

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 21-0319

ROBERT TOWER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TOTAL TERMINALS INTERNATIONAL)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: 7/26/2022
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of Appeal of the Order Granting Respondents' Motion for Summary Decision of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Amie C. Peters (Blue Water Legal PLLC), Edmonds, Washington, for Claimant.

Matthew S. Malouf (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE, and GRESH, Administrative Appeals Judges.

ROLFE and GRESH, Administrative Appeals Judges:

Claimant appeals Administrative Law Judge (ALJ) Richard M. Clark's Order Granting Respondents' Motion for Summary Decision (2020-LHC-00664) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a Senior Operations Manager for Employer at the Port of Seattle until 2019, where he was exposed to injurious noise from toploaders, forklifts, semi-trucks, ship-to-shore cranes, reefers, RTGs (rubber-tired gantry cranes), and chassis. He currently is employed as a General Manager with a non-maritime employer. Claimant's Exhibit (CX) 2 at 20.

Dr. Alan Langman evaluated Claimant on June 12, 2019, conducting physical and audiometric examinations. The physical examination was unremarkable. An audiogram indicated: 0% right monaural hearing loss; 9.375% left monaural hearing loss; and a combined binaural hearing loss rating of 1.56%. Pursuant to the Sixth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides* or *Guides*), Dr. Langman initially added 2% for tinnitus to the 1.56% binaural hearing loss score, bringing the total binaural impairment to 3.56%. CX 1. Dr. Langman further declared Claimant has sensorineural hearing loss in his right ear despite the audiogram measure of 0% loss, particularly at 3000 Hz, necessitating hearing aids in both ears. *Id.* Ultimately, Dr. Langman increased Claimant's tinnitus rating from 2% to 4% due to the degree it affected his daily activities.¹ CXs 1, 3-4.

¹ In approximately May 2020, Claimant was hospitalized for reasons unrelated to his hearing loss. Medical providers prescribed Ambien because he could not sleep due to his tinnitus (he described a "constant high-pitched whining" keeping him awake and ringing in his ears that wakes him). Claimant continues to use Ambien as a sleep aid. CX

On July 11, 2019, Claimant filed a claim for benefits for his hearing loss, and Employer voluntarily paid \$7,361.03 for a monaural hearing loss of 9.375% pursuant to 33 U.S.C. §908(c)(13)(A). Order at 3; Employer's Exhibits (EXs) 3, 5. Claimant thereafter asserted he had been undercompensated and made two separate requests for reassessment. He sought additional benefits in the amounts of \$10,756.61 and then \$16,799.65 after Dr. Langman changed his tinnitus rating from 2% to 4%, each time claiming benefits under 33 U.S.C. §908(c)(13)(B). Director's Brief (Dir. Br.) 2-3. Employer controverted the claim, disputing Claimant's entitlement to additional benefits. CX 1.

Employer filed a Motion for Summary Decision (MSD), asserting it was not liable for any benefits beyond those it had already paid. Claimant filed a cross-motion for summary decision, arguing his award should be calculated under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), pursuant to the Act and the Sixth Edition of the *AMA Guides*. The ALJ granted Employer's motion and denied Claimant's cross-motion. Order at 2, 8-9. Relying on cases that notably did not involve bilateral tinnitus or the Sixth Edition of the *AMA Guides*, he decided monaural impairment is not to be converted to binaural impairment under any circumstances and awarded Claimant compensation pursuant to Section 8(c)(13)(A). *Id.* at 5. Though he acknowledged Claimant's interpretation of the *AMA Guides* (regarding converting monaural to binaural to add the tinnitus rating) is plausible, and an MSD must be viewed in the light most favorable to the non-moving party, he determined the *Guides* cannot override the language of the statute as explained in the case law. *Id.* at 6-7. Consequently, the ALJ awarded Claimant \$7,364.96 (4.875 weeks at \$1,510.76 per week) in benefits for a monaural impairment under Section 8(c)(13)(A).²*Id.* at 8.³

2 at 19-20. Dr. Langman increased the impairment rating for tinnitus after learning of this. CX 1 at 3.

² The difference between the amount voluntarily paid and the amount awarded stems from Employer transposing the number of weeks (4.857 instead of 4.875) used in the calculation. Order at 8 n.6; EX 5. Pursuant to a letter dated February 10, 2021, Employer informed the ALJ that it had corrected its payment mistake prior to filing its MSD but inadvertently did not reflect the remedy in the motion. Attached to that letter is Employer's amended LS-208, dated June 30, 2020, indicating it paid Claimant \$7,364.96, which is the amount the ALJ awarded.

³ The ALJ's Order, dated February 9, 2021, also found Claimant had not indisputably established entitlement to medical benefits, so he ordered the parties to confer on the outstanding issues of medical benefits, interest, and an attorney's fee. Order at 9. On August 20, 2021, the ALJ issued an Order Administratively Closing the File because

Claimant appeals, contending the ALJ erred in granting Employer's MSD. He asks the Board to reverse the ALJ's decision and award him benefits under Section 8(c)(13)(B) in order to include his bilateral tinnitus. He asserts the Act requires use of the *AMA Guides*, 33 U.S.C. §908(c)(13)(E), for computing hearing loss benefits, and the current *AMA Guides* support converting his monaural impairment to a binaural rating to which his tinnitus rating may be added. He asserts his bilateral tinnitus distinguishes his situation from the cases the ALJ relied on where compensation for monaural hearing loss was calculated under Section 8(c)(13)(A).

The Director, Office of Workers' Compensation Programs (Director), agrees, urging the Board to reverse the denial of compensation for Claimant's tinnitus and remand the case for the ALJ to calculate the appropriate benefits pursuant to Section 8(c)(13)(B) as the *AMA Guides* provide. The Director states Claimant is entitled to an award for the entirety of his hearing loss, and tinnitus is a compensable component of that loss under longstanding Board precedent. He further explains that under the plain language of 33 U.S.C. §908(c)(13)(E) of the Act, the *AMA Guides* provide the methods for measuring hearing loss, whether monaural or binaural.

Unlike previous editions, the current edition of the *AMA Guides'* formula specifically provides for compensation for tinnitus by converting Claimant's monaural impairment to a binaural rating. And, counter to what the ALJ held, the Director explains the case law that the ALJ cites simply holds it improper to always convert monaural loss to binaural loss in cases of injury solely to one ear (which would make subsection A obsolete) -- not that such a conversion is not allowed where a claimant suffers from tinnitus in both ears.⁴

Employer responds, urging affirmance of the award under Section 8(c)(13)(A). It asserts the ALJ's decision is in accordance with the law because Section 8(c)(13)(A) provides for compensation exclusively when there is measurable loss in only one ear, regardless of the presence of bilateral tinnitus. Employer also disputes the Director's

the parties did not submit any updates on the issues despite his repeated attempts to gather the information.

⁴ The Director asserts both the *AMA Guides* and the Act should be interpreted to allow a worker to recover the maximum award when there is measurable hearing loss and if tinnitus affects the worker's daily activities. Dir. Br. at 8.

interpretation of the AMA *Guides* regarding the relationship between binaural impairment and tinnitus.⁵

In ruling on a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. To defeat a motion for summary decision, the non-moving party must "come forward with specific facts" to show "there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the ALJ *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in part on recon.*, 46 BRBS 57 (2012).

The facts in this case are undisputed; the question is how to apply the statutory framework to the facts. Claimant has a measurable work-related hearing loss in one ear (9.375%), non-measurable hearing loss in the other, and tinnitus in both that affects his daily activities. He requires hearing aids for both ears. Pursuant to the method specifically included in the current edition of the AMA *Guides* (detailed below), Dr. Langman converted Claimant's monaural loss to a binaural impairment rating of 1.56%, giving him an additional 2% and then 4% rating for his tinnitus. Employer paid benefits for the monaural loss only, which the ALJ upheld. But as Claimant and the Director maintain, the language of the statute specifically incorporating the use of the AMA *Guides*, the method included in the current AMA *Guides*, and the inapposite case precedent that the ALJ relied on -- which exclusively involved injuries to one ear and not the bilateral tinnitus at issue in this case -- establish he erred.

⁵ In response to the Director's argument noted in n.4, *supra*, Employer particularly takes issue with the Director's "backwards analysis" in arguing the section that affords the greatest compensation is the one to be used. Rather, it argues the law decides the compensation, but the compensation does not determine which law to use.

Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), which addresses permanent partial disability benefits under the schedule for work-related hearing loss, states in pertinent part:

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be $66 \frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(13) Loss of hearing:

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

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

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

Thus, under the Act, claimants are entitled to compensation for work-related hearing loss, and impairment is determined by using the *AMA Guides*. 33 U.S.C. §908(c)(13); *see also Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020) (where the Act requires use of the *AMA Guides*, the doctor is to use the *Guides*' most recent version at the time he renders a rating). Claimants therefore are permitted awards for tinnitus under the framework provided in 33 U.S.C. §908(c)(13)(E) that incorporates the *AMA Guides* (and the case law interpreting them) -- which have long compensated tinnitus. *See, e.g., West v. Port of Portland*, 21 BRBS 87, *modifying in part on recon.* 20 BRBS 162(1988).

In *West*, the Board initially held compensation for tinnitus, which manifested in relation to work-related hearing loss, “is subsumed in a hearing loss award under Section 8(c)(13)” and therefore the “claimant was not entitled to a separate award under Section 8(c)(21),” which compensates for injuries not otherwise specifically scheduled. *West*, 20 BRBS at 164; *see* 33 U.S.C. §908(c)(13), (21). On reconsideration, however, the Board

reversed its decision, having been persuaded by the claimant's contention that the Second Edition of the *AMA Guides* "may allow a separate award for tinnitus under Section 8(c)(21) in an appropriate case":

Chapter 7 of the American Medical Association Guidelines states that there is one measurable form of impairment for hearing loss and a separate, distinct form of impairment for tinnitus which is included in the category of equilibrium disturbances. Since the American Medical Association Guidelines provide the basis for determining extent of hearing loss under new Section 8(c)(13)(E), 33 U.S.C. § 908(c)(13)(E) (Supp. III 1986), and since the Guidelines for determining hearing loss do not take into account impairment due to equilibrium disturbances, we modify our original holding in this case to the extent that we will allow an award for tinnitus under Section 8(c)(21) in circumstances where claimant has a distinct physical impairment due to tinnitus, and has established a loss in wage-earning capacity due to the condition.

West, 21 BRBS at 89.⁶

Since *West* was issued in 1988, the *AMA Guides* have undergone four editions of changes. Later editions of the *Guides* have more specific commentary about tinnitus, clarifying it may contribute to a person's impairment. See CXs 3-5. The Sixth Edition of the *Guides*, published in 2007, is the latest and is also the one in effect as of the date Dr. Langman rated Claimant. See *Pierce*, 54 BRBS 27. Chapter 11 addresses hearing loss; Section 11.2 acknowledges tinnitus is "subjective" and must be "based on the individual's

⁶ Chapter 7 of the Second Edition stated:

The functions of the ear are hearing and equilibrium, which are considered separately in the following sections. The criteria for evaluating hearing impairment are relatively specific. On the other hand, it is necessary to provide rather general criteria for disturbances of equilibrium. Such disturbances of the ear as chronic otorrhea, otalgia and tinnitus are not measurable and, therefore, the physician should assign a degree of impairment that is based on severity and importance and is consistent with established values.

West, 21 BRBS at 88 (quoting Second Edition). Because the claimant did not establish a loss of wage-earning capacity, as is necessary for an award under Section 8(c)(21), the Board denied him benefits for his tinnitus. *West*, 21 BRBS at 89.

self-reports” because it “cannot be measured objectively.” CX 4. Section 11.2b states, in part:

[T]innitus is not a disease but rather is a symptom that may be the result of disease or injury. *** [I]f tinnitus interferes with [Acts of Daily Living], 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.

CX 4.⁷

Section 11.2c covers criteria for rating hearing loss and states: “[t]he binaural hearing impairment percentage is based on the severity of the hearing loss, which accounts for changes in the ability to perform ADLs.”⁸ *Id.* Sections 11.2d, e, and f discuss calculating impairment ratings. Section 11.2f specifies:

Binaural Impairment is determined by the following formula:

Binaural Hearing Impairment (%) = [5 x (% hearing impairment better ear) + (% hearing impairment poorer ear)] ÷ 6

To calculate binaural impairment when only 1 ear exhibits hearing impairment, use this formula, allowing 0% impairment for the unimpaired ear.

Id.

⁷ Section 11.2a of the Fifth Edition stated:

Tinnitus in the presence of unilateral or bilateral hearing impairment may impair speech discrimination. Therefore, add up to 5% for tinnitus in the presence of measurable hearing loss if tinnitus impacts the ability to perform activities of daily living.

CX 3.

⁸ Section 11.2 advises an individual’s hearing loss is to be evaluated on a binaural basis using the pure tone readings.

As the applicable Sixth Edition of the *AMA Guides* now unambiguously incorporates bilateral tinnitus impairment by adding it to a binaural hearing loss rating (which was not the case when *West* was decided), under the clear statutory framework recognized in *West*, benefits for tinnitus-related impairment now must be included under Section 8(c)(13) instead of Section 8(c)(21).⁹

The *AMA Guides* make clear: 1) tinnitus is a symptom of hearing loss and should not be treated as a separate impairment; 2) if tinnitus interferes with daily activities, up to a 5% impairment may be added to a measurable binaural hearing impairment; and 3) there is a specific formula for binaural conversion, including when one ear has 0% loss.

We, therefore, agree with the position set forth by Claimant and the Director that the ALJ should have converted Claimant's monaural rating to a binaural rating and added the tinnitus rating per the *AMA Guides*. The Act requires use of the *AMA Guides* to determine hearing impairment. If tinnitus is a factor, the doctor must compute binaural hearing impairment to which he may then add up to 5% binaural impairment to account for the tinnitus. Indeed, under the *Guides'* blueprint, "binaural impairment" may only be determined once both ears have been tested and their results entered into the formula or chart. CX 4. And, because the formula states 0% is to be used for the unimpaired ear, the only way for a claimant with a monaural hearing loss to be compensated for the related effects of his tinnitus under the current edition is to convert it to a binaural impairment.

Consequently, Claimant does not need to have measurable hearing loss in both ears to be entitled to compensation for tinnitus. Rather, he need only have a "measurable binaural impairment" following use of the conversion formula provided in the most recent addition of the *AMA Guides*. Once his binaural impairment has been calculated, the ALJ

⁹ As noted, the Sixth Edition of the *AMA Guides* differs from the Fifth Edition in discussing how to compensate for tinnitus. The Fifth Edition permitted adding a tinnitus impairment rating to a "measurable hearing loss," while the Sixth Edition says to add it to "a measurable binaural hearing impairment." CXs 3-4; *see supra*. The AMA does not give a specific reason why it made this change. In the Q&A Section for the Sixth Edition, however, Dr. James B. Talmage explained the successive *Guides* expanded on how they addressed tinnitus: from zero to little mention (First and Second Editions) to allowing for up to 5% (Fourth Edition), to explaining there must be a measurable hearing impairment before tinnitus could be rated (Fifth Edition). He stated the Sixth Edition "adds the clarification that "the 'up to 5%' is binaural impairment." CX 5. We interpret this as meaning tinnitus affects both ears, so the "up to 5%" binaural impairment may only be added to a binaural rating. As such, we do not believe the "up to 5%" is meant to be added directly to a monaural impairment rating.

may rely on a credited doctor's opinion and add up to 5% to account for tinnitus impairment. Therefore, when tinnitus affecting both ears is a factor in a claimant's work-related hearing loss, benefits under the current *AMA Guides* are to be awarded under Section 8(c)(13)(B), even if there is measurable hearing loss in only one ear.

We disagree with Employer's assertion that this interpretation of the *AMA Guides* reads Section 8(c)(13)(A) out of the Act. To the contrary, claimants who have monaural hearing loss and no tinnitus, like those discussed in the caselaw authority it presents, are still entitled to hearing loss benefits under Section 8(c)(13)(A). But unlike those cases, Claimant has tinnitus in both of his ears. His situation is materially different; cases involving hearing loss related to injuries to one ear and different versions of the *AMA Guides* simply do not apply to it.¹⁰

¹⁰ Without discussing the language of the statute or the cases interpreting it, our dissenting colleague asserts "it is unclear how the Director can interpret the statutory language as permissive" and that "the decisions do not brook conversion of the monaural loss to a binaural loss in such a case." Neither is true. As the Director explains, the Act provides "[d]eterminations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the [...] AMA." 33 U.S.C. § 908(c)(13)(E). Thus, the extent of a claimant's hearing loss must be measured according to "the most currently revised edition" of the *AMA Guides*. See 20 C.F.R. § 702.441(d). The most currently revised issue of the *Guides* unambiguously provides that in cases of bilateral tinnitus measurable hearing loss only in one ear is converted to bilateral hearing loss, and then an additional rating is added for the tinnitus, which affects both ears. The Director's interpretation comes straight from the statute – without any gloss. And because none of the cases the dissent cites involve bilateral tinnitus and the current addition of the *AMA Guides*, they simply do not apply to these circumstances. Contrary to our colleague's assertion, enforcing this framework is following the precise method Congress itself expressly created. 33 U.S.C. § 908(c)(13)(E).

Accordingly, we vacate the ALJ's Order Granting Respondents' Motion for Summary Decision and remand the case to the ALJ for further consideration and an award of benefits consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues that the ALJ erred in failing to award Claimant compensation for tinnitus, I respectfully dissent from their decision to award him benefits

under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), as that conflicts with both the language of the Act and case precedent.

Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A), provides the method for calculating benefits when a claimant has hearing loss in one ear.¹¹

Claimant's monaural impairment is an undisputed fact.¹² With such a loss, those courts which have addressed the issue have uniformly held compensation must be

¹¹ Section 8(c)(13)(A) states:

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be $66 \frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(13) Loss of hearing:

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

The courts have reasoned the plain language of the statute directs monaural (hearing in one ear) losses be compensated according to the criteria of subsection (A), while subsection (E) directs the amount of loss be determined in accordance with the *Guides*. See, e.g., *Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 635, 28 BRBS 27, 29(CRT) (4th Cir. 1994); *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 146, 27 BRBS 113, 115(CRT) (5th Cir. 1993); *Rasmussen v. Gen. Dynamics Corp.*, 993 F.3d 1014, 1017, 27 BRBS 17, 22-23(CRT) (2d Cir. 1993). More specifically, the courts have explained the statute provides a formula for determining how such losses should be compensated, whereas the *Guides* provide the methods employed under the Act for measuring hearing loss, whether monaural or binaural. *Id.*

¹² The *AMA Guides* do not identify the measurable hearing loss in this case as a binaural hearing loss, but rather as a monaural loss which is to be converted to a binaural impairment for calculation purposes. Under the *AMA Guides*, tinnitus is considered only when there is a measurable hearing loss. Thus, the existence of a measurable hearing loss is determinative. In this case, that measurable loss is in one ear, although the *Guides* convert the measurement to binaural before adding a percentage for tinnitus. The majority

calculated under Section 8(c)(13)(A). *Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27(CRT) (4th Cir. 1994); *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993); *Rasmussen v. Gen. Dynamics Corp.*, 993 F.3d 1014, 1017, 27 BRBS 17(CRT) (2d Cir. 1993); *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 955 F.2d 41 (4th Cir. 1992), *rev'g* 24 BRBS 173 (1991) (Smith and Dolder, JJ., dissenting). Since then, the Board has consistently followed suit. *J.T. [Tracy] v. Global International Offshore Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. V. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013); *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994) (en banc), *modifying on recon.* 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., concurring and dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).¹³

Given the statutory language, the decisions do not brook conversion of the monaural loss to a binaural loss in this case. Indeed, reading the statutory language, it is unclear how the Director can interpret the statutory language as permissive. We are compelled to find compensation under the Act for a monaural impairment is to be paid under subsection A, as the ALJ found.

However, with respect to tinnitus, the AMA *Guides* indicate “up to 5%” is merely added to the final impairment rating. Therefore, I would modify the ALJ’s decision by adding the 4% tinnitus rating directly to the 9.375% monaural rating to reflect an award to Claimant for a 13.375% monaural impairment under Section 8(c)(13)(A).

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

tries to make the existence of bilateral tinnitus determinative of whether the hearing loss is loss of hearing in one ear or in both ears; however, it is clear that under the *Guides* and the statute this Claimant’s actual measurable hearing loss is in only one ear; consequently, under the statute it must be compensated as loss of hearing in one ear.

¹³ The statutory language as to the mode of payment is clear. The AMA *Guides*’ conversion of monaural hearing loss to binaural hearing loss is no more compelling now as a basis for making payment under the binaural portion of the statute than it was thirty years ago. Put simply, the AMA *Guides* cannot trump the clear language manifesting the determination of Congress.