

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOHN F. DELANE,)
)
Employee,) FINAL DECISION AND ORDER
Claimant,)
) AWCB Case No. 201714295
v.)
) AWCB Decision No. 24-0028
CHUGACH ELECTRIC COMPANY,)
) Filed with AWCB Anchorage, Alaska
Self-insured Employer,) on May 20, 2024
Defendants.)
)

John F. Delane's (Employee) June 27, 2022 claim was heard on April 24, 2024, in Anchorage, Alaska, a date selected on January 4, 2024. A November 30, 2023 hearing request gave rise to this hearing. Attorney Andrew Wilson appeared and represented Employee, who appeared and testified. Attorney Michael Budzinski appeared and represented self-insured Chugach Electric Company (Employer). Witnesses included Lynette Delane and Andrew Berman, MD, for Employee, and Leon Zeitzer, MD, for Employer. The record remained open for additional attorney fee and cost evidence and argument, and closed on May 3, 2024.

ISSUES

Employee contends his bilateral hearing loss arose out of and in the course of his employment with Employer. He contends his 25 years at work around loud tools, equipment, machinery and various motor vehicles caused his progressive hearing loss.

Employer contends Employee's hearing loss is common and age-related. It contends his work for Employer was not the substantial cause of his hearing loss.

1) Did Employee's hearing loss arise out of and in the course of his employment?

Because he contends his hearing loss is work-related, Employee also contends Employer is liable to him for life-long medical care and related travel costs for his hearing loss treatment.

Employer contends Employee's hearing loss is not work-related. Therefore, Employer contends it is not liable for any hearing loss treatments or travel expenses.

2) Is Employer liable for Employee's hearing loss treatment costs?

Employee contends Employer must pay permanent partial impairment (PPI) benefits for his hearing loss.

Employer contends it is not responsible for PPI benefits because it is not responsible for Employee's hearing loss.

3) Is Employer liable for Employee's PPI benefits?

Employee contends he is entitled to a late-notice penalty because Employer failed to file an injury report with the Workers' Compensation Division (Division) timely.

Employer did not address this issue in its brief or arguments at hearing. This panel presumes Employer opposes liability for a late-notice penalty.

4) Is Employer liable for a late-notice penalty?

Employee contends he is entitled to interest on benefits due and owing.

Employer contends Employee is not entitled to interest as there are no benefits due and owing.

5) Is Employer liable for interest?

Employee claims an attorney fee and cost award on all benefits this decision awards.

Employer contends Employee is entitled to no benefits. Therefore, it contends this decision should deny his request for attorney fees and costs.

6) Is Employer liable for Employee's attorney fees and costs?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) On July 2, 1982, Employer first hired Employee through his union as an apprentice lineman. That temporary assignment ended on December 29, 1982. Employee also worked for Employer in 1990, 1991 and 1992, although these periods do not appear on his work history from Employer, and exact dates are unknown. (Deposition of John Delane, February 22, 2023; Exhibit 1).
- 2) On July 16, 1990, Employee had a hearing test from Advanced Hearing Technologies, Inc., on referral from Employer. His "Pure Tone Audiogram" was within normal limits. There are no other audiograms in Employee's file until 2004. (Audiogram, July 16, 1990; agency file).
- 3) Employer re-hired Employee on February 24, 1993; that assignment ended on March 9, 1993. On March 29, 1993, Employer re-hired him again; he quit on August 23, 1993. On August 26, 1993, Employee returned to work for Employer and continued until February 25, 1994, when that dispatch ended. On May 24, 1994, Employer re-hired Employee who continued to work until November 21, 1994, when Employer changed his classification from a "temporary" to a "regular" employee. (Deposition of John Delane, February 22, 2023; Exhibit 1).
- 4) On February 27, 2004, Beacon Occupational Health & Safety Services, Inc. (Beacon) in conjunction with Employer's "Hearing Conservation Program" did a "Baseline" audiogram. Thereafter, these audiograms were "required annually." The report stated, "No change or minimal change from Baseline/Last Recordable Baseline noted on Annual [indecipherable]." According to this report, Employee had "mild loss of hearing" in both ears. The report clarified that since "this test was [Employee's] baseline test there was no comparison made to a previous test." It also stated, "Note: Hearing Protection is strongly recommended for persons exposed to increased noise levels." The report also suggested, "Always wear the appropriate hearing protection when exposed to excessive noise. This will help protect against any future loss of

hearing. If you have any questions regarding this matter please speak to your supervisor.” Both Employee and the examiner signed this report. (Beacon audiogram report, February 27, 2004).

5) On February 21, 2005, Beacon performed another audiogram on Employee. This report showed “mild loss in hearing” in his left ear but “normal hearing” in his right ear. It also noted he had a “STANDARD THRESHOLD SHIFT” (STS) which occurs “when there is a change in hearing, when comparing the current test to the baseline, that is greater than 10 dB in frequencies of 2000 hertz (Hz), 3000 Hz and 4000 Hz. The examiner reported, “Your hearing test indicates a possible medical problem. If you have not already seen a hearing specialist regarding this matter, it is recommended that you do so.” This report reiterated the prior recommendation that Employee wear appropriate hearing protection when exposed to excessive noise, to protect against future hearing loss. (Beacon audiogram report, February 21, 2005).

6) On February 23, 2005, Kenni Simons, Employer’s Environmental Assistant, sent Employee a memo regarding the February 21, 2005 audiogram. It stated that given the results, the Occupational Safety & Health Administration (OSHA) required further evaluation. Accordingly, Simons said he would schedule Employee for a clinical evaluation within an ear, nose and throat (ENT) specialist. An audiologist would perform another audiogram and check how Employee’s ear protection fit; Employee would take the results from the audiogram appointment to the ENT who would “review [his] history,” “conduct an examination,” and determine “what steps need to be taken to prevent further hearing loss.” Simons scheduled an audiogram appointment with Anchorage Audiology, and an appointment with Geneva Woods Ear, Nose & Throat Associates for the ENT examination. (Simons memo, February 23, 2005).

7) A February 1, 2006 audiogram with Beacon disclosed bilateral mild hearing loss but “no significant change” since Employee’s “baseline test.” The report repeated the prior recommendations and warnings. (Beacon audiogram report, February 1, 2006).

8) On January 29, 2007, Beacon performed an audiogram and issued a report similar to the February 1, 2006 report. (Beacon audiogram report, January 29, 2007).

9) By January 14, 2009, Beacon’s audiogram showed “moderate hearing loss” in Employee’s left ear, which “occurs when the average level in hearing is greater than 40 dB in either ear. The report stated this was a “baseline test” and there was “no comparison made to a previous test.” It included the recommendation and warning from the previous audiograms. (Beacon audiogram report, January 14, 2009).

10) By March 31, 2009, Beacon using a new reporting format, reported results from an audiogram that included “age corrected” results. The interpretation was “Abnormal,” and showed “mild hearing loss” in both ears. It stated, “extended exposure to loud noises may make this loss worse.” The provider compared this test to a baseline audiogram from July 16, 1990: “Using age correction, a[n] [STS] exists. Shift lateralizes to the left (left: 14 dB). If confirmed, consider revising the [STS] baseline.” The report further stated:

OSHA Hearing Conservation Requirements:

The employee must be notified of this [STS]. If determined to be work related, this event must be recorded on your OSHA-300 LOG. If a recheck, performed within the allowed 30 days, does not confirm this shift the entry should be “lined out” (SYSTOC will mark the record invalid). Please schedule a recheck audiogram before 02/20/2010. (Beacon audiogram report, March 31, 2009).

11) Employee’s agency file does not have a follow-up report within 30 days. (Agency file).

12) On March 4, 2010, Beacon’s age-corrected audiogram analysis was “abnormal,” with “mild hearing loss” in both years, “greatest at high frequencies.” It again warned, “extended exposure to loud noises may make this loss worse.” The provider compared this test to the baseline 1990 test for the right ear and the February 21, 2005 test for the left ear. With age-correction, an STS existed. “Shift lateralizes to the right (right: 18 dB).” The provider gave Employer the warning regarding the “OSHA-300 LOG” requirement. Employee was to have a recheck audiogram before March 6, 2011. (Beacon audiogram report, March 4, 2010).

13) On March 4, 2011, Beacon provided an “annual” report for a “14-hr Retest.” Age-corrected results showed “mild hearing loss” in both ears “greatest at high frequencies.” The provider compared this test to the 1990 test for the right ear and the February 21, 2005 test for the left. The test showed an STS lateralizing to the right 11 DB. It stated, “this exam has been redesignated as the current [STS] baseline. This was a “recheck for exam dated 02/04/2011.” The report no longer contained the above-quoted OSHA language from the March 31, 2009 report. (Beacon report, March 4, 2011).

14) On January 26, 2012, Employee told Beacon in an “Annual” report that in the last 14 hours he had not been exposed to loud noises without wearing hearing protection; he did not have a cold; he had been told or noticed that he was hard of hearing; he had ringing or buzzing in his ears; and did not have a history of ear infections or ear surgery. The report found mild bi-lateral

hearing loss greatest at high frequencies. It warned Employee that extended exposure to loud noises may make this loss worse. The provider compared this test to the March 4, 2011 baseline audiogram for the right ear, and the February 21, 2005 audiogram for the left. “Using age correction, no [STS] has occurred.” The provider recommended Employee see an audio specialist if he had not done so in the past. (Beacon report, January 26, 2012).

15) On April 15, 2013, Beacon found bilateral “moderate hearing loss” greatest high frequencies, and warned that extended exposure to loud noises may make it worse. Comparing these results to the March 4, 2011 (right ear) and the February 21, 2005 (left ear) there was no STS. The provider recommended Employee see an audio specialist. (Beacon audiogram report, April 15, 2013).

16) On September 19, 2017, Timothy McCarty, Au.D, saw Employee “For Loss of Hearing—Ongoing to Live to Workplace Noise Exposure.” Dr. McCarty examined Employee and diagnosed “bilateral workplace noise induced hearing loss.” He fixed September 19, 2017, as Employee’s medical stability date. (Physician’s Report, September 19, 2017).

17) September 27, 2017 was Employee’s last day working for Employer. (Deposition of John Delane, February 22, 2023; Exhibit 1).

18) On October 2, 2017, Employer filed with the Division an Electronic Data Interchange (EDI) report stated Employee had reported a September 20, 2017 injury described as: “LOSS OF HEARING, ONGOING CUMULATIVE WORKPLACE NOISE EXPOSURE.” The report further stated Employer first knew about this injury on September 20, 2017. It occurred on Employer’s premises in “OPERATIONS.” The body parts injured were Employee’s “EAR(S); the injury was “HEARING LOSS OR IMPAIRMENT”; and the cause was “CONTINUAL NOISE.” The event was described as a “TRAUMATIC INJURY.” (First Report of Occupational Injury (FROI), October 2, 2017).

19) On November 15, 2017, Employer filed with the Division a FROI “change” report that appears identical to the October 2, 2017 report, except it changed the injury date to September 18, 2017. (FROI change report, November 15, 2017).

20) On September 29, 2022, Employee filed and served a document that included Dr. McCarty’s bills for services to Employee. The bills state that Dr. McCarty’s office sent these bills directly to Employee, not to Employer or its adjuster. Beginning October 23, 2019, Employer’s adjuster began paying these bills in full as they were billed. A February 15, 2021

bill says, “Bill to W/C claim,” which presumably refers to workers’ compensation. As best as can be determined, Employer’s adjuster paid each subsequent bill. These documents are inadequate to determine when Employer was billed and when it paid. (Notice of Intent to Rely, September 29, 2022).

21) On February 22, 2023, Employee testified by deposition. He began working for Employer on July 2, 1982, as an apprentice lineman on temporary assignments. Employee’s temporary journeyman work with Employer continued off and on until November 21, 1994, when his job was reclassified from a “temporary” to a “regular” employee. During Employee’s temporary work, he worked as a journeyman lineman for Employer anywhere from two months to several months at a time. There was about a 10-year gap between his early temporary employment and his permanent employment beginning in 1994. He also worked for Employer during that gap in 1990, 1991 and 1992. When Employee was not working for Employer during this “gap” period, he worked electrical construction for other contractors, doing the same work, with similar noise exposure. He wore ear protection at those times too. (Deposition of John Delane, February 22, 2023).

22) When Employee first began working for Employer as an apprentice lineman and later as a temporary journeyman, he worked both on underground and overhead lines. His noise exposure included working with, “Motors, diesels, trucks, generators . . . air knife, which is an air compressor, digger trucks, helicopters, crane trucks, . . . a lot of driving.” During his early days with Employer, Employee sometimes operated all the above-referenced devices as well as digging machines like backhoes and bulldozers, and boom trucks. Employee had exposure to at least some of the machines he mentioned, daily, “pretty much all the time. . . .” Employee wore foam earplugs; “ earmuffs” did not work for him, because he had to wear a hard hat, so he preferred earplugs. He wore earplugs daily.

Q. Sure. Do you have any recollections of any instances where you were exposed to loud noises at work where you did not have ear protection? I’m talking about work exposures.

A. No. I -- well -- one more time [repeat the question].

Q. Right. I’m just trying to find out if you had any recollection of any loud noise exposures. And here I’m thinking, like, sudden or overt loud events that occurred at work where you did not have your ear protection on.

A. I can’t come up with a specific time. (Deposition of John Delane, February 22, 2023).

23) Employee could not recall exactly when he first started to “experience hearing loss issues.” However, his work “always [stayed] the same,” so in 1994 he went from being a “NECA” journeyman lineman to a regular employee lineman. Once he became permanent for Employer, Employee worked at least 40 hours a week plus overtime. In 2002, Employee’s job description went from journeyman lineman to “substation lineman.” This position differed somewhat from the lineman position because substation lineman predominantly work in or at the substations, which are the fenced-in areas outside, as opposed to working in buildings; the substations were located in various places. (Deposition of John Delane, February 22, 2023).

24) A “substation” assignment could also mean working in power plants. Local power plants in Beluga, Cooper Landing and Kenai have substations on the outside and generators and other equipment inside, and are “extremely noisy.” As for noise levels, the substations have the same exposure to trucks, airplanes and helicopters and all tools. “Plus[,] substations have really noisy transformers, and -- well, breakers opening and closing.” As a substation lineman, Employee continued to wear his hearing protection. However, he did not wear hearing protection the whole day. “No. I mean, I didn’t put them in the morning and take them out at night. I don’t think your ears can handle that.” He would put earplugs in when he detected a “Noise hazard.” Noise Employee encountered while being a substation lineman included diesel trucks he was driving, “six-by-sixes,” cranes, CATs, backhoes, tractor-trailers, flying in airplanes and helicopters to Beluga, circuit breakers opening and closing, huge transformers and air compressors. Employee considered his work as a lineman versus his work as a substation lineman was “the same” but at different times and places. The noise level stayed the same. Employee’s felt his hearing loss was “gradual over time.” He could not pinpoint the exact time he first noticed his hearing loss; however, he estimated that he started noticing some “hearing loss issues” in the early or mid-90s. Employee recalls his wife pointing out that he was having difficulty hearing her, but that did not help him remember when it began. (Deposition of John Delane, February 22, 2023).

25) Prior to 2005, Employee had been a hunter; he hunted moose, caribou, sheep and went bear hunting once. He started shooting small game when he was a teenager in Minnesota; Employee used 22 caliber weapons and a shotgun, with incidental target practice. He did it seasonally, “Not a whole lot.” As he recalled, Employee used hearing protection when he was shooting back

in Minnesota. Employee continued seasonal, small-game hunting each year thereafter, until he moved to Alaska. (Deposition of John Delane, February 22, 2023).

26) Employee came to Alaska and began working for Employer in 1982, at age 25. He believed he continued hunting here; Employee had a 12-gauge shotgun. Employee also had a .22 long rifle, a 30-06 rifle, a .308 rifle, and several large caliber handguns. He also collects military rifles, which he generally does not shoot because they are collector's items. Employee has gone target shooting since he moved to Alaska, but has not done so for many years since his shooting friend is no longer around. Between 1982 and 2005, Employee did not go to shooting ranges or fire his weapons very often. The last time Employee went moose hunting was the year prior to his deposition; on that occasion he never fired a shot over a 10-day period. In years past, since coming to Alaska, Employee had gone on more than one hunt in a calendar year. When hunting, Employee always wore foam earplug hearing protection; he did not wear earmuffs. (Deposition of John Delane, February 22, 2023).

27) Employee also owned a snowmachine in Alaska. He estimated he would go snowmachining once or twice a month if the snow was good. However, Employee did more snow machining at work for Employer than he did on his own. He wore hearing protection when he went snowmachining for fun and while at work. (Deposition of John Delane, February 22, 2023).

28) Employee also mowed his own lawn and operated power motors for Employer at 50 substations. He also operated a snowblower at home and at work for Employer. Employee wore hearing protection. (Deposition of John Delane, February 22, 2023).

29) Employee flew in helicopters and airplanes frequently for Employer. Depending upon the job, he could fly every day for two weeks or a month and then go for two months without flying. He frequently flew on Twin Otters, but he wore hearing protection. (Deposition of John Delane, February 22, 2023).

30) Employee also operated power tools for Employer, including grinders, sawzalls, drills, and bandsaws. At home, he had only a battery-powered drill. (Deposition of John Delane, February 22, 2023).

31) Employee sees Dr. McCarty for his hearing aids. He once paid around \$10,000 out-of-pocket for Dr. McCarty's services. Dr. McCarty later reimbursed him for this after an insurance

payment, but Employee knows nothing about that and had no health insurance at the time that could have paid Dr. McCarty. (Deposition of John Delane, February 22, 2023).

32) Employee has never had any head injuries or ear infections. His mother never had any hearing problems; his father had hearing problems because he served during World War II. Employee has eight brothers and sisters and only one, his younger brother, has hearing problems. Like him, Employee's younger brother was a power lineman. No other relatives had diminished hearing. (Deposition of John Delane, February 22, 2023).

33) Employee's hearing aids have improved his ability to hear and have been, "Very useful." He plans to see a hearing specialist as needed. (Deposition of John Delane, February 22, 2023).

34) Employee agreed he had tinnitus at least by 2005; he first noticed it after he would come home from work. His hearing aids help reduce tinnitus. Employee usually wears his hearing aids at all time unless he is sleeping. (Deposition of John Delane, February 22, 2023).

35) On February 23, 2022, Dr. Zeitzer performed a record-review employer's medical evaluation (EME). He noted Employee worked for Employer from May 24, 1994, until September 27, 2017, and during that time was in a "hearing conservation program" and had annual hearing tests. Dr. Zeitzer found no hearing tests between 1990 and 2004, which he said would have been "more informative." He acknowledged, "Unfortunately, those hearing tests are not available to me." (Zeitzer report, February 23, 2022).

36) Dr. Zeitzer based his opinions on what he called "evidence-based findings" including the American College of Occupational and Environmental Medicine (ACOEM) Guidance Statement (2018), to which R.A. Dobie, MD, contributed, Dr. Dobie's book entitled *Medical-Legal Evaluation of Hearing Loss* (2015), the American Medical Association (AMA) guides to the evaluation of disease and injury causation, second edition (2014). Summarizing this literature in relevant part, Dr. Zeitzer said:

. . . The most common causes of hearing loss include:

- (1) Natural aging (Age-Related Hearing Loss or Presbycusis)
- (2) Genetic or Familial Hearing Loss
- (3) Noise Exposure or Noise-Induced Hearing Loss
- (4) A combination of the above

Genetic factors, not always apparent in past generations are a strong determinant of onset, degree and progression of hearing loss particularly in age-related hearing loss.

Due to OSHA hearing conservation regulation starting in 1981, occupational noise exposure probably now accounts for less than 10% of the burden of adult hearing loss in the United States; most of the rest is age-related. Most of the occupational noise burden is attributable to unprotected exposures above 95 dBA.

It should not be assumed that because an individual works in noise that his hearing loss is due to occupational noise-induced hearing loss.

- (1) ONIHL (Occupational noise-induced hearing loss), as most hearing losses, is always a **sensorineural** loss. It is never conductive.
- (2) ONIHL is almost always **bilateral and symmetrical** or the same in each ear, due to the reverberation of sound in the work area.
- (3) **NIHL is characterized by a “notch” formation.** The “notch” formation is more obvious in the **earlier stages** of noise-induced loss.
- (4) The “notch” is defined as hearing loss greatest at the frequencies 3000-6000 Hz (usually 4000 Hz) with recovery at 8000 Hz.
- (5) Additive age factors may later obscure the “notch” but “**recovery**” of the hearing in the higher frequencies is often still present.
- (6) In ONIHL with stable exposure conditions, losses at 3000, 4000, and 6000 Hz usually reach a **maximum level in 10-15 years.** As hearing loss progresses, the rate or **incremental loss of hearing decreases.** This is different in age-related hearing loss that progresses most rapidly as an individual ages.
- (7) High-frequency losses in ONIHL rarely exceed 75 dBA, and low-frequency losses rarely exceed 40 dBA.
- (8) Hearing loss due to noise exposure occurs at the time of exposure.
- (9) Hearing loss due to past noise exposure that has been discontinued, **does not progress** after the noise exposure is discontinued.
- (10) Past noise exposure does not produce additional sensitivity to later noise exposure (emphasis in original).

As for workplace noise exposure, Dr. Zeitzer explained:

- (1) Noise is measured by the **Time-weighted Average** for an 8-hour shift (**TWA-8 HRS**). Measurements for less or more hours are converted to the 8-hour standard.
- (2) OSHA uses 5 dBA as the **doubling criteria.** (4 hours at 90 dBA is the same exposure as 8 hours at 85 dBA). This is due to the semi-logarithm nature of the decibel. 3 dBA as a doubling criteria is more accurate i.e. two pumps operating at 95 dBA will produce a total of 98 dBA and is the standard often used (NIOSH, ACGIH).
- (3) **90 dB TWA** is considered the threshold of hazardous noise. That is 90 dB for the entire 8-hour shift on a daily basis for years will cause measurable hearing

loss in sensitive individuals. OSHA requires a hearing conservation program at 85 dB TWA. This is ½ the hazardous exposure level (90 DBA) on a TWA basis. OSHA designates this as the **Permissible Exposure Level** or PEL.

(4) Noise-induced hearing loss (NIHL) **develops slowly** after many years of constant exposure. Susceptibility varies quite wild widely, but **10 years or more** of exposure is generally required for **significant** hearing loss to occur. Maximal loss due to occupational noise exposure usually occurs at 10-15 years.

(5) **Intermittent noise** is considered less harmful than **constant** noise due to the ears ability to recover after a rest period (emphasis in original).

As for recreational shooting, Dr. Zeitzer stated:

Recreational shooting is a frequent cause of hearing loss. The hearing is usually **asymmetrical** or greater in one ear. The hearing loss is usually in the opposite ear as handedness of the shooter in shotgun and rifle shooters. The sound wave is propagated at the muzzle of the gun with direct propagation into the inner ear. Physical and acoustic damage without ear protection can rapidly occur.

....

The first sign of exposure to hazardous noise is usually the phenomenon of **temporary** (muffled) hearing and/or increased tinnitus immediately after noise exposure. The degree and extent of TTS [temporary threshold shift] usually indicates the degree of noise overexposure. Damage to hearing is usually temporary but repeated episodes may cause permanent damage to hearing. This may be noticeable after an athletic or rock concert event as an example.

....

Hearing loss due to noise exposure and other sources such as age is additive. The characteristic “notch” configuration of noise exposure may be later obscured by the effects of age-related hearing loss. In most cases it is not possible to determine the cause of hearing loss with just a recent hearing test. It is possible to determine the extent of noise induced-hearing loss by “serial” or comparison hearing tests. These are obtained in annual hearing tests from industrial hearing conservation programs. It cannot be assumed that since individual works in noise that the hearing loss is due to noise exposure. Many other factors should be considered in that opinion. (Zeitzer report, February 23, 2022).

37) Dr. Zeitzer reviewed Employee’s serial hearing tests beginning with February 27, 2004. In his view, the earlier hearing tests would be most informative because hearing loss would be more evident in the early stages. In Dr. Zeitzer’s opinion, after 10 years of working for Employer, Employee should have “significant evidence of noise-induced hearing loss.” He implied that he did not see a “notch” configuration at 4000 Hz, and stated this was more compatible with age-related rather than noise-induced hearing loss. Dr. Zeitzer also opined Employee’s most recent

May 7, 2020 hearing test revealed a typical down sloping hearing loss compatible with age-related factors. (Zeitzer report, February 23, 2022).

38) Dr. Zeitzer followed the procedure in the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Edition (*Guides*) to formulate a PPI rating. He did not explain or show his work, but it appears he relied on a post-retirement, May 7, 2020 audiogram for his calculations. Dr. Zeitzer attributed a “0.4” percent whole-person PPI rating due to binaural hearing loss; however, he attributed this to aging. (Zeitzer report, February 23, 2022).

39) Dr. Zeitzer opined that occupational hearing loss would occur during the first 10 to 15 years of employment. However, Employee’s left-ear configuration in his opinion showed a progressive down sloping indicative of age-related factors. In his view, Employee’s greatest hearing loss occurred after 2004. Dr. Zeitzer found the same significant increase after 2004 in Employee’s right ear. He also found Employee’s hearing loss appeared to accelerate as he aged. These demonstrate age-related factors, in Dr. Zeitzer’s opinion. (Zeitzer report, February 23, 2022).

40) Dr. Zeitzer also suggested if Employee’s hearing is corrected for age, most of his hearing is within the normal range. He concluded that most of Employee’s hearing loss was due to age-related factors. Dr. Zeitzer conceded that occupational noise-induced hearing loss was a possibility in the early years of his employment, but “it is more likely that age-related factors are the main cause of his hearing loss.” (Zeitzer report, February 23, 2022).

41) Dr. Zeitzer said the \$47,768 Employee paid for hearing aids, evaluation, and testing “in spite of warranty” was “extraordinary.” He opined some hearing aid providers may “push technology” as hearing aids improve. Most hearing aid dealers, in Dr. Zeitzer’s opinion, allow for a 30-day trial before a patient purchases the hearing aid. In his experience, charges for fitting and exchanging hearing aids are part of the total purchase price. Dr. Zeitzer warned that a “open-ended situation” can result in a constant search for a “new and better hearing aid” at “extraordinary cost.” “This can be unethical on the part of the audiologist.” Replacing hearing aids every five years “appears to be the usual recommendation for wear and tear.” (Zeitzer report, February 23, 2022).

42) Based on the above, Dr. Zeitzer concluded “other contributions to hearing loss cannot be completely excluded,” but age-related hearing loss was the “major cause.” Employee’s hearing loss should not progress after September 27, 2017, if it was noise-induced. Dr. Zeitzer

concluded that the medical treatment rendered to date for Employee's hearing loss had been a "significant overcharge for services and diagnosis." (Zeitzer report, February 23, 2022).

43) On May 5, 2022, Employer denied Employee's right to all benefits based on Dr. Zeitzer's February 23, 2022 EME report. (Controversion Notice, May 5, 2022).

44) On May 15, 2022, Dr. McCarty responded to Dr. Zeitzer's EME report. He stated that state law required providers to use the *AMA Guides*, and opined that publication "prohibits" the use of age-correction in workers' compensation cases. Dr. McCarty criticized Dr. Zeitzer's use of population statistical results to a specific, noise-related individual case. He added that Dr. Zeitzer's errors "result in a fatally flawed report, which should be discarded immediately." Dr. McCarty opined that Employer paying for and then denying Employee medical care not only affected his ability to hear but placed his "cognitive ability" at risk. (McCarty letter, May 15, 2022).

45) On August 24, 2022, Employer denied Employee's claim in reliance on Dr. Zeitzer's February 23, 2022 report. (Controversion Notice, August 24, 2022).

46) On June 27, 2022, Employee claimed he suffered cumulative, progressive hearing loss while working for Employer. He sought PPI benefits, medical and related transportation costs, a penalty, interest, attorney fees and costs. (Workers' Compensation Claim, June 27, 2022).

47) On August 30, 2023, second independent medical evaluator (SIME) Andrew Berman, MD, otorhinolaryngology specialist, saw Employee for hearing loss and tinnitus. Dr. Berman reviewed Employee's records, performed an examination and provided his diagnoses, conclusions and opinions. (Berman report, September 11, 2023).

48) Employee told Dr. Berman that his hearing loss and tinnitus began in 1990. He had worked for union contractors for 12 years prior to working for Employer for 25 years as a "powerline man," until he retired in 2017. His noise exposure on-the-job with Employer included: power tools, transformers, truck engines, helicopters and other large machinery. "He did wear earplugs when possible." Dr. Berman noted a 1990 audiogram "showed hearing within normal limits." Employee had worn hearing aids since 2017. (Berman report, September 11, 2023).

49) Dr. Berman reviewed all 212 pages of medical records. Among other things, he chronologically reviewed Employee's audiograms. (Berman report, September 11, 2023).

50) For Employee's SIME, Miguel Avila, Au.D, performed an audiogram and other testing:

This gentleman responded well to the subjective aspects of the audiogram. An accurate hearing test was achieved, as there was very good inter-test reliability. A significant sensorineural loss was recorded for both ears. . . . Speech discrimination values are 92% for the right ear and 92% for the left ear.

He also has a significant disparity in his right versus left measurements of discrimination with the sound field (52% right ear versus 84% left ear), which will also require additional testing.

....

The tinnitus test match . . . confirms that he has ringing in his ears. . . .

Dr. Berman found no ear canal obstruction, perforation, or any other ear ailment. He diagnosed (1) bilateral hearing nerve loss, and (2) moderate tinnitus, both secondary to industrial noise exposure. Dr. Berman continued:

Mr. Delane has a 25-year history of exposure to noise as a power line man for [Employer]. He attributes his hearing loss and tinnitus to that noise exposure.

Friends and family tell him he does not hear as well as he did in years' past, and he often has to ask others to repeat what they have just said. The problem is worse in settings such as restaurants and public places where ambient noise is present.

Audiometrically, he records a significant sensorineural loss that is consistent with cumulative noise exposure. There is no medical and/or surgical treatment he might undertake that would improve or eliminate his hearing loss or his accompanying moderate tinnitus. Both entities are now permanent and stationary and completely (100%) attributable to his work in and around loud noises as a power line man for [Employer].

Given my review of the medical records, I would not apportion his hearing loss or tinnitus to his employment prior to [Employer]. It is medically more reasonable than not, that his hearing loss and tinnitus began as a result of his exposure while with [Employer].

Based on his examination, his current hearing aids appear to be adequately meeting his needs. He should see his dispensing audiologist as needed for adjustments and repairs as needed, all on an industrial basis. He will be required to wear hearing aids for the balance of his lifetime. His hearing loss and tinnitus do constitute permanent impairment.

Both Dr. Berman and his audiologist who performed the hearing tests concurred that Employee would benefit from bilateral amplification. Dr. Berman performed a PPI rating pursuant to the *AMA Guides* 6th Edition. After performing his calculations, Dr. Berman ascribed a four percent whole-person PPI rating to Employee's hearing loss and tinnitus. However, because Employee has severe high tone hearing loss, this causes disorientation, anxiety and affects his emotional well-being. These factors "cause mild limitations in his daily social and interpersonal functioning." Accordingly, Dr. Berman ascribed an additional one percent whole-person PPI rating for this, for a five percent whole-person PPI for noise trauma incurred while Employee worked for Employer. He also opined that Employee would need annual audiograms, ongoing hearing aid batteries and repairs, ENT examinations every five years if his audiologist recommends it, and hearing aid replacements every four to five years. Dr. Berman recommended digital circuitry programmable hearing aids, which he said would cost anywhere from \$6,800 to \$8,200, and over-the-counter Lipo-Flavonoid to address tinnitus. Employee might benefit from noise-canceling hearing aids or white noise programming and possible behavioral therapy. Dr. Berman also recommended a brain magnetic resonance imaging (MRI) to ensure there was no lesion causing his hearing loss. (Berman report, September 11, 2023).

51) Dr. Berman also answered questions. He did not find a preexisting condition. Employee's noise exposure at work was "the substantial cause" of his disability and need for medical treatment. He became medically stable on his last day of employment in 2017. Dr. Berman did not think his recommended treatment would relieve Employee from debilitating pain, promote recovery from a chronic condition or limit his permanent impairment. But it would help him manage his hearing condition at current levels. (Berman report, September 11, 2023).

52) As support for his opinions, Dr. Berman said Employee's audiometric testing and history as well as "his hearing loss curve" made it "far more medically likely than not that his hearing loss and tinnitus are industrial in nature." He found no other causes for Employee's hearing loss and stated that "age-related hearing loss is accounted for" in the *Guides* rating formulas. Dr. Berman also opined Employee's "long history of noise exposure at work," made it more medically reasonable than not that his hearing loss and tinnitus were work-related. As for age-related hearing loss, Dr. Berman said if it was present "noise exposure makes the age-related hearing loss worse." He provided a link to a National Institute of Health Library of Medicine article that supported noise-induced hearing loss after years of exposure. Dr. Berman also agreed

with Dr. McCarty's May 15, 2022 response to the EME report. In Dr. Berman's opinion, Employee's normal 1990 audiogram, followed by a non-ratable hearing loss in February 2005, supported his conclusion that noise exposure since 2005 is the substantial factor in causing his present need for treatment. The extent to which earplugs prevented greater exposure to loud noises "is not quantifiable." Dr. Berman opined that earplugs may have helped Employee somewhat but would not have prevented permanent disability from industrial noise exposure. (Berman report, September 11, 2023).

53) Drs. Berman and Zeitzer both used the same PPI calculation methodology from the *Guides* in calculating Employee's binaural hearing impairment. Their results differ because they used different audiogram tests (May 7, 2020, for Dr. Zeitzer and September 11, 2023, for Dr. Berman) and Dr. Berman applied additional impairment from the *Guides* for Employee's tinnitus and its effect on Employee's emotional well-being. (Judgment; inferences from all the above).

54) Dr. Berman made an addition calculation error on page 19 of his report, as shown below, which affected his results, as follows:

Binaural hearing impairment: To calculate the binaural hearing impairment, multiply the ratable hearing loss percentage of the better hearing ear by a factor of 5, then add to that number hearing loss percentage of the poorer ear. Then divide that total by 6 (or multiply by .1667).

Better Ear: $9.38\% \times 5 = 46.90$

Poorer Ear: $11.25\% \times 1 = 11.25$

Total = $\overline{35.65} \times .1667 = 51.57\%$

Adding 46.90 and 11.25 = 58.15, not 35.65. Dr. Berman's report says he added these numbers, but he subtracted them ($46.90 - 11.25 = 35.65$). Using the exact methodology that Dr. Berman used, but using the correct sum of 58.15, Employee's binaural hearing loss based on the same audiogram Dr. Berman used is 9.69 percent ($58.15 / 6 = 9.69$ percent). Adding, as Dr. Berman, did five percent for Employee's "moderate tinnitus" to the audiogram-based percentage for binaural hearing loss results in 14.69 percent (9.69 percent for audiogram + 5 percent for tinnitus = 14.69 percent). Referring to Table 11-3, as Dr. Berman did, and using the corrected figure, 14.69 equals five percent whole-person PPI. Adding, as Dr. Berman did, one percent for "mild limitations in his daily social and interpersonal functioning," under impairment due to alteration in Mental Status, Cognition and Highest Integrative Function (MSCHIF) to the corrected

number, Dr. Berman's corrected calculations result in six percent whole-person PPI for this injury (5 percent for audiogram and tinnitus loss + 1 percent for MSCHIF = 6 percent). If the panel accepts Dr. Berman's opinion, this is the corrected PPI rating based on his methodology, corrected for the addition error. (Berman report, September 11, 2023; judgment; observations).

55) On February 7, 2024, Employee filed and served Dr. McCarty's billing ledger. It shows Employer paid Dr. McCarty's bills pursuant to the Alaska Medical Fee Schedule. As of January 19, 2024, Dr. McCarty had a zero balance. (Notice of Intent to Rely, February 7, 2024).

56) On April 1, 2024, Dr. Berman prepared an addendum after reviewing Employee's March 9, 2024 MRI. His report summarized his previous opinions and the recent MRI, but did change any previously expressed opinions. (Berman addendum report, April 1, 2024).

57) On April 19, 2024, Wilson filed and served his initial fee and cost affidavit. He addressed seven of the eight *Rusch* considerations, as follows:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly: Wilson stated the time he documented was necessary given the complexity, novelty and difficulty involved in this case. He further stated his workers' compensation experience gave him the skill requisite to perform the services properly and diligently.
- (2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer: Wilson stated the time he spent representing Employee was not available to represent another client.
- (3) The fee customarily charged in the locality for similar legal services: Wilson contended his hourly rate is within the customarily charged rate for similar legal services in the local community.
- (4) The amount involved, and the results obtained: Wilson stated the issue at stake is lifetime audiological care for Employee's injury if he prevails.
- (5) The time limitations imposed by the client or by the circumstances: Wilson did not specifically address this issue.
- (6) The nature and length of the professional relationship with the client: Wilson stated his fees were commensurate with a case that took two years to bring to hearing.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services: Wilson's firm has been representing claimants for 35 years, and he has done so for 10.
- (8) Whether the fee is fixed or contingent. Wilson acknowledged that his attorney fees are contingent.

Wilson began representing Employee on June 9, 2022, and billed at \$375 per hour through March 29, 2024. Beginning April 1, 2024, Wilson began charging \$400 per hour. Attorney fees

and costs through April 18, 2024, total \$62,678.42. (Affidavit of Fees and Costs, April 19, 2024).

58) On April 19, 2024, Christi Teixeira filed and served her affidavit stating her paralegal costs totaled \$3,630.88, at \$185 per hour. (Affidavit of Fees and Costs, April 19, 2024).

59) At hearing on April 24, 2024, Dr. Berman testified he was the SIME physician. He has a master's degree in public health and an MD degree. Dr. Berman has been in private practice since 1989. About 20 years ago, he started handling workers' compensation hearing loss cases and it now comprises about 40 percent of his private practice. He is an ENT specialist and sees most first responders in the Los Angeles, California area for hearing issues. (Record).

60) Dr. Berman reviewed all the SIME records sent to him, and Dr. Zeitzer's report. He examined Employee and his assistant performed audiometric testing. Dr. Berman opined that Employee has "significant hearing loss" especially in the mid- to high-frequency range. There was no evidence suggesting Employee was not truthfully responding to the test. Employee had no hearing loss in 1990, but by February 27, 2004, he began to have high high-frequency hearing loss, in Dr. Berman's opinion, "consistent with noise exposure." (Record).

61) Dr. Berman agreed with the opinion set forth in Dr. Endres' March 29, 2005 report, that Employee's hearing loss audiograms were consistent with noise-related hearing loss. He also agreed with Dr. Enders that Employee's normal 1990 audiogram when compared with his 2004 test was "consistent with an early noise-induced effect." Dr. Berman explained that absent a specific noise event, hearing loss typically shows up as a slow deterioration happening from the higher frequencies down to the lower frequencies as noise exposure continues. He agrees with Dr. Enders' opinion that Employee has bilateral, high-frequency sensorineural hearing loss in a noise-induced pattern. High-frequency means above speech level, which ends around 3000 Hz. Sensorineural means it is a nerve-loss issue, not a "conductive" loss. A conductive loss can be caused by recurrent ear infections causing nerve scarring, otosclerosis (or hardening of the three tiny ear bones), or a tumor. Employee does not have conductive hearing loss. Dr. Berman explained what Employee's "threshold shift" meant under the *AMA Guides*. The *Guides* use charts to determine a whole-person impairment, which is different than causation. At the time Dr. Enders saw Employee on March 29, 2005, Employee did not have any ratable hearing loss under the *Guides*, because of the way the charts are set up, which only measure impairment to hearing from 500 Hz through 3000 Hz. But there was a "shift" between Employee's initial

employment and his previous hearing tests. In his opinion, a “standard threshold shift” change represents a hearing loss, as the physician resets the baseline threshold for the person’s hearing. (Record).

62) The audiogram “notch” refers to a specific frequency loss. By contrast, Employee’s tests for the most part show a slow reduction over time. In Dr. Berman’s experience, that profile is consistent with noise-induced hearing loss. He sees this in his patients “all the time.” (Record).

63) Dr. Berman explained that when a cochlea nerve is irritated by acoustic trauma, like with attending a rock concert, the resultant ringing in the ear or tinnitus for a few days is “acoustic trauma.” Usually, this tinnitus will resolve. However, if the acoustic trauma is continuing, it causes scar tissue and eventually the affected cochlea nerve will die. The most common cause of tinnitus is hearing loss. Employee first reported intermittent tinnitus in 2005. (Record).

64) Dr. Berman explained his answer to a question in his report, where he said, “The nature of [Employee’s] hearing loss curve makes it far more medically likely than not that his hearing loss and tinnitus are industrial in nature.” Initially, in 1990 Employee had “great hearing.” “Normal hearing” is anywhere from zero to 25 dB. As the decibel number increases on the audiogram, the hearing is getting worse. Employee had a “little loss” in 2005. But, as his audiometric testing went on over the years, the decibel (dB) numbers in the higher frequencies got worse and start “dipping down” toward 2000. By the time Employee had his hearing tested in 2017, his right ear hearing at 2000 Hz had gone from zero dB in 1990 to 30 dB. Moreover, in Dr. Berman’s opinion, the decreased high-frequency hearing loss combined with decreased hearing at the lower frequencies is consistent with “chronic noise exposure over time.” OSHA has criteria for workplace noise exposure; formerly the level was 100 dB, which OSHA has now moved down to 85 dB. Additionally, if a person is exposed to “a sudden loud noise,” he needs less noise exposure to cause hearing damage. In his opinion, “chronic noise exposure” wears down a person’s hearing and results in hearing loss. Various construction tools make noise in varying frequencies. Therefore, Dr. Berman would expect to see hearing loss at various frequencies. In his view, the *AMA Guides* do not take age into account in determining hearing loss. (Record).

65) Dr. Berman also addressed Dr. Zeitzer’s report. He disagreed with Dr. Zeitzer’s conclusion that Employee has age-related hearing loss. First, he cited Employee’s significant hearing loss before he retired in 2017, and no significant change six years later when Dr.

Berman's office tested his hearing; if his hearing loss was age-related, one would expect a more significant post-retirement change. Second, Dr. Berman suggested that one cannot overlook "the elephant in the room," which is the fact that Employee worked in and around an extremely noisy environment continually. Third, the *AMA Guides* specifically do not take age into account. Although Employee wore ear plugs, in Dr. Berman's opinion hearing protection "helps on a limited basis." And it does not help with the "vibration of the skull," which in his opinion also causes "damage to the nerve." He conceded that many people lose hearing as they age. However, not everyone does, and some people lose their hearing at a much younger age than Employee. (Record).

66) Dr. Berman found no evidence Employee had significant, chronic ear infections or meningitis that could account for hearing loss. What is indicated through Employee's audiometric testing is consistent with noise-induced hearing loss. One would not expect the "slowing down" present here if his hearing loss was age-related. In his view, Employee's post-retirement hearing loss is not significant. (Record).

67) Referring to Dr. Zeitzer's report on page 4, where he listed 10 considerations for determining causation for hearing loss, Dr. Berman agreed with Dr. Zeitzer that occupational noise-induced hearing loss is always a sensorineural loss. Dr. Berman disagreed that occupational noise-induced hearing loss was always bilateral; it often was. He also disagreed that it is always symmetrical; it is situation-specific. Dr. Berman disagreed with considerations 3 through 5 regarding the "notch," finding the statements were "conditional" based on the noise to which the person was exposed. For example, if a person was exposed to a shotgun blast that caused hearing loss, the "notch" would be expected at only one or perhaps two measured frequencies. The study upon which Dr. Zeitzer relied was a general, not specific, guideline in Dr. Berman's opinion. (Record).

68) To explain Employee's high-frequency hearing loss, Dr. Berman opined that if a person is exposed to a louder noise at a higher frequency, that is the frequency at which the person's hearing will be damaged. The cochlea wears down over time and hearing loss develops. (Record).

69) Dr. Berman also disagreed with consideration 6 in Dr. Zeitzer's report because if Employee had age-related hearing loss, his hearing loss would have been expected to progress more rapidly across the entire spectrum from 250 Hz through the higher frequencies as he aged.

But it did not. It stopped progressing altogether at the lower frequencies and did not progress significantly at the higher frequencies. Dr. Berman did not consider Dr. Zeitzer's consideration 7 applicable in this case. He later stated he agreed with considerations 8 and 9 that hearing loss due to noise exposure occurs at the time of exposure and does not progress after the noise exposure is discontinued, respectively. However, he disagreed that past noise exposure does not produce additional sensitivity to later noise exposure, as Dr. Zeitzer stated in consideration 10. In his experience, patients are more sensitive to later noise exposure at the frequencies most affected in their hearing loss. (Record).

70) Dr. Berman agreed with the OSHA Training Manual (OTM) that said noise-induced hearing loss over time may appear on an audiogram as age-related. In his opinion, it is possible that Employee has both age-related and occupational noise-induced hearing loss. Dr. Berman understands the *AMA Guides* to not consider age in either PPI ratings or causation determinations. Part of Employee's hearing loss could be age-related. "Without a doubt," age-related hearing loss can be aggravated by occupationally induced noise exposure, in his view. In Dr. Berman's experience, age-related hearing loss starts at around age 55 in approximately 10 percent of the population, and increases over time. Employee's hearing loss increased until he stopped working for Employer, and then stopped increasing. Dr. Berman opined that this pattern makes it far more likely that Employee has work-related noise-induced hearing loss, and far less likely it is age-related. In his opinion, had Employee not had the long-term noise exposure at work for Employer, he "certainly would not have a significant hearing loss like this." (Record).

71) Dr. Berman reviewed the MRI he had requested, and found nothing significant. Nothing changed his opinions expressed in his original report. His treatment recommendations are the same, including Lipo-Flavonoid, which he prescribes to his own patients. Employee may need behavioral therapy to address his anxiety in dealing with constant tinnitus. Some people cannot tolerate constant tinnitus and behavioral therapy can assist with this. Noise-canceling hearing aids can assist with reducing tinnitus. A "sound oasis" pillow may be helpful by creating white noise while Employee sleeps and is not wearing his hearing aids. (Record).

72) In Dr. Berman's opinion, the substantial cause of Employee's hearing loss and need for treatment is his work for Employer. (Record).

73) On cross-examination, Dr. Berman said he reviewed Employee's deposition; he was aware Employee wore ear plugs at work. When Employer suggested Employee could not have hearing damage from work when he was wearing hearing protection, Dr. Berman explained:

No, that's not correct. It's not that there isn't exposure, there is muted or reduced exposure. So, I'm going to answer that in two parts if that's okay. The first part being the noise -- so noise exposure that comes in through the ear canal is muted. Whether it be a foam plug, which was described, or a muff. It doesn't get rid of it. You know, we can get up to maybe 30 odd dB [protection] at best. But if it's louder, or continuous at a louder range, there still is going to be continuing damage. Two, you still have that noise that's con. . . . -- as we talked about with the transducer behind the year that's conductive, that still causes damage to the cochlea. Now is it less? Yes. It's not as concentrated because you don't have it coming through the ear canal as well. But you still have damage to the cochlea by the shaking and the noise exposure of your skull itself causing the cochlea, which is encased in bone, to shake and cause damage to the hairs on the inside of the cochlea, which are what send the sound to the brain.

Dr. Berman likened this to waves in a pond after a rock is thrown into it. The cochlea is filled with fluid and when it is shaken by noise, the little hairs which are basically nerve endings are shaken, which causes acoustic trauma to the nerve endings. In Dr. Berman's opinion, hearing protection can only reduce sound waves to a less harmful level. "You can only reduce so much." In his opinion, 85 dB would be a non-harmful noise exposure level, five days per week for eight hours per day. He opined that at levels approaching 100 dB or higher, one would need much less exposure to have hearing damage. For example, if a person were exposed to 130 dB, and was wearing hearing protection rated at 30 dB, that person would still have exposure to 100 dB. In his experience, ear plug protection usually provides from 8 to 12 dB, and "really good ones" like those worn by professional musicians may provide up to 35 dB. (Record).

74) Dr. Berman has treated lineman, who have used hearing protection. He observed hearing loss in "most of them." They are sent to Dr. Berman because they have hearing loss. On how to differentiate between occupationally-induced and age-related hearing loss, Dr. Berman said it is based on their serial hearing tests. He also asks about previous head injuries that could cause hearing loss and performs a physical examination. Meningitis, diabetes, familial [genetic] hearing loss, otosclerosis, Down syndrome, chronic ear infections as a child and other noise exposure are things he looks for in determining hearing loss causation, because all could contribute to hearing loss. (Record).

75) Dr. Berman found nothing significant in Employee's history that could cause his hearing loss. The fact that his father and brother had hearing loss make no difference in this instance because Employee started out with good hearing, worked in a noisy environment and developed hearing loss, which in Dr. Berman's opinion was work-related. In this case, Dr. Berman was not hired to make an evaluation in favor of one side or the other; he does not do that. Dr. Berman considered Employee's opinion regarding the source of his hearing loss because it is another factor, and informs him as to Employee's perception. (Record).

76) Dr. Berman explained that the comment in his report that Employee wore earplugs on the job "when possible," referred to occasions when earplugs interfered with his ability to perform his job. He based this comment on his assumption, based on his experience, that people in Employee's profession occasionally have to remove earplugs to communicate safely with others. If Employee testified that he "always" wore earplugs, Dr. Berman would understand that meant "when possible," given his understanding of these professions. Assuming Employee wore his earplugs "regularly, without fail" while at work for Employer, his earplugs would reduce his noise exposure but would not ameliorate it entirely. (Record).

77) Dr. Berman reviewed a September 2018 article from the *Journal of Occupational and Environmental Medicine* called, "Occupational Noise-Induced Hearing Loss." An American College of Occupational and Environmental Medicine (ACOEM) task force developed this article, authored by Raul Mirza, DO, Bruce Kirchner, MD, Robert A. Dobie, MD and James Crawford, MD. Dr. Zeitzer had relied upon this article in formulating his opinions. Under "Characteristics," Dr. Berman agreed with this article that noise-induced hearing loss is always sensorineural, primarily affecting the cochlear hair cells, is usually but not always bilateral, and its "first sign" is a "notching" in an audiogram at frequencies of "3000, 4000, or 6000 Hz with recovery at 8000 Hz." Dr. Berman reviewed Dr. Zeitzer's charts attached to his report and opined that "Chart 1 INITIAL HEARING TEST 2/27/2004," had a "notch" on this audiogram at 6000 Hz that recovered at 8000 Hz. Dr. Berman agreed that if the ACOEM article is correct, then Employee meets this characteristic, and the article supports his opinion that Employee's hearing loss is noise-related. In his own cases Dr. Berman has used the principles set forth in this article, though not necessarily the article itself, to inform his conclusions regarding causation in hearing loss cases. In his opinion, serial audiograms are necessary to determine causation, but the "notch" is not the only determination in determining causation. Dr. Berman opined that

Employee's serial audiograms are more consistent with noise-induced hearing loss than it is age-related. Some people are more susceptible to greater hearing loss on the same job than other people, notwithstanding their best effort to wear earplugs. In Dr. Berman's speculation, Employee appears to be one of those people, although this is beyond modern science's ability to determine. (Record).

78) Tinnitus is a harbinger of hearing loss. Hearing loss caused by damage to the cochlea is one of the leading causes of tinnitus. Tinnitus does not tell a physician anything about what caused the hearing loss. Tinnitus may begin before a person realizes he has hearing loss. (Record).

79) In Dr. Berman's reading, the *Guides* recommends physicians not take age into account when determining causation or impairment. (Record).

80) Dr. Berman compared the September 19, 2017 audiogram with the September 11, 2023 audiogram done in his office. In his opinion, there was a "little bit" of additional hearing loss in Employee's hearing from 2017 until 2019 when his office tested him. (Record).

81) On re-direct, Dr. Berman further explained tinnitus. In his opinion, tinnitus that followed extremely loud noise exposure would be directly related to that exposure. Dr. Berman opined that the following could cause hearing loss: riding in a helicopter; riding on a snowmachine; working near a diesel bucket-truck; chainsaws; power tools; industrial drills; constructing electrical panels; attaching metal objects; laying cable; running backhoes; and backup warning devices. (Record).

82) In Dr. Berman's opinion, occupational hearing loss as demonstrated on audiograms relates to the hertz at which the person suffered the exposure. In other words, if an audiogram demonstrates occupationally caused hearing loss at 3000 or 8000 Hz, that means the person was exposed to damaging sound emanating at those frequencies. (Record).

83) Dr. Berman agrees with the statement from the OTM that a sloping audiogram with tapering to the lowest levels at 8000 Hz often indicates that the hearing loss is age-related, but not always. After years of exposure, noise-induced hearing loss can have the same pattern. In his opinion, the most probable reason for Employee's high-frequency hearing loss at 8000 Hz is high-frequency noise exposure at his employment with Employer. (Record).

84) Dr. Berman agreed that people can have age-related hearing loss at high frequencies with no noise exposure. However, he opined that the "notch theory" has been proven "inconclusive"

in other studies. The important point to Dr. Berman is that Employee had hearing loss early in his career working for Employer and it got worse as the noise exposure continued. Dr. Berman further opined that it is unclear to science why people who have no noise exposure have high-frequency hearing loss. But he further noted in the context here, where there is a history of occupational exposure to extremely loud noise, the hearing loss pattern is more consistent with noise-related hearing loss than age-related, in his opinion. (Record).

85) At hearing, Employee testified he is currently 67 years old. He is one of nine children in his family. Employee moved to Alaska around 1981 and joined the electrical workers' union. The union dispatched him as an apprentice to various places around the Anchorage area. Employee worked as an apprentice for Employer off and on, then became a journeyman in 1986 and worked for Employer off and on in 1990, 1991, 1992 and 1993. As a temporary worker for Employer, Employee was a substation worker. He was also on "crews" at the same time and did all the work a lineman would do. "Crew" work included setting power poles, pulling wires underground and overhead and operating heavy equipment necessary to perform that work. In 1994, Employee went from temporary worker to permanent employee for Employer; he retired in 2017. (Record).

86) When he became permanent in 1994, Employee regularly operated backhoes, tractor-trailers, bulldozers, trackhoes, air compressors, bucket trucks and other heavy equipment. He operated the same equipment to a lesser extent when he worked at substations. Employee regularly flew in airplanes and helicopters to remote sites. During power outages, Employee would reset in-line circuit breakers on power poles, and when operated, the circuit breakers were "really loud" like a "shotgun" going off. "Bucket trucks" were typically ran at high-idle to keep the hydraulic systems functioning. He would sometimes work on bucket trucks all day, and often over-time. Helicopter rides were particularly noisy. Employee would wear earplugs as he approached the aircraft to get on, but once he was on he had to take his earplugs out and wear earmuffs so the pilot could speak to him. During this time, Employee had to listen to the copter noise so he could hear the pilot. Sometimes, the helicopter pilot would land in a remote area and keep the engine at high-idle while he exited because the pilot was going to leave as soon as he disembarked. (Record).

87) Around 2004, Employee was reassigned from powerlines to substations. Although the work was different, Employee said it was just as noisy or noisier as being a lineman. He also

worked on a crew when he was a substation worker. This included operating all the noisy machines he previously described. (Record).

88) Employee shared a photograph of University Substation on Tudor Road, in Anchorage. The picture showed among other things a large wall, which Employer constructed because neighbors on the other side of the four-lane road complained about noise coming from the substation; the wall was an attempt to abate the noise. Transformers in substations are very noisy, and send out loud humming and vibrations. (Record).

89) Employee described a photograph of foam earplugs he wore on the job with Employer. When describing how often he wore hearing protection at work, he said he wore earplugs daily for as long as he needed them; the time varied depending upon what he was doing. Employee noted that often, if a co-worker needed something, Employee would have to remove his earplugs so he could hear them yelling at him over the noise of the equipment. While doing certain duties, Employee had to use a handheld radio to contact dispatch, to avoid making a fatal mistake. He had to remove his earplugs to use the radio. Other workers did it too; "You had to." The earmuff style hearing protection did not work for him because they did not fit right on his head. At the substation, Employee's "office" was in a mechanic's shed. "It was noisy." In it was a ceiling crane used to lift items, and people were drilling, grinding and cutting things in that area. Employee did minimal computer work, but when he did, it was in this area. Other people fabricated and tested electrical components in that same area. He was not required to wear hearing protection in the shed area. (Record).

90) Employee was also exposed to noise while working in power plants. For example, Beluga Powerplant generated electricity with large natural gas turbines which were "extremely loud." The Cooper Landing Powerplant was the loudest he ever experienced. The turbine in that building sounded like "a jet engine." Employer required workers to wear both earplugs and earmuffs before entering that building. Employee described that building as being so loud "that whole building would shake" and "vibrate." (Record).

91) From 1982 until 1994, Employee worked about 1,700 hours per year. However, beginning in 1995 Employee typically worked over 2,000 hours per year for Employer and remembers working 2,500 hours per year, with "a lot of overtime." (Record).

92) Employee first noticed hearing loss when he was at a restaurant and had difficulty hearing his companions talking. He could not remember the exact date, but it was probably in the 90s.

Employee recalls noticing tinnitus around 2005. He began noticing that after he came home from work his ears would ring at night. Employee's ears did not ring before work. Once the tinnitus started, Employee noticed that loud noises made it worse. Employee did not wear his earplugs from 7:00 AM in the morning until the end of work at 3:30 PM because they hurt his ears. Hardhats made it difficult to wear the earmuff style. (Record).

93) At some point, Employee became frustrated and felt like he was "on the outside," so he tried to learn lip-reading. People started getting angry with him because he could not hear what they were saying. In 2017, Employee decided to see a physician because his wife was getting short with him, and he could not hear well. He saw Dr. McCarty who tested his hearing and set him up with hearing aids. Dr. McCarty cleaned and programmed his hearing aids as necessary. "There is no doubt" that the hearing aids helped him hear. Without them, he probably would not have heard what was going on at the hearing other than Dr. Berman who was amplified over the speakers in the room. Not being able to hear well "isolates" him, because he does not understand what is happening around him. "You miss out on all of that" without hearing aids. (Record).

94) On cross-examination, Employee agreed that Employer required hearing protection. He would have worn it anyway, because if he stood by a loud diesel truck all day, "It doesn't take a rocket scientist to figure out that you are destroying yourself." (Record).

95) Employee started hunting in his late teens when he hunted grouse and small game. He also did some "plinking." Employee collects military rifles from World War II. He participated in matches at local gun ranges two or three times but does not shoot much anymore. Employee did some big game hunting over the years and in 2021, he shot a moose. On some occasions while hunting, Employee never shot a single round. While hunting, Employee wore earplugs. In his opinion, his firearm use over the years did not contribute to his hearing loss because it was controlled and over a short period. On some occasions, he may have fired only two rounds in a year. In Employee's view, his firearm use was "not like standing next to a generator for eight hours." While shooting, he would use earplugs and earmuffs. Shooting ranges required shooters to use hearing protection and they are highly controlled. (Record).

96) Employee is not aware that Dr. McCarty has unpaid bills. He understands that Employer paid his bills for hearing loss treatment. (Record).

97) Employee's father who had hearing issues was a World War II veteran, having served from 1943 through 1946, and saw action in the Philippines. Employee's brother who had hearing

issues is also a journeyman power lineman. No one else in his family has hearing issues. (Record).

98) At hearing, Employee's wife Lynette said she they had been together since 1991. She began noticing "things" about Employee. For example, he would turn up the radio in the car too loudly during the late 90s and into the early 2000s. Employee would sit at home after work and tell her that his ears were "ringing." This began in the early 2000s, and occurred "every day." Employee began frequently saying, "What, what?" He began mixing up his words and his issues started wearing on her nerves. Beginning around 2017, she began getting "snippy" with him because he could not hear her. Lynette noticed a definite improvement with Employee's hearing aids. He seemed much happier now that he could hear and participate in discussions. She noticed that Employee had difficulty, especially with restaurants and movie theaters, which are too noisy for him. (Record)

99) On cross-examination, Lynette said Employee takes Lisinopril for blood pressure and Simvastatin for cholesterol. She is not aware that Employee has any genetic disorder, or since 2000 any infectious diseases, head injuries, cerebrovascular accidents, immune disorders, central nervous system neoplasms or Ménière's disease. She knows Employee's family and has met his parents. Lynette was unaware of his father's hearing loss. She is not aware that any person other than Employee's brother had hearing issues in his immediate family. Lynette also is not aware of any unpaid medical bills for Employee's hearing loss. (Record).

100) At hearing, Dr. Zeitzer reviewed his credentials. He too is an ENT physician whose more recent focus has been on occupational hearing loss and related issues. Dr. Zeitzer is on the Board's SIME list but in this instance, Employer hired him as a medical expert. He reviewed all records previously provided to Dr. Berman. Dr. Zeitzer also listened to all the testimony to this point at the hearing. (Record).

101) Dr. Zeitzer testified that virtually everyone develops hearing loss as they age; some earlier and some later. A statement that a person worked in noise and therefore their subsequent hearing loss was caused by that noise is invalid. A physician must examine the hearing loss and differences in hearing loss characteristics. Dr. Zeitzer obtains a hearing history and then takes available audiograms and places them in a graph configuration to compare and contrast them. He relies on the literature referenced in his written report to support his opinions. Dr. Zeitzer especially relies on a literature compilation set forth in the ACOEM guidelines to differentiate

between noise-induced and age-related hearing loss. He relies heavily on the “notch” concept, which he testified creates an objective view to differentiate between the types of hearing loss. (Record).

102) Dr. Zeitzer reviewed the ACOEM Guidelines, and referenced his “summary” of this attached to his report. Noise-induced hearing loss is sensory and based on a defect produced by noise in the cochlea. The ACOEM Guidelines are a compilation from various physicians who focus on noise-induced hearing loss. He reviewed the characteristics that Dr. Berman had reviewed in his testimony. Dr. Zeitzer opined that if he had noise-induced hearing loss, Employee should have had a “notch formation” obvious in the earlier stages of his hearing loss. He referred the Board to the “Audiogram Example” attached to his report, which showed what Dr. Zeitzer said was the typical “notch” for noise-induced hearing loss as well as the “downslope” configuration typical of age-related hearing loss. In explaining and referring to the “notch,” Dr. Zeitzer testified:

Well, at first it’s limited really to 4000 Hz, and it’s pretty definite. As time goes on, there’s some additional loss that occurs in the higher frequencies and that’s because of the influence of, or additive influence of, age-related hearing loss. But the characteristic of improvement in the hearing at the higher frequencies like 8000 Hz is usually present. . . . While it’s nice to have the earlier hearing tests, we still can make a judgment concerning whether it’s due to noise-induced hearing loss or age-related hearing loss by the return, or increased hearing, in the higher frequencies after 4000 Hz.

“Hertz” in layman’s terms refers to the low or high pitch of sound. Increased decibel numbers on audiograms demonstrate increased hearing loss, not increased ability to hear. Dr. Zeitzer agreed that speech generally falls between 250 Hz up to 3000 Hz. Higher frequencies help us refine our hearing. He agrees that zero dB to 25 dB is considered “normal” hearing. Dr. Zeitzer also referred to the various figures he reproduced from the book, *Medical-Legal Evaluation of Hearing Loss*, by “R. A. Dobie, MD.” Figure 1 shows audiometric progression of noise-induced hearing loss according to Dr. Dobie’s book. Figure 1 emphasizes the “notch” formation at 4000 Hz. Figure 2 shows audiometric progression of age-related hearing loss and demonstrates the “down sloping” expected with it. Dr. Zeitzer testified there is “no notch” in age-related hearing loss. In his opinion, if one compares Employee’s audiograms to Figures 1 and 2, “it becomes

very obvious to everyone” that Employee’s hearing loss audiograms more resemble age-related rather than noise induced hearing loss. (Record).

103) As to whether there can be an insignificant “notch,” Dr. Zeitzer testified that the notch tends to “flatten out as one gets older,” because there is an additional effect of age-related hearing loss, which is purely high-frequency. “But there is usually a significant return that is identifiable,” within the parameters of audiological testing. On Dr. Zeitzer’s “Audiogram Example,” the blue line demonstrates the noise-induced “notch” while the red line depicts age-related hearing loss. The Audiogram Example, which he emphasized was not Employee’s, shows an idealized diagram with “pretty severe noise exposure” at an early age. (Record).

104) As for the 10 noise-induced hearing loss characteristics that Dr. Berman addressed earlier at hearing, Dr. Zeitzer agreed that most noise-induced hearing loss occurs early and reaches a maximum level in 10 to 15 years. However, in his opinion, as occupational hearing loss progresses, the rate or incremental loss of hearing decreases. By contrast, age-related hearing loss progresses more rapidly as the individual ages. In his opinion, Employee demonstrates this feature. Dr. Zeitzer opined there are limits to hearing loss in noise-induced cases, and high-frequency loss rarely exceeds 75 dB and low-frequency rarely exceeds 40 dB. He agreed with Dr. Berman that noise-induced hearing loss occurs at the time of exposure, and does not progress after the noise exposure stops. Dr. Zeitzer also explained “time-weighted” averages and agreed with Dr. Berman that OSHA measures noise exposure by an eight-hour period. OSHA requires workers to wear hearing protection when noise level exceeds 85 dB. All of the standards upon which Dr. Zeitzer relied came from the ACOEM guidelines. (Record).

105) Dr. Zeitzer stated the genesis of the ACOEM guidelines came from “loom operator” studies in Thailand. In his understanding, Thailand was used because there is nowhere in the United States today where a study could be done on workers who have 90 dB or higher noise exposure all day long, because OSHA imposes exposure limits. (Record).

106) Based on the standards Dr. Zeitzer set forth, he concluded that Employee’s hearing loss is age-related. Dr. Zeitzer understood that Employee had a 10-year absence from work with Employer. He referred to the chart attached to his report showing Employee’s initial February 27, 2004 hearing test, which he said “pretty obviously” showed a down sloping hearing loss. In Dr. Zeitzer’s opinion, this demonstrated age-related hearing loss. When referred to what appeared to be a notch at 6000 Hz on Chart 1, Dr. Zeitzer stated this was not a notch because the

notch is “usually” centered at 4000 Hz. Moreover, in his opinion a 10 dB difference is not a significant finding. In his view, Chart 1 shows normal hearing until 2000 Hz, and then demonstrates a normal down sloping age-related hearing loss. Chart 2 represents Employee’s May 7, 2020 audiogram. Dr. Zeitzer opined that this chart also supports age-related hearing loss because it shows a down sloping pattern. (Record).

107) Dr. Zeitzer testified that Chart 2A shows hearing loss subject to a PPI rating under the AMA *Guides*. Employee’s hearing loss in the lower frequencies for the most part is within the normal hearing range. He has significant high-frequency hearing loss that is not ratable under the *Guides*. Dr. Zeitzer disagrees with Dr. Berman’s view of the *Guides*; he says the *Guides* are strictly for impairment, and do not address cause. In Dr. Zeitzer’s opinion, his Chart 3 left and right ear, again show age-related hearing loss because it demonstrates the increase loss per interval, and greater progression as he aged. Dr. Zeitzer found a “significant” increase in high-frequency hearing loss after 2016. Chart 4 is Dr. Zeitzer’s age-corrected audiogram, which he contends the average male population would have at Employee’s age. He offered this chart to demonstrate his opinion that Employee’s hearing loss is age-related and is “not unusual” for people Employee’s age who were not subject to excessive noise. Dr. Zeitzer reviewed Employee’s deposition, and nothing in it would change his opinions. He understood Employee to say that he always wore hearing protection when exposed to noise while working for Employer. (Record).

108) Dr. Zeitzer reviewed Dr. Berman’s SIME report and heard his testimony. He disagrees completely with Dr. Berman's opinion. In his view, had Dr. Berman graphed Employee’s audiograms as he did, Dr. Berman would have concluded there was no evidence of noise-induced hearing loss in this case. Dr. Zeitzer opined that Dr. Berman’s purported opinion that his own audiogram on Employee was compatible with noise-induced hearing loss did not consider Employee’s serial audiograms or his age. In Dr. Zeitzer’s practice, what he sees in his patients is consistent with the ACOEM Guidelines to differentiate between noise-induced and age-related hearing loss. He also opined that Dr. Berman failed to consider that Employee wore hearing protection while at work. Moreover, he said, “There is no evidence of any notch configuration” in Employee’s hearing tests. Dr. Zeitzer agreed that Employee’s firearm history did not contribute to his hearing loss. In his opinion, age-related hearing loss is “genetically determined to a certain extent.” Dr. Zeitzer would lump together genetic factors with age-related hearing

loss. He therefore ruled out noise exposure as the substantial cause of Employee's hearing loss. In Dr. Zeitzer's opinion, had Employee worked in a quiet environment instead of a noisy one, he would have the same hearing loss as he has today. Even if Dr. Zeitzer applied the old "a substantial factor" test to account for Employee's pre-2005 noise exposure, he would not ascribe any responsibility for Employee's hearing loss to Employer. Noise was not a factor of any significance to Employee's hearing loss, in his opinion. (Record).

109) Dr. Zeitzer explained that in his February 23, 2022 report, his answer to question 2A, which stated "[o]ther contributions to hearing loss cannot be completely excluded," meant that there could be multiple causes. But, he does not have the earlier hearing tests, so he added that comment, presumably in case these audiograms came to light later. "The major cause by far" in his opinion for Employee's hearing loss is age-related worsening. Dr. Zeitzer later clarified that by "earlier" hearing tests, he meant prior to 2004. (Record).

110) In Dr. Zeitzer's opinion, the ACOEM Guidelines have "withstood the test of time." In his view, the OTM is similar to these guidelines. (Record).

111) On cross-examination, Dr. Zeitzer conceded he had never met Employee. Nevertheless, he obtained an appropriate history regarding his hearing loss from his records and deposition. Dr. Zeitzer said the "notch configuration" if present would be more obvious on earlier tests, which he conceded he did not have. He based his opinion on the information available. Dr. Zeitzer would not expect to find any change even if he had those audiograms. When asked how many decibels constitute a notch "recovery," Dr. Zeitzer testified that there was no specific figure, but reemphasized his opinion that one would expect the greatest hearing loss notch to be at 4000 Hz. He then agreed that in this case there is at 6000 Hz "what you might say is a notch," but this did not appear throughout all his hearing tests. In Dr. Zeitzer's opinion, a notch at 6000 Hz is "quite rare." He again referred to his Figure 1 from Dr. Dobie's book as what one would expect, and "what is accepted." Figure 1 is from a study done on Thailand loom weavers, derived from Dr. Dobie's book. Figure 1 represents "an average" of however many people were included in the loom worker study. Dr. Zeitzer admitted that by definition since this study represents an average, there would be variables. (Record).

112) When asked why the "notch" affects frequencies from 3000 to 6000 Hz, Dr. Zeitzer said it is based on cochlea physiology. He disagrees with Dr. Berman, and opined that the cochlea is not frequency specific. As noise travels through the ear canal, it is modified by ear structures,

which restrict sound entering the inner ear, and that restriction “mostly” limits the noise to 4000 Hz, in his opinion. In Dr. Zeitzer’s view, the sounds heard by the loom workers subject of Figure 1, was “white noise,” as in any industrial setting. However, he conceded some jobs might have louder sounds in lower or higher frequencies. When asked what an audiogram would look like that depicted both noise-induced and age-related hearing loss, Dr. Zeitzer referred to Figure 1. He agreed that as a person continues to work, they continue to age. In his view, this is what causes the flattening in the notch over time. Dr. Zeitzer is “vaguely aware” of a 2017 study called “*Current Insights in Noise-Induced Hearing Loss.*” He considers the journal in which this article appeared reputable. Dr. Zeitzer opined that Dr. Berman’s opinion on how vibrations affect hearing was “just not true.” In his opinion, there has to be contact between the vibratory source and the skull to affect the ear. (Record).

113) When asked if the 4000 Hz level was the “magical number” for a notch, and a person could not have noise-induced hearing loss unless he had a notch at that level, Dr. Zeitzer said that was not a correct understanding; he opined the “notch” was only one factor to consider and one would have to make “a judgment” based on everything including hearing loss progression and incremental increases. Dr. Zeitzer said in this case, there was no notch configuration but there was a down sloping pattern in Employee’s audiograms. He understood Employee wore hearing protection at all times when he was exposed to noise. Dr. Zeitzer would not “rule out” noise-induced hearing loss if there were no notch present, but he would expect to see one. (Record).

114) When asked if in his Chart 3 for the right ear showed a notch at 6000 Hz, Dr. Zeitzer said it did not in his opinion represent a notch. He referred the panel back to Figure 1 from Dr. Dobie’s book and said, “That’s a notch.” When comparing Figure 1 to Chart 3 for Employee’s right ear, Dr. Zeitzer said first, the notch was not at 4000 Hz, which made it less likely that deviation was caused by noise-induced hearing. Second, the 10 dB recovery in Chart 3 was more likely due to the minor deviation in the testing. In other words, the recovery of only 10 dB in Chart 3 was not a big enough recovery to consider that a “notch.” Dr. Zeitzer confirmed that Figure 1 from Dr. Dobie’s book resulted from a study. He explained that Figure 1 came from United States Public Health Service survey data, 1960 to 1962, for 25-34-year-old women and 55-64-year-old men. Dr. Zeitzer does not know how large the study size was, but knows it was “significant.” He agreed that there could be a situation where there was a notch with no recovery, because in medicine nothing is 100 percent. However, his opinions must be based on objective evidence.

In his opinion, this could be a case where there was no recovery, but based on medical probability, this is not noise-induced hearing loss. (Record).

115) Dr. Zeitzer did not attribute Employee's hearing loss to anything other than age. He did not address Dr. Berman's testimony about hearing protection not protecting Employee's hearing 100 percent. (Record).

116) In rebuttal testimony, Dr. Berman said he heard Dr. Zeitzer's testimony and disagreed. First, he opined that the loom study to which Dr. Zeitzer referred was probably not well-controlled since it was in Thailand. Second, the loom workers were exposed to the same noise frequencies day in and day out, for years with the same machines. That was not similar to Employee's experience. Third, in 2015 Norway studied 12,000 railway workers. Norway in his view may have the best healthcare system because everyone is in it, and Norway keeps good records. The Norway study addressed "the notch." That study came out "inconclusive." Therefore, in Dr. Berman's opinion, the earlier loom study is not something a physician "can hang his hat on" like Dr. Zeitzer did. Dr. Berman said the OTM says the same thing as the railway study. He acknowledged that the OTM considered the ACOEM Guidelines, but he testified that OSHA did not accept the notch as conclusive. Rather, Dr. Berman said OSHA concluded it is not. He noted Dr. Zeitzer's inconsistent testimony about the frequency at which a notch can occur and still show noise-induced hearing loss. Moreover, Dr. Berman said Dr. Zeitzer misunderstood Dr. Berman's testimony and inferred he did not consider Employee's ear protection and serial audiograms in formulating his opinions; Dr. Berman testified that he did. He also disagreed with Dr. Zeitzer's opinion regarding acoustic vibration and opined that acoustic vibration affects the cochlea and can cause hearing damage. In his opinion, Employee's hearing loss leveled off post-retirement, contrary to Dr. Zeitzer's opinion. Dr. Berman said leveling off is consistent with what one would see with noise-induced hearing loss, even according to Dr. Zeitzer testimony's. (Record).

117) Dr. Berman agreed with the OTM and, working backwards, he would expect to see some hearing loss on pre-2004 audiograms if they were available. Nevertheless, it would not change the fact that Employee lost hearing over many years while working for Employer. In his opinion, Employee's hearing loss plateaued from 2017 to the present. Dr. Berman also opined that this fact makes Employee's high-frequency hearing loss during his employment consistent with noise-induced loss. (Record).

118) Dr. Berman did not attribute Employee's hearing loss to anything other than his work with Employer. (Record).

119) Drs. Berman and Zeitzer both have exceptional credentials. (Judgment; observations).

120) Employee contends that Employer's position is based on believing in too many coincidences. He contends three physicians agree that Employee's hearing loss is noise-induced. Only Dr. Zeitzer disagrees with their opinions, and his opinions are inconsistent and "extreme." Employee contends that Dr. Endres was actually Employer's first physician, as it sent him to see that provider. Thus, he contends even Employer's first physician agrees with his position. Since Dr. Berman is the Board's physician, it should give his opinions greater weight. Employee contends hearing loss is not a "one-size-fits-all." He noted that he was the only one in the hearing room who wore hearing aids. Moreover, he first noticed his hearing loss at age 47. Employee contends this refutes the notion that everyone eventually has hearing loss. He contends "science" appears to disagree in this case. Employee spent the most of his time working for Employer. He contends that the Board should award PPI benefits and medical care for his hearing loss. (Record).

121) Employer contends the Board should "look at the science." It contends that everyone develops hearing loss at some point. Employer contends the ACOEM developed guidelines and a structure to assist in objectifying hearing loss. It relies on that study, which shows specific patterns in audiograms that the study's proponents contend relate to noise-induced or age-related hearing loss. Employer contends Dr. Zeitzer's opinions are consistent with this study and with Employee's hearing loss patterns. It contends that Employee's testimony that his recreational shooting had no effect on his hearing loss because he wore hearing protection, is inconsistent with his feeling that his work caused his hearing loss, because he also wore hearing protection at work. Employer contends that the Board should not weigh Dr. Berman's opinion any greater than Dr. Zeitzer's, simply because Dr. Berman is an SIME physician, because Dr. Zeitzer is also an SIME physician on the Board's list, even though Employer hired him in this case as an expert. It urges the panel to rely on a statistical study demonstrating the audiogram "notch" consistent with noise-induced hearing loss versus the normal down-sloping hearing curve associated with age-related hearing loss. Employer contends Employee's audiograms reflect that age-related hearing loss slope. It contends Employee was fastidiously wore hearing protection both at work

and while doing activities away from work such as hunting and shooting guns. Consequently, it reasons that his hearing loss must be age-related. (Record).

122) The April 24, 2024 hearing took approximately seven hours. Drs. Berman and Zeitzer were present on the Zoom link the entire time, and heard each other's testimony, except when Dr. Zeitzer left the Zoom hearing after he concluded his testimony, and Employee called Dr. Berman as a rebuttal witness. No questions were posed to either physician regarding their respective PPI ratings, and the rating calculations were not otherwise discussed. Neither physician challenged nor attacked the other physician's PPI rating. (Record).

123) Post-hearing on May 1, 2024, Wilson updated his attorney fees and costs with another affidavit. His additional work since his previous affidavit increased his fees and costs by \$12,670.63, with fees at \$400 per hour. (Supplemental Affidavit of Fees and Costs, May 1, 2024).

124) On May 1, 2024, Texeira updated her paralegal costs since her previous affidavit. She added \$578.13 in costs at \$185 per hour. (Supplemental Affidavit of Fees and Costs, May 1, 2024).

125) On or before May 3, 2024, Employer did not file an opposition to Employee's claimed attorney fees or costs. The record closed on that date. (Agency file; record).

126) Employee relies on a review from the *Journal of Otolaryngology -- Head and Neck Surgery*, called "Current Insights in Noise-Induced Hearing Loss: A Literature Review of the Underlying Mechanism, Pathophysiology, Asymmetry, and Management Options" (2017) (Current Insights). While the review is highly technical, and the technical portions are not useful to this lay panel, the authors make some easily understood statements relevant to this case: "Without doubt, chronic noise exposure and the resultant cochlear trauma cause hearing loss and tinnitus." It added:

Despite its prevalence, there is still an ongoing debate about the consequence of noise-induced damage. For many years, the maximum severity of NIHL was argued to be mild to moderate and symmetrical based on pure tone audiograms [6].

Footnote [6] above refers to Dr. Dobie's study upon which Employer and Dr. Zeitzer rely. (Current Insights at 1-2, footnote [6]: "Occupational Noise-Induced Hearing Loss: ACOEM Task

Force on Occupational Hearing Loss,” *Journal of Occupational and Environmental Medicine* (2012)).

127) Included in Current Insights is a discussion about asymmetric noise-induced hearing loss:

The typical pattern of hearing loss resulting from acoustic trauma is symmetrical (footnote omitted). However, there is increasing evidence that asymmetrical hearing loss occurs as well (Table 1). Asymmetry in NIHL generates some controversy in both clinical as well as medico-legal contexts and hence warrants an in-depth discussion. (Current Insights at 4).

The Current Insights authors summarized 20 studies by various researchers on asymmetric, noise-induced hearing loss. Notably, 19 studies found at least some, if not significant, asymmetry in noise-induced hearing loss cases. Only one study from the journal *Ear Hear*, called “Does Occupational Noise Cause Asymmetric Hearing Loss?” (2014), by Dr. Dobie and others, found “no significant asymmetry attributable to current occupational noise exposure.” (Current Insights at 5-6, 13 (footnote 91)). Current Insights continued:

Hearing protection offers a secondary level of protection. However, evidence for effective hearing loss prevention programs (using personal hearing protection) is limited. The most effective hearing protection, including earmuffs and earplugs, can reduce loud noise trauma, but compliance may be limited due to the impact on one’s ability to communicate when they are worn and/or discomfort related to their use (footnote omitted) (Current Insights at 9).

....

... Individual fit-testing, which measures the effectiveness of hearing protection devices specifically for each individual, can be invaluable, particularly with earplugs since they are generally less consistent in noise reduction than earmuffs (footnote omitted) (Current Insights at 10).

....

... Evidence in the current literature further supports the notion that noise exposure can result in an asymmetric pattern of hearing loss due to unique differences in susceptibility to noise damage within individuals, increase frequency of tinnitus as well as vestibular dysfunction. The left ear (hearing and balance) is more adversely affected by noise, even in the presence of symmetric noise exposure. ... (Current Insights at 11).

128) Employee and to some extent Employer rely on the OTM. This manual provides a general education to compliance personnel primarily, about sound and occupational noise, with various illustrations. Some information is technical and not useful to this lay panel. However, relevant

statements from the OTM include: “[A] small change in number of decibels indicates a huge change in the amount of sound pressure and correspondingly the potential for damage to a person’s hearing.” The OTM continues:

Most noise is not a pure tone, rather consists of many frequencies simultaneously emitted from the source. To effectively evaluate the total noise of a [sic] most sources, it is usually necessary to measure it across its frequency spectrum. One reason for this is that people react differently to low, mid, and high-frequency sounds. Additionally, for the same sound pressure level, high-frequency noise is much more disturbing and more capable of producing hearing loss than low-frequency noise. . . .

Sensorineural hearing loss tends to be a permanent condition that is often associated with irreversible damage to the inner ear. The normal aging process and excessive noise exposure are both notable causes of sensorineural hearing loss. Studies show that exposure to noise damages the sensory cilia that line the cochlea. Even moderate noise can cause twisting and swelling of the cilia and biochemical changes that reduce cilia sensitivity to mechanical motion, resulting in auditory fatigue (emphasis in original). . . . Occupational noise exposure is a significant cause of sensorineural hearing loss, which appears on sequential audiograms as declining sensitivity to sound, typically first at high frequencies (4,000 Hz) and then lower frequencies as damage continues. Often the audiogram of a person with sensorineural hearing loss will show a “Notch” between 3,000 Hz and 6,000 Hz, and most commonly at 4,000 Hz. This is a dip in the person’s hearing level at 4,000 Hz and is an early indicator of sensorineural hearing loss due to noise. . . . Sensorineural hearing loss can also result from other causes, such as viruses (e.g., mumps), congenital defects, and some medications. Moderate hearing aids, though expensive, are able to adjust background sounds, changing signal-to-noise ratios, and support hearing and speech discrimination despite the diffuse nature of sensorineural hearing loss. . . .

The OTM includes various figures with sample audiograms similar to those Dr. Zeitzer relied upon to support his opinions. Figure 8 shows a distinct “notch” at 4,000 Hz and recovery at 8,000 Hz. The OTM also defines presbycusis:

Presbycusis is a gradual sensorineural hearing loss associated with aging. The onset and the degree of hearing loss can vary considerably and is related to genetics, other impacts such as an accumulation of diseases, medications and the cumulative effect of noise in the modern environment. Presbycusis and noise induced hearing loss appear to be additive and both can contribute to hearing loss in older people. Both types of hearing loss affect the upper range of an audiogram. A sloping audiogram with tapering to the lowest levels at 8,000 Hz

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often indicates that the hearing loss is age-related, but after years of exposure, noise-induced hearing loss can have the same pattern (emphasis in original).

....

Earplugs, earmuffs, or hearing bands alone might not provide sufficient protection from significantly high noise levels. In this case, workers should wear double hearing protection (e.g., earmuffs with earplugs).

Among many other resources, the OTM referenced Dr. Dobie’s 1993 edition of “Medical-Legal Evaluation of Hearing Loss.” (OTM).

129) Employee’s serial audiograms found in his agency file showed the following:

Table I

Hertz → Date ↓	500		1000		2000		3000		4000		6000		8000	
	↓L	↓R	↓L	↓R	↓L	↓R	↓L	↓R	↓L	↓R	↓L	↓R	↓L	↓R
7/16/90	5	10	0	0	0	0	15	0	10	0	15	15	--	--
2/27/04	0	5	0	5	0	5	25	20	25	10	45	50	55	35
1/31/05	10	10	5	5	5	10	35	20	40	15	45	50	45	35
2/21/05	10	15	10	10	10	10	30	20	35	15	45	40	45	30
3/29/05	5	5	10	5	5	5	30	20	40	15	45	40	45	40
2/1/06	10	10	5	5	5	5	35	20	30	15	55	50	60	40
1/29/07	10	15	5	10	5	5	35	20	45	15	50	45	50	30
1/14/09	10	15	5	15	5	5	40	25	35	20	50	40	55	45
1/21/10	5	5	10	5	15	5	40	20	40	25	50	55	50	55
2/4/11	10	25	10	15	10	15	40	35	45	35	45	50	50	50
3/4/11	5	10	10	10	0	5	35	30	35	30	55	45	55	50
1/26/12	10	15	5	10	5	5	40	25	35	25	50	55	55	50
4/15/13	10	20	5	20	10	20	40	35	45	40	50	55	40	50
2/10/14	15	20	10	15	10	15	40	30	40	35	65	55	60	55
3/12/15	10	15	10	10	20	15	45	35	45	30	70	60	65	70
3/31/16	10	20	10	15	10	20	40	40	50	55	65	70	65	80
4/22/16	15	20	15	20	15	20	45	40	50	55	85	70	75	65
6/15/17	10	20	10	15	15	10	40	25	45	40	80	70	80	70
9/19/17	10	20	25	25	20	30	40	40	50	50	80	75	85	75
9/27/17	Employee retired.													
6/18/19	10	20	20	20	15	25	45	40	60	50	85	70	70	80
5/7/20	15	20	10	25	20	30	50	45	70	60	85	90	75	95
9/11/23	20	20	20	30	30	30	50	50	65	60	75	70	80	75
	↑ Numbers in all these columns represent decibels. ↑													

Employee’s pre-retirement, higher-frequency hearing loss (4000 dB to 8000 dB) was generally asymmetric, and his left ear was more affected than his right. His lower frequency hearing loss

pre-retirement (500 dB to 3000 dB) never exceeded 45 dB. Employee’s pre- and post-retirement higher frequency hearing loss exceeded 75 dB only six times. (Table I; observations).

130) Employee’s agency file does not include audiograms for 1991 through 2003, 2008, or 2018. Neither party offered any explanation for this. It is unclear if Employee had audiograms performed during those years. (Agency file; record).

131) Employer has a hearing protection safety manual. It suggests that noise at its facilities could exceed 140 dB. (Chugach Corporate Safety Policy Manual, §1.4.3.5.4, December 1, 2010).

132) The panel found no evidence in Employee’s agency file showing the actual decibel level at any site where Employee worked for Employer. Similarly, it could find no evidence showing the decibel level protection offered by the earplugs Employee typically wore. Employer did not dispute Employee’s account of the noise levels at work and did not present evidence or testimony contradicting his accounts. (Agency file).

133) The remaining two panel members take official notice that former Board member Mark Sayampanathan participated in the hearing and deliberations and the resulting decision was unanimous. However, at the time this decision and order was issued, Sayampanathan was no longer a Board member and is unable to sign this decision. (Official notice).

134) The panel members have worn hearing protection around noisy apparatus and note that it reduces but does not prevent all noise from entering the ear. (Observations).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .

The Board may base its decision on not only direct testimony, medical findings, and other tangible evidence, but also on the Board’s “experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.010. Coverage. (a) . . . compensation or benefits are payable under this chapter . . . for medical treatment of an employee . . . if the . . . need for medical treatment arose out of and in the course of the employment. . . . When determining whether . . . the . . . need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the . . . need for medical treatment. Compensation or benefits under this chapter are payable for the . . . need for medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment. . . .

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). Construing AS 23.30.010(a), *Morrison v. Alaska Interstate Construction, Inc.*, 440 P.3d 224, 234-37 (Alaska 2019), said the Board must consider different causes of the “benefits sought” and the extent to which each cause contributed to the need for the benefit at issue. The Board must then identify one cause as “the substantial cause.” *Morrison* clarified the statutory language:

The statutory language does not require the Board to look at the type of injury in identifying the substantial cause of the need for medical treatment. Alaska Statute 23.30.010(a) requires the Board to “evaluate the relative contribution of different causes of the . . . the need for medical treatment.” That subsection then provides, “Compensation or benefits under this chapter are payable for . . . medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment” (citation omitted). When read together, these sentences do not reflect an instruction to consider the type of *injury* when evaluating compensability; instead, they require the Board to look at the *causes* of the injury or symptoms to determine whether “the employment” was a cause important enough to bear legal responsibility for the medical treatment needed for the injury.

In revising the applicable statute, the legislature did not remove from coverage certain injury or disease classes, “nor did it require a pathological change in a condition in order to establish compensability.” (*Id.* at 234). *Morrison* held the statute does not require the substantial cause to be a “51% or greater cause, or even the primary cause, of the disability or need for medical treatment.” The causation test “remains flexible” and is “necessarily fact-dependent.” The Board need only find which of all causes “in its judgment is the most important or material cause related to that benefit.” (*Id.*). *Morrison* also held that preexisting conditions, which a work injury aggravates, accelerates or combines with to cause disability or need for medical treatment,

can still constitute a compensable injury. (*Id.* at 234, 238-39). Lastly, *Morrison* held that the legislature gave the Board discretion “to assign a cause based on the evidence before it.” (*Id.* at 240).

Traugott v. ARCTEC Alaska, 465 P.3d 499, 511-13 (Alaska 2020) said:

The 2005 amendments did not change the but-for or factual part of compensability. For a disability to be compensable, work must still be a factual cause of the disability or need for medical treatment (footnote omitted). The 2005 amendments changed the proximate or legal cause component of the compensability analysis. Now the Board must determine which among the different causes-in-fact is the most important in the current disability or need for medical care.

....

Here, to show that the work at ARCTEC was a cause-in-fact of his disability and need for medical care, Traugott needed to establish that but for his work at ARCTEC he would not have suffered the disability at that time, in that way, or to that degree. No one disputes that he did so. The Board then needed to determine whether work was the most important of the identified causes of his disability and need for medical care.

....

And the Board, not a medical expert, is charged with determining legal responsibility. Experts can provide opinions about the ultimate question in a case, but the Board as the fact finder has the authority to interpret an expert’s opinion and decide what weight to give it (citation omitted).

In *The Boeing Company v. Heidy*, 51 P.3d 793, 797-98 (Wash. 2002), the Washington Supreme Court rejected the employer’s reliance on Dr. Dobie’s statistical “median-based allocation” to reduce an injured worker’s permanent partial “disability” for work-related hearing loss “because people of that worker’s age” generally have age-related loss. Dr. Dobie testified:

You basically look at the amount of [hearing] loss to be expected for that individual, given his age, and look at the amount of loss to be expected from what you know about the noise exposure [based on Databases A and B]. You then say, in my judgment, the fairest allocation is the one that is in proportion to those two; that if a group of people working in 90 dBA for 40 years ended up having three quarters of their loss at age 60 being age-related and a quarter of it being noise induced, that that’s a proper division of responsibility for the individual who’s 60 years old and worked for 40 years in that noise exposure. (*Id.* at 797).

Heidy reviewed Dr. Dobie's above hearing testimony said it summarized "the flaw with the median-based allocation method; it does not assist a doctor in determining the actual extent to which an *individual* suffers from ARHL" [age-related hearing loss] (emphasis in original). *Heidy* further noted under Washington's workers' compensation law, "compensation for a particular injury focuses specifically on the injured individual and the extent of his or her injuries. Statistical studies showing tendencies within given age groups do not help triers of fact determine the actual extent of workers' individual work-related diseases." Moreover:

Because of its generalized nature, Boeing's median-based allocation method is inconsistent with the entire nature of workers' compensation in Washington, which focuses on the specific and individual employment-related injuries and diseases of workers. . . .

. . . While employers are not required to compensate workers' nonwork-related diseases and injuries, the fact a worker is a certain age is irrelevant to establishing that any portion of his or her injury or disease is not work-related. If it is determined that a worker's disability is work-related and the employer can establish, on an individualized basis, that the full amount or portion of a worker's disability is not work-related, the employer need not compensate that worker portion of the worker's disease or injury that is not work-related. However, the statutes do not allow an employer to establish that a worker's disease or injury is not work-related simply by arguing the worker is of a certain age and then showing that people of that age generally suffer from the same or similar disease. (*Id.* at 798).

In *Wheeling Pittsburgh Steel Corp. v. Workers' Compensation Appeals Board*, 827 A.2d 564, 567-68 (Pa. Commonw. Ct. 2003), the Court heard an appeal in a work-related hearing loss case. The employer's medical expert though acknowledging the claimant's sensorineural hearing loss was the type that results from work-related noise exposure, testified:

However, [Dr. Chen] stated that the predominant portion of a sensorineural hearing loss occurs during the first 10 to 15 years of noise exposure; thereafter, the rate of loss slows down. Dr. Chen noted that claimant's hearing loss accelerated, starting in 1994 to 1995, when Claimant was fifty-three years old. Dr. Chen opined that a hearing loss that accelerates towards the end of a work experience, when a patient is getting older, represents an onset of age-induced hearing loss. This opinion was based upon a medical treatise by Robert Dobie, MD, entitled *Medical-Legal Evaluation Of Hearing Loss*, which Dr. Chen asserted is widely relied upon by otolaryngologists.

The workers' compensation judge and the appeals board rejected Dr. Chen's testimony and found the employer liable. It found the evidence showed that "occupational noise, alone" explained the claimant's hearing loss and audiograms showed he had "consistent and gradual hearing loss" between the subject years. The fact-finders also rejected Dr. Chen's attempt to assign the worker's hearing loss to "rifle noise or to age." On further appeal, the Court in *Wheeling Pittsburgh Steel Corp.* noted that the fact-finders before the board below had the right to accept or reject any witness' testimony in whole or in part. It further noted that a fact-finder "may dismiss an entire school of science if he determines that it lacks credibility." (*Id.* at 568). The Court affirmed.

AS 23.30.070. Report of injury to division. (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall file with the division a report. . . .

. . . .

(f) An employer who fails or refuses to file a report required of the employer by this section or who fails or refuses to file the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. . . .

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has a right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

AS 23.30.097. Fees for medical treatment and services. (a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. . . .

AS 23.30.120. Presumptions. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter. . . .

If an injured worker concedes that his employer rebutted the raised presumption of compensability, he waives the argument, and the Board need not analyze the presumption in its decision. *Jespersen v. Tri-City Air*, Alaska Supreme Court Slip Op. No 7698 (May 3, 2024). “Substantial evidence” is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion, considering the whole record. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The party with the burden of proving asserted facts by a preponderance of the evidence must “induce a belief” in the fact-finders’ minds that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness’s testimony . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The Board’s credibility findings and weight accorded evidence are “binding for any review of the Board’s factual findings.” *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). “The board has the sole power to determine the credibility of a witness’ and to weigh the evidence from a witness’s testimony, including medical testimony and reports.” *Moore v. Afognak Native Corp.*, AWCAC Dec. No. 087 (August 25, 2008).

AS 23.30.145. Attorney fees. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries. . . .

Cortay v. Silver Bay Logging, 787 P.2d 103, 109 (Alaska 1990) stated attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 975 (Alaska 1986) reiterated, "As we have noted, the objective of awarding attorney's fees in compensation cases is to ensure that competent counsel are available to represent injured workers." *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784, 798-99, 803 (Alaska 2019) reviewed the Court's directives on awarding attorney fees to successful claimant lawyers:

To clarify our holding in *Bignell*, we hold that the Board must consider all of the factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney's fee. . . . On remand, the Board must consider each factor and either make findings related to that factor or explain why that factor is not relevant.

In *State v. Wozniak*, 491 P.3d 1081, 1088 (Alaska 2021), the Court addressed and affirmed the Board's lump-sum attorney fee award and associated Board-awarded continuing statutory fees on future benefits resulting from an attorney's success in a case. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Dec. No. 152 (May 11, 2011) affirmed the Board's decision declining to reduce an attorney fee award for *de minimis* issues upon which the injured worker did not prevail at hearing.

AS 23.30.155. Payment of compensation. . . .

(p) An employer shall pay interest on compensation that is not paid when due. . . .

Medical benefits are "compensation" subject to interest. *Moretz v. O'Neill Investigations*, 783 P.2d 764 (Alaska 1989).

AS 23.30.190. Compensation for permanent partial impairment; rating guides.

(a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . . The compensation is payable in a single lump sum, except as otherwise provided. . . .

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the

American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. . . .

AS 23.30.395. Definitions. In this chapter,
. . . .

(24) “injury” means accidental injury . . . arising out of and in the course of employment. . . .

8 AAC 45.180. Costs and attorney’s fees. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . . .

Alaska Rules of Prof. Conduct, Rule 1.5(a), referenced in *Rusch*, 453 P.3d 784, 798-99 states:

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

The Division’s copy of the *Guides* 6th Edition, second printing 2009, used in this case and required by law for calculating impairment benefits in these cases, states in relevant part:

**CHAPTER 2
PRACTICAL APPLICATION OF THE *GUIDES***

2.3a Who Performs Impairment Ratings?
. . . .

It must be emphasized, however, that even though the *Guides* is mainly written by medical doctors for medical doctors and others permitted to do impairment evaluations, nonphysician evaluators may analyze an impairment evaluation to determine if it was performed in accordance with the *Guides*. (*Id.* at 23).

....

CHAPTER 11 EAR, NOSE, THROAT, AND RELATED STRUCTURES

11.1 Principles of Assessment

....

Hearing sensitivity may be tested with and without an assistive device. However, only the measurement without the assistive device should be used to determine the impairment rating. . . . (*Id.* at 248).

....

11.2a Evaluation of Hearing Impairment

....

. . . Sensorineural hearing impairment is caused by pathologic processes taking place in the cochlea, the acoustic nerve, or the brainstem. There are many causes of sensorineural hearing impairment, including excessive noise exposure, ototoxic medications, childhood diseases, hereditary hearing loss (which may begin at any age), presbycusis, meningitis, tumors, infections, and head injuries, among others. . . . (*Id.*).

11.2b Tinnitus.

Tinnitus is a term used to describe perceived sounds that originate within a person, rather than in the outside world (*italics in original*). Although nearly everyone has mild tinnitus momentarily at some point in life, continuous tinnitus is abnormal. . . . This symptom is more common in people with otologic problems, although tinnitus also can occur in otologically normal patients. (*Id.* at 249).

....

. . . Nonetheless, if the tinnitus interferes with ADLs, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well-being, up to 5% may be added to a measurable binaural hearing impairment. . . . (*Id.*).

11.2c Criteria for Rating Impairment due to Hearing Loss

....

In the calculation of a hearing impairment rating, no correction for presbycusis should be made because: (1) the method in Section 11.2d calculates the degree of hearing and assigns a rating regardless of cause (e.g., age, injury, or noise

exposure) and (2) age correction would result in a reduced binaural impairment score that would thus underestimate true magnitude of the hearing impairment. . . . (Id. at 249-50).

The *Guides* in sections 11.2 and related tables, provide a comprehensive format and formulas for calculating hearing loss. (Id. at 248-54). For brevity, they are not all reproduced here, but are incorporated by reference. The following example from the *Guides* is similar to the instant case and illustrates how the audiogram-based calculations are performed:

Example 11-3: SENSORINEURAL HEARING IMPAIRMENT, BILATERAL

Subject: 64-year-old man.

History: Retired machinist. Progressive hearing loss for 13 years. Worked in several noisy environments; used hearing protectors fairly regularly. Exposure to gunfire during 4 years of service in the Marines. General health good. No history of tinnitus or vertigo.

Current Symptoms: Difficulty with communication at home, in restaurants, driving a car, and in noisy environments.

Physical Exam: No abnormalities.

Clinical Studies: Audiological tests: speech perception threshold of 20 dB. Pure tone audiometry reveals the threshold levels (DB) given in comment.

Diagnosis: Sensorineural hearing impairment, bilateral.

Impairment Rating: 8% impairment of the whole person. Apportionment for the military-related hearing loss can be accomplished only by subtracting impairment verified from audiograms reflecting the individual's post-Marine hearing status.

Comment: The impairment calculated from this audiogram is based on the DSHL [the decimal sum of hearing threshold levels]. The DSHL for the right ear is 175 (20+15+60+80), and the DSHL for the left ear is 160 (25+15+60+60). Combine 175 (worse ear) and 160 (better ear) using Table 11-2 for a binaural hearing impairment of 23.4%. Use Table 11-3 to obtain the 8% whole person impairment. (Id. at 254).

**CHAPTER 13
THE CENTRAL AND PERIPHERAL NERVOUS SYSTEM**

Table 13-8 Criteria for Rating Neurologic Impairment Due To Alteration in Mental Status, Cognition, and Highest Integrative Function (MSCHIF)

The *Guides* Table 13-8, provides MSCHIF whole-person impairment ratings in five classes. A “Class 1” alteration is an “Alteration in MSCHIF but the patient is able to assume all usual roles and perform ADLs,” that ranges from “1%-10%.” (*Id.* at 331).

ANALYSIS

1) Did Employee’s hearing loss arise out of and in the course of his employment?

“Causation” is the primary issue in Employee’s claim. If his hearing loss and need to treat it did not arise out of and in the course of his employment with Employer, then the inquiry ends here -- Employer would be liable for no hearing loss benefits. AS 23.30.010(a); AS 23.30.395(24).

The parties agree on some issues in this case. First, they agree that Employee has hearing loss. His audiometric testing discloses as much. Second, they agree that he worked for Employer for a long time in a noisy environment. Employer had a hearing conservation program, and required that he wear hearing protection, recognizing that noise at work was a hazard. Its safety manual suggest noise can exceed 140 dB. Moreover, Employer presented no evidence or witnesses disputing Employee’s account of the extremely noisy environment in which he worked for Employer. Third, the parties agree that Employer rebutted the raised presumption of compensability, which placed the burden of production back on Employee. Therefore, the presumption analysis does not apply. AS 23.30.120(a)(1); *Jespersen*. The burdens of proof and persuasion fall on Employee. *Miller; Saxton*.

Employee claims a cumulative exposure injury that ended when he retired in 2017. He ascribes his work for Employer beginning in 1982, with a 10-year hiatus, and then off-and-on work for Employer from 1990 through 1994, and permanent employment thereafter until his retirement as causing his hearing loss and the need to treat it. His September 18, 2017 injury date means the post-2005 causation standard, “the substantial cause,” applies to this case. AS 23.30.010(a).

To prevail on causation, Employee must demonstrate that his employment with Employer was the substantial cause of his need for medical treatment for hearing loss. *Huit*. He must convince the fact-finders that of all the different causes of the “benefits sought,” work with Employer was “the substantial cause.” *Morrison*. In other words, this panel must evaluate the “relative contribution of different causes of the . . . need for medical treatment,” and, if his work for Employer in relation to other causes is the substantial cause of the need for medical treatment, then Employer is liable. *Id.* The fact-finders do not consider the “type of injury” when evaluating compensability, but look at “the causes of the injury or symptoms” to determine whether employment was “a cause important enough to bear legal responsibility for the medical treatment needed for the injury.” *Id.* The legislature did not require a “pathological change in condition” to establish compensability. *Id.* The “substantial cause” need not be a “51% or greater cause, or even the primary cause,” of the need for medical treatment. The causation test is “flexible” and is “necessarily fact-dependent.” The fact-finders use their judgment to determine which of all causes based upon the evidence before them is “the most important or material cause” related to Employee’s need for medical care for his hearing loss. *Id.*

Employee’s work with Employer must be a factual cause of his need for medical treatment. *Traugott*. To prevail, Employee must show that “but for his work” with Employer, he would not have had hearing loss at the time, in the way or to the degree that he did. The fact-finders will then determine whether his work with Employer was the most important of the identified causes of his hearing loss and need for medical care. *Id.* This panel, and “not a medical expert” determines legal responsibility. Medical experts provide opinions, but the fact-finders have the authority to “interpret an expert’s opinion and decide what weight to give it.” *Id.*

This case presents an evidentiary battle between two highly qualified medical experts. *Rogers & Babler*. Both are on the Division’s SIME physician list. Dr. Berman is the assigned SIME for Employee’s case; Employer hired Dr. Zeitzer to give opinions. Yet their opinions are mostly diametrically opposed. Dr. Berman is convinced that Employee’s hearing loss is noise-induced, and caused by working for Employer. Dr. Zeitzer is equally convinced that Employee’s hearing loss is age-related and his work for Employer contributed nothing to it. This opposition highlights the scientific disagreement and controversy regarding occupationally induced and age-

related hearing loss. Simply stated, the dispute between these eminently qualified physicians boils down to Dr. Berman relying on his experience as a hearing loss expert, his cited literature and his clinical experience, and Dr. Zeitzer relying on his experience as a hearing loss expert, a statistical study, his cited literature and his clinical experience, to support their opinions.

A) A Statistical Study Is Not Helpful to the Factfinders.

Employer urges this panel to “follow the science,” and relies primarily on a statistical study based on loom workers in Thailand, and on various treatises that also relied on that study. Dr. Zeitzer’s report and his hearing testimony relied heavily on this study and various articles and books reproducing its findings. In Dr. Zeitzer’s opinion, the study requires a “notch” finding at 4000 Hz on Employee’s audiograms within 10 to 15 years of beginning his employment with Employer, to support noise-induced hearing loss. The “notch” must meet additional parameters to actually be a notch. It is “almost always” symmetrical. Asymmetrical hearing loss is “usually” caused by recreational exposure to, for example, firearms. Occupational noise-induced hearing loss produces high-frequency loss, while lower speech frequencies are not “usually” involved. Age-related hearing loss incrementally accelerates over time in a down-sloping audiogram configuration. The “notch” recovery (improvement in hearing at that frequency), also has specific parameters in his opinion. And because in Dr. Zeitzer’s view these characteristics are not met, Employee does not have noise-induced hearing loss caused by his employment with Employer.

Employer further contends, again based on Dr. Zeitzer’s report and testimony, that the factfinders cannot determine that Employee has work-related hearing loss simply because he worked in a noisy place. It contends this is a logical fallacy; Employer is correct. Nevertheless, Employer applies a similar logical fallacy and contends this panel should rely on a statistical study and apply it to this case to find Employee’s hearing loss is age-related. In other words, Employer contends that since a statistical study showed that a certain population at a particular industry had a distinct audiogram configuration, Employee must also have this configuration or else his employment could not cause his hearing loss. This argument lacks merit for the following reasons:

Our Act applies to individual “injured workers.” AS 23.30.001(1). For an individual “employee” to succeed in his case, he must show that his disability or need for medical treatment “arose out of and in the course of” his employment. AS 23.30.010(a); AS 23.30.395(24). The Act’s focus is on the injured worker’s work occurrence, not on some other worker’s incident. The Act requires the fact-finders to evaluate relative contributions of different causes of Employee’s hearing loss and need for treatment. *Morrison*. The causation test is “necessarily fact-dependent.” *Id.* It is not dependent on statistical averages from studies that may or may not apply in a specific case.

The Washington Supreme Court in *Heidy* rejected an argument similar to Employer’s in a hearing loss case. Ironically, the employer in *Heidy* relied on Dr. Dobie’s statistical “average” analysis, much like Dr. Zeitzer and Employer rely on Dr. Dobie’s statistical audiogram “notch” theory in this case. *Heidy* noted that Dr. Dobie’s testimony summarized “the flaw” with his method; “it does not assist a doctor in determining the actual extent to which an *individual* suffers” from age-related hearing loss (emphasis in original). Just like in Alaska, Washington’s workers’ compensation law “focuses specifically on the injured individual and the extent of his or her injuries.” *Heidy* further concluded that statistical studies showing “tendencies” within given age groups “do not help triers of fact determine the actual extent of workers’ individual work-related diseases.” It held that Dr. Dobie’s approach was “inconsistent with the entire nature of workers’ compensation.” *Heidy* further concluded that Washington’s statutes do not allow an employer to show hearing loss is not work-related simply by arguing that the worker “is of a certain age and then showing that people of that age generally suffer from the same or similar disease.” Although *Heidy* is not binding precedent in Alaska, its facts are analogous to the instant case and its reasoning is persuasive. However, this decision will still evaluate the relative contributions of different causes for Employee’s hearing loss and need for treatment. *Morrison*.

A Pennsylvania court came to a similar conclusion in *Wheeling Pittsburgh Steel Corp.*, another hearing loss case. There, the employer’s expert cited Dr. Dobie’s book relied upon by Dr. Zeitzer in this case, *Medical-Legal Evaluation of Hearing Loss*, and argued the same statistical findings upon which Dr. Zeitzer relies here. In *Wheeling Pittsburgh Steel Corp.*, the workers’

compensation judge and appeals board rejected the medical expert's testimony and found the injured worker's "occupational noise, alone," explained his hearing loss and found that audiograms showed "consistent and gradual hearing loss" over the years the worker worked for the employer. On further appeal, the higher court affirmed. *Wheeling Pittsburgh Steel Corp.*, noted that fact-finders had the right to accept or reject any testimony in whole or part, and could "dismiss an entire school of science" if it determined it lacked credibility. The facts in *Wheeling Pittsburgh Steel Corp.*, were similar to the instant case and while not binding, its reasoning is also persuasive.

Given the reasoning from the above jurisdictions, this decision will give less weight and credibility to the statistical "notch" and other noise-induced hearing loss characteristics and findings relied on by Dr. Zeitzer and Employer, and on those publications and treatises that rely on that study. AS 23.30.122; *Smith; Moore; Heidy; Wheeling Pittsburgh Steel Corp.* Moreover, Dr. Berman cited a 2015 Norwegian railway worker study that found the "notch" theory "inconclusive." This study highlights the controversy and disagreement among medical experts on this hearing loss issue. Therefore, the fact that OSHA and other groups cited to studies and publications upon which Employer and Dr. Zeitzer relies is immaterial. Reliance on a statistical study does not aid the fact-finders here in determining whether Employee's specific hearing loss and need to treat it arose from and in the course of his unique work circumstances while working for Employer.

B) Alternatively, Even if the "Notch" and Other ACOEM Characteristics are Applied, Employee Would Still Prevail.

Employer contends Dr. Zeitzer's opinions are "evidence-based," because they are based primarily on a study from Thailand. But Dr. Berman is also a medical expert and based his opinions on evidence as well, and on a study that disputes the notch study. There are other problems with Dr. Zeitzer's opinions: First, his "summary" of the ACOEM statement is not exactly accurate, and he enhances its statements and uses sources that relied on it to support his opinion. In many instances, the evidence is contrary to his analyses. For example, the following compares the ACOEM noise-induced hearing loss characteristics in italics, with Dr. Zeitzer's opinions and the evidence:

- *Noise-induced hearing loss is always sensorineural.* Both experts agreed that this is true. They both agree Employee has sensorineural hearing loss. This supports Employee's hearing loss being noise-induced. AS 23.30.122; *Smith*.
- *Noise-induced hearing loss is "typically" bilateral because "most" noise exposure affects both ears symmetrically.* But Dr. Zeitzer said it is "almost always" symmetrical. There is a difference between "typically" and "almost always." His opinion amplified the occurrence of symmetrical hearing loss above what the ACOEM stated, to bolster his opinion. Current Insights came to a contrary conclusion and highlighted recent evidence calling the symmetrical loss theory into question. This enhancement effort, and the Current Insights evidence, reduces Dr. Zeitzer's credibility. AS 23.30.122; *Smith*.
- *The first sign of noise-induced hearing loss is a "notching" on an audiogram at frequencies of 3000, 4000 or 6000 Hz with recovery at 8000 Hz.* Dr. Zeitzer's opinion emphasized the 4000 Hz notch. He offered other factors to support his opinion, but he focused on the notch. Since Employee did not have an audiogram notch at 4000 Hz, Dr. Zeitzer concluded that his hearing loss could not be noise-induced. But the ACOEM statement upon which he relies expressly states that the notch can occur at 3000, 4000 or 6000 Hz. The panel and Dr. Berman agree that Employee has a distinct notch at 6000 Hz on several audiograms (see Table I, above and graphs on Dr. Zeitzer's report). At hearing, when addressing this finding, Dr. Zeitzer first stated the 6000 Hz reading did not qualify as a notch for various reasons. He later agreed there is at 6000 Hz "what you might say is a notch." Dr. Zeitzer later retreated to his position that this is not really a notch. The primary reasons he gave included that it did not appear on all audiograms, and it did not "recover" enough to qualify as a notch. But Dr. Zeitzer also testified that aging may cause the notch to decrease and agreed that as a person ages, noise-induced hearing loss and age-related hearing loss may appear the same on audiograms. Moreover, since Employee's notch appeared at 6000 Hz, and his audiograms only measured to 8000 Hz, the 10 Hz recovery that Dr. Zeitzer said was probably a testing deviation could not recover past 8000 Hz because the graph ends at 8000 Hz. The audiogram science is equivocal at best. Both physicians seemed to agree that in some instances, a 10 dB change is significant; in other instances, a 10 dB change may be a test booth variation or other insignificant anomaly. Dr. Zeitzer's attempt to minimize

Employee's 6000 Hz notch was advocacy for Dr. Dobie's theory and reduces his credibility. AS 23.30.122; *Smith; Moore*. By contrast, Dr. Berman testified that Employee had a notch even under ACOEM standards, and assuming the ACOEM guidelines were correct (he stated recent studies show the notch is "inconclusive") this would support Employee's hearing loss as noise-induced. His testimony is credible and is given greater weight. AS 23.30.122; *Smith; Moore*.

- *The exact location of the notch depends on multiple factors including the frequencies of the noise and Employee's ear canal size.* Dr. Zeitzer did not satisfactorily address how this applied to Employee's case, where the panel and Dr. Berman saw a notch at 6000 Hz.
- *In early noise-induced hearing loss, average hearing thresholds at the lower frequencies of 500, 1000 and 2000 Hz are better than the average thresholds at 3000, 4000 6000 Hz.* Employee's audiograms demonstrate this characteristic. Dr. Zeitzer did not address this.
- *Noise exposure alone usually does not produce a loss greater than 75 dB in high frequencies and greater than 40 dB in lower frequencies.* This is consistent with most of Employee's audiograms (see Table 1, above). Dr. Zeitzer did not address these findings.
- *Hearing loss due to continuous or intermittent noise exposure increases most rapidly during the first 10 to 15 years of exposure.* Employee had "normal" hearing in 1990. Beginning 15 years later in 2004 and 2005, he began showing hearing loss on serial audiograms. Dr. Zeitzer attributed this to aging. But Employee was only in his mid- to late-40s when audiograms showed his hearing declining. Dr. Zeitzer did not explain this, which further reduces his credibility. AS 23.30.122; *Smith; Moore*.
- *Available evidence shows that previously noise-exposed ears are more sensitive to future noise exposure.* Dr. Zeitzer appeared to disagree with this ACOEM statement.
- *There is insufficient evidence to conclude that hearing loss due to noise will progress once the noise exposure is discontinued, although recent animal studies showed degeneration of the cochlear nerve suggesting delayed hearing effects.* Changing "insufficient evidence" into a certainty, Dr. Zeitzer concluded that noise-induced hearing loss stops when the noise stops. By contrast, Dr. Berman said there may be continued hearing loss from noise after the noise ceases. Dr. Berman is given greater credibility. AS 23.30.122; *Smith; Moore*.

- *Exposure from 80 to 85 dB may contribute to hearing loss in unusually susceptible individuals.* Dr. Zeitzer implied that there were no “sensitive” individuals.
- *Continuous noise exposure throughout the workday for years is more damaging than interrupted exposure to noise.* This is exactly the noise to which Employee was exposed while working for Employer. Yet Dr. Zeitzer attributed his hearing loss to age.
- *Hearing protection attenuation may vary widely between individuals, and in the real world may provide less than a laboratory-derived dB rating.* Dr. Zeitzer and Employer concluded that since Employee wore hearing protection constantly, this would have protected him from hearing loss. But at hearing Employee testified that he wore his hearing protection as much as he could; his deposition testimony read in context is not at odds with his hearing testimony and both were credible. AS 23.30.122; *Smith*. More importantly, regardless of how much Employee wore his earplugs, Dr. Berman testified that hearing protection reduces exposure to noise but does not eliminate it. Moreover, Employee wore earplugs almost exclusively, and according to the OTM, earplugs are the least effective form of hearing protection. Dr. Berman understood Employee’s hearing protection use at work, was credible and his testimony is given significant weight. AS 23.30.122; *Smith; Moore*.
- *The presence of a temporary threshold shift which largely disappears within a hours or days after exposure to loud noise is a risk indicator that permanent noise-induced hearing loss will likely occur if hazardous noise exposure continues.* Employee had a standard threshold shift in his January 13 and February 21, 2005 audiograms. The experts did not address whether this is the same as a temporary threshold shift, but it did occur during the first 10 to 15 years of exposure, which coincides with noise-induced hearing loss under ACOEM standards. This is given some weight. AS 23.30.122; *Smith*.

Employer contended that since Employee wore hearing protection at all times while at work, he could not have suffered noise-induced hearing loss. Both the ACOEM statement above, and Dr. Berman testimony refuted that contention; both stated that earplugs provide the least protection and do not provide complete protection from noise. Employee’s description of the extraordinary noise to which he was exposed for decades while working for Employer suggests he was exposed to hearing-damaging noise notwithstanding his earplugs. Employer built a wall at its

Tudor Road power substation to reduce noise to a neighborhood located across a four-lane highway. One building in which Employee worked was so noisy that the whole building shook and vibrated. He described riding in helicopters and airplanes where he could not wear earplugs because he had to speak with the pilots. Employee described a variety of earthmoving equipment and other tools and trucks that experience teaches can be extremely noisy. He often removed his earplugs to converse with co-workers. The panel's own experience with hearing protection shows that it does not prevent all noise from entering the ear. *Rogers & Babler*.

Employer provided no decibel measurements for any place where Employee worked. It presented no evidence suggesting he exaggerated the noise at work. Its safety manual suggests that noise at work could exceed 140 dB. (Chugach Corporate Safety Policy Manual, §1.4.3.5.4). There is no evidence Employee had "fitted" earplugs, nor evidence of how effective his earplugs were in protecting his ears. Dr. Berman testified that common earplugs protect from 8 to 12 dB; there was no contrary evidence. A chart attached to Employee's February 21, 2005 audiogram depicted noise from various sources: A helicopter (100 dB) -- Employee flew in these and heard the noise because he could not wear his earplugs and still hear the pilot through a headset; a lawnmower (105 dB) -- Employee used these at substations; jet engines (110 dB) -- Employee worked in power plants that used turbines similar to jet engines. Even assuming Employee wore both earplugs and earmuffs in that area, there is no evidence of their ratings or effectiveness. As the ACOEM statement stated, "the real world" may provide less than a laboratory-derived dB rating for hearing protection. Dr. Berman's credible testimony suggests that Employee's common, non-fitted earplugs would reduce these noises by only 8 to 12 dB even assuming he wore them all day long, every day. The evidence shows that Employee's work with Employer exposed him to significant, inadequately reduced noise. This is not to criticize Employer; as Dr. Berman credibly stated, hearing protection can only do so much. AS 23.30.122; *Smith*.

The medical records and the *Guides* mention conditions, exposures and substances that could cause hearing loss and tinnitus. *Guides*, Chapter 11, 11.2. There is no evidence Employee has causes of sensorineural hearing loss and tinnitus including: high cholesterol and blood pressure (Employee takes medication for both; no physician said either caused his hearing loss or tinnitus); lesions or tumors in the inner ear, cochlea, ear canal or brain; a severe head injury;

chronic infections; or a genetic disposition or disorder. On this last potential cause, there is no genetic testing in evidence to support a familial tendency. Employee comes from a large family and none of his siblings have hearing loss except for a brother who was also a lineman. Employee's father had hearing loss but fought in a war. Similarly, there is no evidence Employee used ototoxic drugs or solvents, or had Ménière's disease or Down Syndrome. Employee's wife Lynette supported these conclusions with her credible testimony. AS 23.30.122; *Smith*.

Although Employer implied that shooting firearms may have caused Employee's hearing loss, it did not expressly offer that defense and Dr. Zeitzer did not say that firearm use played any role in Employee's hearing loss. Further, Employee testified that he did minimal shooting over the years compared with his noise exposure at work, and he wore both earplugs and earmuffs while shooting. His testimony was credible. AS 23.30.122; *Smith*.

The only two causes offered to explain Employee's hearing loss, tinnitus and need for treatment were: (1) occupationally noise-induced, and (2) age-related. As a whole, the evidence shows he was exposed to extremely loud noises while working for Employer, nearly constantly, for at least 25 years. It is undisputable that as he continued to work for Employer, Employee also aged. But it is also undisputable that as Employee continued to work for Employer he was exposed to loud noises that could cause hearing loss and tinnitus especially given his chosen hearing protection. There is undisputable evidence that he developed hearing loss and tinnitus at a relatively young age within 10 to 15 years of working for Employer full-time. Dr. Berman testified that Employee's audiograms are consistent with those of lineman and first-responders that he has treated for decades for occupational noise-induced hearing loss and tinnitus. By contrast, it is unknown and unknowable what Employee's hearing loss would be today "but for" the noisy environment in which he worked for Employer. *Traugott*. Therefore, Dr. Zeitzer's age-related opinions are given less weight and credibility because they are speculative and based primarily on "inconclusive" studies and literature. Contrary to his opinion, the notch theory has not withstood "the test of time," and was based on what is "normally," or "usually" or "typically" found, and was challenged in a more recent Norway study. AS 23.30.122; *Smith*; *Moore*.

In summary, the Act requires findings based on Employee's fact-specific circumstances, not on a study depicting a trend among a particular population. AS 23.30.001(1); AS 23.30.010(a); *Heidy; Wheeling Pittsburg Steel Corp.* Alternately, even considering the "inconclusive" study and related treatises, Employee still prevails. The evidence when viewed as a whole shows that Employee's noise exposure while working for Employer is the most important or material cause of his hearing loss and tinnitus and the need to treat them. *Morrison.* The weight of the evidence shows that "but for" his work for Employer, Employee's hearing loss, tinnitus and need to treat them would not have happened at the time, in the way or to the degree that it did. *Traugott.* Employee's hearing loss and related tinnitus arose out of and in the course of his employment with Employer, and are compensable. AS 23.30.010(a); AS 23.30.395(24); *Miller; Saxton.*

2)Is Employer liable for Employee's hearing loss treatment costs?

As Employee's hearing loss and tinnitus are compensable injuries, Employer must furnish medical and other attendance or treatment as well as apparatus for the period which the nature of the injury or the process of recovery requires. AS 23.30.095(a). Hearing loss is a life-long problem. The parties agree there are no outstanding medical bills; Dr. McCarty's ledger says as much. Employer will be directed to continue to pay for Employee's ear examinations, hearing aids and other reasonable and necessary hearing-loss-related treatments including those Drs. Berman and McCarty previously recommended, subject to the Alaska Medical Fee Schedule.

Dr. Zeitzer suggested that hearing-aid-related costs to this point have been exorbitant. However, other than Dr. Zeitzer's opinion, there is no evidence that Dr. McCarty's charges or his services were unreasonable or unnecessary. Moreover, Alaska has a Medical Fee Schedule that dictates what is a reasonable charge. AS 23.30.097(a). Dr. Zeitzer did not testify that he sold hearing aids or was an audiologist. His opinion on these medical costs is given little weight. AS 23.30.122; *Smith; Moore.* Employer will also be directed to pay medical-related transportation benefits for Employee's hearing loss pursuant to the Act and applicable regulations.

3)Is Employer liable for Employee's PPI benefits?

As Employee's hearing loss and tinnitus are compensable, he is entitled to PPI benefits if he has an appropriate rating under the *AMA Guides*. AS 23.30.190(a), (b). This case presents two diametrically opposed PPI ratings, from two highly qualified ENT specialists. *Rogers & Babler*. In accordance with the *Guides*, the panel reviewed the *Guides* and determined that both physicians used the same, correct method to determine Employee's audiogram-based PPI ratings. *Guides*, Chapter 2, §2.3a. Dr. Zeitzer did not perform his own hearing tests, but those upon which he relied were done without an assistive device. Dr. Berman's audiologist tested Employee's hearing without an assistive device. *Guides*, Chapter 11, §11.1. Dr. Zeitzer added no additional percents for Employee's moderate tinnitus, or for MSCHIF; Dr. Berman gave him five percent for tinnitus, pursuant to *Guides*, Chapter 11, §11.2b, and an extra one percent for MSCHIF, pursuant to *Guides*, Chapter 13, Table 13-8. Though it is hard to tell, Dr. Zeitzer may have age-corrected his PPI rating, which the *Guides* prohibits; Dr. Berman did not. *Guides*, Chapter 11, 11.2.

Dr. Berman's PPI rating report was detailed; he "showed his work," making it easier for the panel to ascertain how he obtained his PPI rating. He made one subtraction error, which is discussed below. By contrast, Dr. Zeitzer's PPI rating was brief and not easy to follow until after the panel read Dr. Berman's report and compared it to *Guides*' methodology. Only then could the panel determine that both physicians properly used the same audiogram-related method. Both raters used post-retirement audiograms; Dr. Zeitzer used Employee's May 7, 2020 audiogram, while Dr. Berman used Employee's September 11, 2023 audiogram performed in his office. As the audiograms are different, this explains the disparate audiogram-based ratings. Dr. Zeitzer calculated a "0.4" percent whole-person PPI audiogram-based rating, while Dr. Berman derived a "4" percent whole-person audiogram-based rating. With one exception, both physicians' ratings were correct and in accordance with the *Guides* based upon the audiogram information they used in their calculations. AS 23.30.190(b); *Rogers & Babler*.

On page 19 of his report, Dr. Berman made a subtraction error. When calculating Employee's binaural hearing impairment, he correctly stated that he had to multiply the ratable hearing loss percentage of the better hearing ear by "5," then "add to that number" the hearing loss percentage of the poorer ear (emphasis added). However, instead of *adding* the latter number,

Dr. Berman inadvertently *subtracted* it ($46.90 + 11.25 = 58.15$, not 35.65 as Dr. Berman stated; $46.90 - 11.25 = 35.65$). Since the *Guides* give facts-finders authority to analyze an impairment rating to make sure it is performed in accordance with the *Guides*, the panel recalculated Dr. Berman's audiogram-based PPI rating using the correct, *added* figure, above. *Guides*, Chapter 2, §2.3a. The panel does not reduce the weight given to his rating because Dr. Berman used the proper method pursuant to the *Guides* but simply made a subtraction mistake. AS 23.30.190(b).

Dr. Berman also gave Employee an extra five percent binaural hearing impairment for his "moderate tinnitus" in accordance with the *Guides*. *Guides*, Chapter 11, §11.2b. This, added to his audiogram-based PPI, results in a five percent whole-person PPI rating. Dr. Berman also gave Employee an additional one percent pursuant to the *Guides* for his minimal MSCHIF impairment pursuant to Table 13-8. *Guides*, Chapter 13, Table 13-8.

Neither physician discussed his PPI rating at hearing nor were they questioned about them. Neither disagreed with nor criticized the other's rating. The *Guides* do not indicate which of many audiograms a physician should use in determining a PPI rating. Both physicians selected a post-retirement audiogram. This, and the widely disparate PPI ratings, made selecting an appropriate PPI rating in this case problematic. However, the panel is limited to the evidence before it, and Dr. Berman's PPI rating is more in line with the *Guides* example: a 64-year-old retired machinist who had progressive hearing loss for 13 years, worked in several noisy environments, and used "hearing protectors fairly regularly." He too had gunfire exposure while in the Marines for four years, although Employee's was much less. As Employee and his wife testified, he like the retired machinist had difficulty with communication at home, in restaurants, driving a car and in noisy environments. The machinist, like Employee had no physical abnormalities. The sample worker, like Employee, had bilateral sensorineural hearing impairment. Using the *Guides* formula that both physicians used here, the example shows the retired machinist had eight percent whole-person PPI for his hearing loss. The retired machinist had considerably worse audiograms than Employee. *Guides*, Example 11-3. However, unlike Employee, he had no tinnitus, which explains why the example did not include any additional impairment for that. The example did not address Table 13-8. Therefore, Dr. Berman's PPI rating is given greater weight because it is done strictly and solely in conformance with the

Guides and is closer to the example the *Guides* provides in a similar situation. AS 23.30.122; AS 23.30.190(b); *Smith*.

Corrected for the subtraction error, Dr. Berman's overall whole-person PPI rating is six percent. Employer will be ordered to pay Employee PPI benefits based on Dr. Berman's corrected six percent rating (\$1,770 x 6 percent = \$10,620). AS 23.30.122; AS 23.30.190(a); *Smith*; *Moore*; *Guides*, Chapter 2, §2.3a.

4) Is Employer liable for a late-notice penalty?

Employee requests a penalty pursuant to AS 23.30.070(f). He contends that Employer knew he had hearing loss in 2005 and failed to timely report an injury. AS 23.30.070(a). The statute states if Employer failed or refused to file a report required under the Act in the required time, shall "if so required" pay Employee, his representative or other party entitled to compensation "an additional award" commonly referred to as a "penalty," equal to 20 percent "of the amounts that were unpaid when due." AS 23.30.070(f). Unlike other so-called "penalty" statutes in the Act, this one gives the fact-finders discretion to require the penalty, or not.

Employee's penalty claim makes a valid point, but it also has several problems. As he stated, Employer knew by at least 2005 when Employee saw Dr. Endres that he was subjected to loud noises at work and had hearing loss, which Dr. Endres conceded could be caused by his work for Employer. Employer should have filed an injury report at that time, within 10 days of Dr. Endres' report. AS 23.30.070(a). However, the main problem with Employee's penalty claim is that he fails to state on what benefit the penalty should be levied. The record discloses no time loss resulting from Employee's hearing loss. It shows no unpaid medical bills from 2005 or thereafter, until sometime around 2017 when Employee filed a claim for benefits. The parties agreed that Employer paid all hearing-loss related medical bills, and there remain no unpaid bills to date. The referenced penalty statute allows the panel to assess a penalty only on benefits "that were unpaid when due." AS 23.30.070(f). Employee failed to explain what benefits were "unpaid when due" in 2005 or at any other time. In any event, given these factors, this decision will decline to "require" Employer to pay a penalty. Employee's penalty claim will be denied.

5) Is Employer liable for interest?

Statutory interest in these cases is required on compensation not paid when due. AS 23.30.155(p). It is paid for the time-loss value of money, and also applies to medical benefits. *Moretz*. However, to the extent he requests interest on medical benefits, Employee did not present evidence on what benefits would be subject to interest, and inadequately briefed the issue. Employee's interest claim on medical benefits will be denied. Moreover, Employee would ordinarily be entitled to interest on Dr. Berman's PPI calculation from the time he made it, but the actual PPI rating pursuant to the *Guides* was not determined until this decision corrected Dr. Berman's subtraction error. Therefore, as long as Employer timely pays the PPI benefits awarded in this decision, Employee's claim for past interest on PPI benefits will be denied.

6) Is Employer liable for Employee's attorney fees and costs?

Employer controverted both Employee's right to benefits and his claim. Consequently, Employee is entitled to an attorney fee and cost award under AS 23.30.145(a). He seeks lump-sum attorney fees and costs for past services rendered in this successful claim, and so-called *Wozniak* fees on any future benefits provided to Employee. Employer did not object to Wilson's hourly rate or to the time expended on this case. It did not address the *Wozniak* fees. In reviewing an attorney fee request, this decision must consider factors in italics from Professional Rule 1.5(a). *Rusch*:

(1) *The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly*: This was a highly technical case involving issues not normally presented in a workers' compensation claim. Wilson documented the complexity, novelty and difficulty involved. He demonstrated the skill requisite to perform the services properly and diligently.

(2) *The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer*: This hearing loss case probably took Wilson longer than the typical claim. The time he spent representing Employee was not available to represent another client.

(3) *The fee customarily charged in the locality for similar legal services*: Wilson's hourly rate is lower than the customarily charged rate for similar legal services in the local community.

(4) *The amount involved, and the results obtained:* Wilson vigorously represented Employee, and with exception of his interest and penalty claims, obtained PPI benefits and lifetime care for Employee's injury. His lost interest and penalty claims are *de minimis* and do not detract from his overall success. *Porteleki*.

(5) *The time limitations imposed by the client or by the circumstances:* Wilson did not specifically address this issue. The record does not show that Employee or Wilson operated under exigent circumstances to obtain these benefits.

(6) *The nature and length of the professional relationship with the client:* Wilson took about two years to bring to hearing, which is somewhat longer than an average case.

(7) *The experience, reputation, and ability of the lawyer performing the services:* Wilson has 10 years' experience representing injured workers and for the most part did an excellent job representing Employee in this case. His briefing, preparation and presentation at hearing on the primary issue helped the fact-finders make their decision. Wilson has a good reputation.

(8) *Whether the fee is fixed or contingent.* Wilson's attorney fees are contingent.

Considering the *Rusch* factors as required, and Employer's lack of objection, Employee's attorney fees and costs are well-documented and reasonable. This decision will award Wilson \$75,349.05 in full, reasonable attorney fees and costs. *Cortay; Bignell*; 8 AAC 45.180(f). It will also award Wilson ongoing attorney fees under *Wozniak*.

CONCLUSIONS OF LAW

- 1) Employee's hearing loss arose out of and in the course of his employment with Employer.
- 2) Employer is liable for Employee's hearing loss treatment costs.
- 3) Employer is liable for Employee's PPI benefits.
- 4) Employer is not liable for a late-notice penalty.
- 5) Employer is not liable for interest.
- 6) Employer is liable for Employee's attorney fees and costs.

ORDER

- 1) Employee's June 27, 2022 claim is granted in part and denied in part.

- 2) Employer is directed to pay for Employee's hearing loss treatment costs and related transportation expenses, pursuant to the Act, Alaska Medical Fee Schedule and this decision.
- 3) Employer is directed to pay Employee \$10,620 for a six percent PPI rating.
- 4) Employee's request for a late-notice penalty under AS 23.30.070(f) is denied.
- 5) Employee's request for interest under AS 23.30.155(p) on past benefits is denied.
- 6) Employee's request for an attorney fee and cost award is granted. Employer is ordered to pay Wilson \$75,349.05 in full, reasonable attorney fees and costs. The panel reserves jurisdiction over this issue to resolve any cost disputes in the event Employee has not yet received a final billing statement for Dr. Berman's hearing-day participation.
- 7) Employer is also ordered to pay Wilson ongoing statutory minimum attorney fees on the value of all future hearing-loss-related benefits that Employer pays to Employee or to medical providers on his behalf.

Dated in Anchorage, Alaska on May 20, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Brian Zematis, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30

days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of John F. Delane, employee / claimant v. Chugach Electric Company, employer; Chugach Electric Company, insurer / defendants; Case No. 201714295; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on May 20, 2024.

/s/

Pamela Hardy, Workers Compensation Technician