compensating monaural hearing losses differently depending on their cause.

The **Fourth Circuit** went on to state that it could find "no irreconcilable conflict between the statute'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 Guides." 25 BRBS at 125 (CRT). The **Fourth Circuit** viewed the Guides as providing the

method employed under the LHWCA for measuring hearing loss, while the statute provides a formula for determining how the loss will be compensated. Id.

In Tanner v. Ingalls Shipbuilding, Inc., 26 BRBS 43, 46 (1992), subsequently overruled, Tanner v. Ingalls Shipbuilding, Inc., 2 F.3d 143, 27 BRBS 113 (**5th Cir.** 1993), the Board declined to follow the **Fourth Circuit** stating:

> Initially, we note that the Board's decisions in Garner I and II are the only published legal precedents on the issue presented herein. By specifically providing that its opinion will not be published, the **Fourth Circuit** has explicitly stated that the opinion is not binding precedent before that court. The court's decision not to publish its opinion cannot be viewed as inadvertent moreover, as the court subsequently denied a motion to publish the opinion on March 12, 1992. The Board's Garner II decision thus remains the most comprehensive discussion of the hearing loss issue before us in a published case.
>
> However, in Rasmussen v. General Dynamics Corp., [993 F.2d 1014] 27 BRBS 17 (CRT) (**2d Cir.** 1992), however, the **Second Circuit** reversed the Board's holding that noise-induced hearing loss must be converted to binaural loss and then compensated under Section 8(c)(13)(B). The **Second Circuit** held that Congress did not intend for the LHWCA to compensate noise-induced hearing loss only on a binaural basis and that where a claimant has a monaural impairment rating under the AMA Guides of 0 percent in the better ear, the claimant has a "loss of hearing," pursuant to Section 8(c)(13), in only one ear and is to be compensated under Section 8(c)(13)(A). 27 BRBS at 23 (CRT).

8.13.8 Hearing Loss and Proving Disability at Last Exposure

In Bruce v. Bath Iron Works Corp., 25 BRBS 157, 159 (1991), the Board affirmed the denial of benefits to a claimant whose maritime employment ended in 1953, where the record contained no evidence reflecting the extent of his hearing loss in 1953 and the judge concluded that he could not project the 1968 audiogram results back to 1953 to find that the claimant sustained a compensable hearing loss by 1953. Compare Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991) (a 1988 audiogram can be used to establish claimant's hearing loss in 1971, at which time he left maritime employment but continued to work at a non-maritime site owned by the same employer); Labbe v. Bath Iron Works Corp., 24 BRBS 159 (1991) (a 1986 audiogram can be used to establish claimant's hearing loss in 1979, at which time his maritime employment ended but continued to work at a non-maritime site owned by the same employer). For more on rebutting the Section 20(a) presumption see Topic 8.13.13.

8.13.9 Hearing Loss and Commencement of Benefits

In Howard v. Ingalls Shipbuilding, Inc., 25 BRBS 192 (1991), (Decision and Order on Reconsideration), the Director argued that the benefits for the claimant, a voluntary retiree seeking hearing loss benefits pursuant to Section 8(c)(23), should commence in 1981, at which time he retired. The Board rejected this argument and held that such benefits begin with the development of the first medical evidence sufficient to establish a permanent binaural hearing loss, i.e., in November 1986.

The Board has held that interest accrues from the date benefits become due under Section 14(b), and accrues on all benefits due and unpaid from that date until they are paid. Wilkerson v. Ingalls Shipbuilding, Inc., 125 F.3d 904 (**5th Cir.** 1997) (interest due 14 days following the notice to employer); Renfroe v. Ingalls Shipbuilding, Inc., 30 BRBS 101 (1996) (en banc); Meardry v. Int'l Paper Co., 30 BRBS 160 (1996) (That interest should be calculated according to a rate determined under 28 U.S.C. §1961).

8.13.10 Hearing Loss and Section 14(e)

In Benn v. Ingalls Shipbuilding, Inc., 25 BRBS 37 (1991), the Board noted:

> [T]he purposes of Section 14(e) are to encourage the prompt payment of benefits, Kocienda v. General Dynamics Corp., 21 BRBS 320 (1988), and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the attention of the Department of Labor. Cox v. Army Times Publishing Co., 19 BRBS 195, 198 (1987). For these reasons, we reject employer's contention that Section 14(e) is inapplicable in the instant case because claimant is not being compensated for a loss of wage-earning capacity but for his scheduled hearing loss. See Ingalls Shipbuilding, Inc., 898 F.2d at 1095, 23 BRBS at 68 (CRT).

Benn, 25 BRBS at 39. Thus, employer's **knowledge** of the injury, and not its **receipt** of the claim from the District Director, triggers its duty to pay the claim or controvert the claimant's entitlement to benefits. Id.; Wilkerson v. Ingalls Shipbuilding, Inc., 125 F.3d 904 (**5th Cir.** 1997) (interest due 14 days following the notice to employer); Renfroe v. Ingalls Shipbuilding, Inc., 30 BRBS 101 (1996) (en banc) (interest accrues on all benefits due and unpaid from the date that they become due under Section 14(b) until they are paid); Meardry v. Int'l Paper Co., 30 BRBS 160 (1996) (interest should be calculated according to a rate determined under 28 U.S.C. § 1961).

In Craig v. Avondale Industries, Inc., ___ BRBS ___, (BRB No. 00-0569) (Oct. 5, 2001) (*en banc*), on reconsideration, the Board held that an initial claim form, standing alone without attached hearing evaluations, triggered the 30-day time period following notice of the claim from the district director in which the employer is required to pay benefits or decline to pay in order to avoid fee

liability under Section 28(a). The Board reasoned that these claim forms specifically evince an intent to seek benefits for a work-related hearing loss and there is no evidence of any intent by Congress to treat hearing loss claims differently with respect to the information necessary for the claimant to file a "valid" claim or the applicability of the attorney's fee provisions of Section 28 of the LHWCA.

The Board has held that the filing of a notice of termination or suspension of benefits (Form LS-208) with the District Director, which notice provides the information required by Section 14(d), is the functional equivalent of a notice of controversion (Form LS-207) for purposes of avoiding a Section 14(e) penalty. White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 79 (1985). The Board has held, however, that the employer's filing of the Form LS-202 (the required form used by an employer to report the injury or death of an employee) is not the functional equivalent of the LS-207 because the LS-202 did not contain all of the relevant information required by Section 14(d) in order for the employer to avoid liability. Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245, 249 (1991), on recon. en banc, 25 BRBS 346 (1992).

Moreover, under Section 14(b), the first installment of compensation is due 14 days after the employer has knowledge of the injury on which date all compensation **then due** shall be paid. If the employer does not controvert the claim in a timely manner, all compensation due 28 days after the employer gains knowledge of such injury is subject to the Section 14(e) penalty. Snowden, 25 BRBS at 252; Browder v. Dillingham Ship Repair, 25 BRBS 88 (1991), aff'g on recon. 24 BRBS 216 (1991).

8.13.11 Multiple Hearing Loss Claims and Date of Injury

In Spear v. General Dynamics Corp., 25 BRBS 254 (1991), the claimant, who was aware of a work-related hearing loss in 1980 and who filed a claim in that year which was never adjudicated, continued working until May 1986, at which time he was laid off. The claimant's hearing was tested in August 1986 and the audiogram revealed a worsening of his hearing loss; he then filed claims in 1987 and 1988 for the hearing loss due to exposure to loud noises. The three claims merged into one claim, pursuant to Krotsis v. General Dynamics Corp., 22 BRBS 128 (1989), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 23 BRBS 40 (CRT) (**2d Cir.** 1990) (where a claim is filed and not adjudicated, it remains open until an order issues, and since the claims were for the same injury, i.e., hearing loss due to noise exposure, the pending claims merge into one claim for which one award is payable).

Although the claimant in Spear knew he had a work-related hearing loss in 1980, he was not aware of the full extent of his hearing loss until his hearing was re-tested in August 1986, at which time his doctor advised that his hearing had deteriorated. The cumulative effects of the continued noise exposure between 1980 and May 1986 constituted a new injury as such continued exposure aggravated and exacerbated the claimant's hearing loss as of 1980. Under the LHWCA, an aggravation is treated as a new injury, Lopez v. Southern Stevedores, 23 BRBS 295, 297-98 (1990), and the time limitations in Sections 12 and 13 do not begin to run until a claimant is aware of the full extent, character, and impact of the new harm that has occurred. Abel v. Director, OWCP, 932 F.2d

819, 24 BRBS 130 (CRT) (**9th Cir.** 1991); Bath Iron Works Corp. v. Galen, 605 F.2d 583, 10 BRBS 863 (**1st Cir.** 1979).

Noting Larson v. Jones Oregon Stevedoring Co., 17 BRBS 205 (1985), overruled in part by Good v. Ingalls Shipbuilding, Inc., 26 BRBS 159 (1992) (the date of a claimant's awareness is the same for purposes of Sections 12 and 13 and the determination of the responsible employer and carrier), the Board reasoned that it followed that a claimant must have a new date of awareness after the new injury occurred and that the last carrier on the risk during which period the claimant was exposed to the injurious stimuli **prior** to this date, is the responsible carrier. Thus, in Spear, the benefits awarded were payable by the carrier on the risk in May 1986, and not in 1980, as the claimant had sustained a new injury in 1986. Spear, 25 BRBS at 258-59. See also Good v. Ingalls Shipbuilding, Inc., 26 BRBS 159 (1992).

In Mowl v. Ingalls Shipbuilding, Inc., 32 BRBS 51 (1998), the Board reaches the same result as in Spear; however, in Mowl the claimant neglected to file a claim following the first injury. An audiogram was performed at that time and it showed a 32% binaural impairment of the claimant's hearing. The claimant could not recall having been informed of the report, but her signature is on a release form as having been given a copy of the report. During the period between the first audiogram in 1988 and the second one in 1994, the claimant remained employed by Ingalls. In 1994, six years after the first injury, a second set of audiograms was done. This indicated that the claimant's impairment rating had risen to 40%. The Board found that the aggravation rule was properly utilized to allow the claimant to recover for **both** injuries, or stated differently, she could recover for the entire impairment even though the first such injury was otherwise time barred.

In Roberts v. Alabama Dry Dock and Shipbuilding Corporation, 30 BRBS 229 (1997), there was a single employer who was self insured at the time of the first audiogram. The first audiogram was performed while the employer was self-insured and the second while the employer was insured by Travelers. The first showed a 3% hearing loss while the second recorded a .6% loss, an improvement of 2.4%. The Board held that if there are two audiograms, separated by a period of time, and the second audiogram does not show an increase over the second. The employer at the time of the first audiogram which shows a hearing loss, is the employer that is liable. Thus, the Board held that the liability fell upon the employer while self-insured, as this was the employer at the onset of the hearing loss. 30 BRBS at 234.

In Benjamin v. Container Stevedoring Co., 34 BRBS 189 (2001) there were two claims involving hearing loss injuries. Citing Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (**2d Cir.** 1955), cert denied, 350 **U.S.** 913 (1955), the Board found that the ALJ acted properly in treating them as one injury and not two. On that basis, the Board found that the responsible employer was the employer during the last employment where the claimant was exposed to injurious stimuli.

8.13.12 Hearing Loss and Average Weekly Wage

The average weekly wage of an employee who was still working as of his date of awareness of the relationship between his hearing loss and his maritime employment is determined as of the date of his injury. See, e.g., Grace v. Bath Iron Works Corp., 21 BRBS 244, 247 (1988). The national average weekly wage as of the date of injury was used, however, to award compensation to a so-called voluntary retiree under the LHWCA. See, e.g., Fairley v. Ingalls Shipbuilding, 25 BRBS 61, 62 (1991) (Decision and Order on Remand).

For a voluntary retiree, however, benefits are awarded based upon the average weekly wage as of the date of last exposure to the injurious stimuli, i.e., usually at about the date of retirement, and not as of the date of awareness of the existence of the hearing loss, as the employee's deafness is usually perfected **before** retirement because after retirement a worker's noise-induced deafness will not ordinarily grow worse. If anything, such loss of hearing should even improve as the worker is removed from further exposure to the injurious stimuli, according to the **First Circuit**. Bath Iron Works Corp. v. Director, OWCP, 942 F.2d 811, 25 BRBS 30 (CRT) (**1st Cir.** 1991), aff'g on other grounds 22 BRBS 384 (1989), aff'd, 506 **U.S.** 153, 26 BRBS 151 (CRT) (1993).

In Ramey v. Stevedoring Services of America, 134 F.3d 954 (**9th Cir.** 1998), 31 BRBS 206(CRT) , the **Ninth Circuit** endorsed the Board's 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.

[ED. NOTE: Query: What happens when both claimant and spouse are dead? *Any accrued benefits owed to the claimant are payable to his estate pursuant to 33 U.S.C. §908(d) as the employee has a vested interest in benefits which accrue during his lifetime, regardless of when they were awarded. Wood v. Ingalls Shipbuilding, Inc., 28 BRBS 27, 35 (1994), modified in part on recon., 28 BRBS 156, 158 (1994); Clemon v. ADDSCO Industries, 28 BRBS 104, 112 (1994). See generally Alabama Dry Dock & Shipbuilding Corp. V. Director, OWCP, 804 F.2d 1558, 19 BRBS 61 (CRT) (**11th Cir.** 1986); Turner v. Christian Heurich Brewing Co., 169 F. 2d 681 (**D.C. Cir.** 1948); Wilson v. Vecco Concrete Construction Co., 16 BRBS 22 (1983). It should be noted that **if the claimant dies without any statutory survivors his unpaid scheduled benefits will be paid into the Special Fund** according to Section 8(d)(3). Unscheduled benefits will still go to the estate of the claimant. See generally Topic 8.5, supra.]*

8.13.13 Rebutting the Section 20(A) Presumption in Hearing Loss Cases

In Davison v. Bender Shipbuilding & Repair Co., Inc., 30 BRBS 45 (1996), the employer was successfully able to rebut the 20(a) presumption even though there where two reports by audiologists establishing that the injury was work related. The employer was able to introduce evidence from a otolaryngologist that proved the hearing loss resulted from a fall that occurred in jail. The fall had caused a skull fracture, not the noise of the work performed, caused the hearing loss. The judge gave the otolaryngologist more credit as he had performed an audiogram at the time of the fall that established the hearing loss had occurred prior to the maritime employment. 30 BRBS at 47.

In Coffy v. Marine Terminals Corp., 34 BRBS 85 (2000) (ALJ accepted medical view that claimant's hearing loss was not caused by noise and was not work related.), the Board would not upset the ALJ's acceptance of one medical opinion over another where the ALJ explained why she gave more weight to one opinion than the other.