No. 09-72979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner

v.

MATSON TERMINALS, INCORPORATED,
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED,
and
GEORGE K. KUNIHIRO,

Respondents

On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE PETITIONER

DEBORAH GREENFIELD
Acting Deputy Solicitor

RAE ELLEN JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

PATRICIA M. NECE
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office
of Workers' Compensation Programs

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BRIEF FOR THE PETITIONER

STATEMENT OF JURISDICTION

This case arises from a claim for benefits for work-related hearing loss under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50, filed by George K. Kunihiro. Mr. Kunihiro's entitlement to compensation is not at issue in this appeal.

Rather, the question in this appeal is whether Mr. Kunihiro's employer—Matson Terminals, Incorporated—is entitled to relief from the Longshore Special Fund for a portion of its compensation liability under LHWCA Section 8(f), 33 U.S.C. § 908(f).[1]

Administrative Law Judge Gerald M. Etchingham (the ALJ) denied Matson's request for 8(f) relief in a decision issued on March 12, 2007, and filed by a Department of Labor (DOL) district director on March 22, 2007.[2] The ALJ had jurisdiction to decide this case under Section 19(c) and (d) of the LHWCA, 33 U.S.C. § 919(c), (d). Matson filed a timely notice of appeal of the ALJ's decision on April 19, 2007. *See* 33 U.S.C. § 921(a) (providing thirty-day period for appeal of ALJ decisions); 20 C.F.R. § 702.393 (thirty-day period begins to run with filing of ALJ's decision by district director). The Board had jurisdiction

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[1] The Special Fund is administered by the Department of Labor, and funded by assessments against certain Longshore employers and insurance carriers. 33 U.S.C. § 944(a), (c).

[2] The ALJ previously issued decisions on June 27, 2005, and May 30, 2006. Matson, however, timely requested modification of the 2005 decision, and the Director, Office of Workers' Compensation Programs, timely requested modification of the 2006 decision. *See* 33 U.S.C. § 922 (providing one-year period for seeking modification of a decision under the LHWCA). Thus, those decisions are not relevant for jurisdictional purposes.

to review the ALJ's decision under Section 21(b)(3) of the LHWCA, 33 U.S.C. § 921(b)(3).

The Board vacated the ALJ's decision and remanded the case for further consideration on April 16, 2008. The Director, Office of Workers' Compensation Programs, filed a timely motion for reconsideration with the Board on May 16, 2008. *See* 20 C.F.R. § 802.407(a), (b) (providing thirty-day period to seek panel or *en banc* rehearing of Board decisions). The Board denied the Director's reconsideration motion on September 28, 2008.

On remand, the ALJ granted relief to Matson in a decision issued on March 23, 2009, and filed by the district director on March 26, 2009. The Director filed a timely notice of appeal with the Board on April 20, 2009. *See* 33 U.S.C. § 921(a); 20 C.F.R. § 702.393. The Board issued a decision affirming the ALJ's grant of 8(f) relief on July 21, 2009. This was a "final order" under 33 U.S.C. § 921(c), as it resolved all outstanding issues in the case. *See Bish v. Brady-Hamilton Stevedore Co.* 880 F.2d 1135, 1137-38 (9th Cir. 1980).

The Director filed a timely petition for review with the Court on September 18, 2009. *See* 33 U.S.C. § 921(c) (providing sixty-day period

for seeking review after final decision of Board). Mr. Kunihiro's injury, within the meaning of Section 21(c), occurred in Hawaii. Thus, the Court has jurisdiction to review the Board's decisions.

STATEMENT OF THE ISSUE

To obtain partial relief from compensation liability under LHWCA Section 8(f), an employer must prove that the employee had a pre-existing permanent partial disability. In hearing-loss cases, DOL's regulations require an employer to make this showing by submitting the results of an audiogram that is sufficient to establish a "presumptive" hearing loss under the statute. An audiogram may constitute presumptive evidence of hearing loss only if the employee received a report of the audiogram. Here, Matson submitted twenty-two audiograms its physician conducted over a twenty-four-year period that documented Mr. Kunihiro's progressive hearing loss. But Matson never gave the reports of any of these audiograms to Mr. Kunihiro. Did the Board err in holding that Matson could obtain Section 8(f) relief for Mr. Kunihiro's work-related hearing loss based on test results it never provided to Mr. Kunihiro?

STATEMENT OF THE CASE

The ALJ initially found that Matson was not entitled to relief under Section 8(f). He concluded that audiograms performed over the course of Mr. Kunihiro's employment were legally insufficient to establish a pre-existing permanent partial disability, one of the elements of a claim for 8(f) relief, because the company had not given the results of the tests to Mr. Kunihiro. On appeal, the Board held that those audiograms were legally sufficient to establish a pre-existing permanent partial disability, notwithstanding that Matson did not provide the results to Mr. Kunihiro. The Board remanded for the ALJ to determine whether Matson had otherwise established entitlement to relief under Section 8(f), and subsequently denied the Director's motion for reconsideration. On remand, the ALJ found that Matson was entitled to 8(f) relief. The Board affirmed this decision, following which the Director petitioned this Court for review.

STATEMENT OF THE FACTS

1. Legal Background

Congress enacted the LHWCA to provide workers' compensation coverage to workers who were constitutionally excluded from coverage

under state workers' compensation provisions. *Director, OWCP, v. Perini North River Associates*, 459 U.S. 297, 306-07 (1983). The statute applies to workers engaged in maritime employment, who are injured on either navigable waters or certain enumerated on-shore locations. *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008, 1010 (9th Cir. 1999); *see* 33 U.S.C. §§ 902(3), 903(a).

Among the injuries compensable under the LHWCA is hearing loss. 33 U.S.C. § 908(c)(13). An injured employee is entitled to 200 weeks of compensation for a 100% binaural hearing loss, and proportionate benefits for lesser injuries. 33 U.S.C. § 908(c)(13), (19). The statute contains special provisions for evaluating evidence of hearing loss. Where 1) an audiogram is "administered by a licensed or certified audiologist or a physician who is certified in otolaryngology," 2) the results of the test are given to the injured employee at the time the test is administered, and 3) there are no contrary audiogram results from the same time, the audiogram is "presumptive evidence of the amount of hearing loss sustained." 33 U.S.C. § 908(c)(13)(C).

The LHWCA also contains a "second injury" provision. LHWCA Section 8(f) provides an employer with partial relief from compensation

liability when "an employee having an existing permanent partial disability suffers injury" and the employee's resulting disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone . . . ." 33 U.S.C. § 908(f)(1). *See also Marine Power & Equipment v. Dep't of Labor*, 203 F.3d 664, 668 (9th Cir. 2000) (setting forth elements for 8(f) claim). Through this provision, Congress intended to provide an incentive to employers to hire or retain previously injured workers. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 203-04 (1949). When an employer obtains relief in a hearing-loss case, its liability is limited to either the compensation for the disability attributable to the second injury that caused additional hearing loss, or 104 weeks of compensation, whichever is *less*.[3] 33 U.S.C. § 908(f)(1).

DOL's regulations set out procedures and requirements for determining whether an employer is entitled to 8(f) relief. 20 C.F.R. § 702.321 (Addendum at ii). In particular, Section 702.321 specifies the

[3] In contrast, for all non-hearing-loss injuries the employer is liable for the *greater* of either the compensation for the disability attributable to the second injury, or 104 weeks of compensation. 33 U.S.C. § 908(f)(1).

manner in which an employer has to establish a pre-existing permanent partial disability in hearing-loss cases: "If the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram *which complies with the requirements of § 702.441*." 20 C.F.R § 702.321(a)(1) (emphasis added).

Section 702.441, in turn, specifies how a party establishes a hearing loss. Subsection (a) generally provides that hearing-loss claims "shall be adjudicated with respect to the determination of the degree of hearing impairment in accordance with these regulations." 20 C.F.R. § 702.441(a) (Addendum at iii). Subsection (b) then provides, consistent with the statute, that an audiogram will be "presumptive evidence" of the amount of hearing loss if: 1) it was administered and interpreted by a licensed or certified audiologist or physician; 2) "[t]he employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter;" and 3) there is no contrary audiogram of equal probative value. 20 C.F.R. § 702.441(b)(1)-(3). Subsection (c) establishes the allowable time-period for audiograms that can be used to demonstrate an employee's pre-employment hearing level. 20 C.F.R. § 702.441(c). Finally, subsection (d) specifies that

hearing loss must be calculated in accordance with the standards set by the American Medical Association, and that audiometers must be calibrated in accordance with certain technical standards. 20 C.F.R. § 702.441(d).[4]

2. Factual and Procedural Background

The facts of this case are not in dispute. Mr. Kunihiro worked for Matson from 1964 to 2002, primarily working in a container repair shop, and also as a security guard. Petitioner's Excerpts of Record (ER) at 66. He was exposed to loud noise throughout his employment. *Id.*

Beginning in 1978 and continuing through 2002 (except for 1990 and 1994), Matson's physician administered annual audiograms—twenty-two in total—to Mr. Kunihiro. ER at 66, 73. These audiograms showed progressive worsening of his hearing. The initial 1978 test revealed a 19.1% binaural hearing loss. ER at 73. By 1987, Mr. Kunihiro had a 26.9% binaural loss. *Id.* Two years later, his hearing loss had increased to 36.6%, *Id.* Finally, the 2002 audiogram showed

[4] Subsections (b) and (d) implement specific statutory directives set forth at 33 U.S.C. §§ 908(c)(13)(C) and (E) pertaining to proving permanent partial disability based on hearing loss.

that Mr. Kunihiro had a 48.4% binaural hearing loss. *Id.* Yet Matson did not provide the results of any of these twenty-two tests to Mr. Kunihiro. ER at 33, 48.

He retired in 2002, and subsequently underwent an audiogram administered by his own physician in 2003, which revealed a 53.1% binaural hearing loss. ER at 67. Based on the 2003 test, Mr. Kunihiro sought compensation for a work-related hearing loss. *See* ER at 66-67. Matson did not contest his entitlement to compensation or that it was the liable party, but sought relief from a portion of its liability under Section 8(f). ER at 67.

To obtain relief, Matson had to show that Mr. Kunihiro had a pre-existing hearing loss that was manifest to the company, and that his ultimate disability was "materially and substantially greater" on account of his pre-existing hearing loss than would have resulted from his second hearing injury alone. *See Marine Power & Equipment*, 203 F.3d at 668. Matson initially requested relief based on the difference in binaural hearing loss between Mr. Kunihiro's 2002 employer-administered audiogram (showing a 48.4% binaural hearing loss) and the 2003 post-retirement audiogram administered by Mr. Kunihiro's

own physician (showing a 53.1% binaural hearing loss). ER at 67. In effect, Matson sought to limit its liability to the compensation for the additional 4.7% hearing loss Mr. Kunihiro suffered after the 2002 test. *See* 33 U.S.C. § 908(f)(1). The Special Fund would then be responsible for the remainder of his compensation. *See id.*

The Director contested this request. The Director argued that the difference between the 2002 and 2003 audiograms was not large enough to show a significant change in Mr. Kunihiro's hearing, but rather reflected only an insignificant variation in the results (in medical parlance, the two tests fell within the range of "test/re-test variability").[5] ER at 67. Thus, the Director contended that the difference in the two tests could not support an award of Section 8(f) relief. The ALJ denied Matson's request for relief, finding that the results of the 2002 and 2003 tests were within the test/re-test variability range. ER at 64, 69-72.

[5] While the test/re-test question is not at issue in this appeal, we have noted it in order to provide the Court with a full understanding of the procedural history of the case.

Matson petitioned for modification of the ALJ's decision under 33 U.S.C. § 922 on two grounds.[6] ER at 58-59. First, it contended that the ALJ made a mistake in denying Section 8(f) relief based on the difference between the 2002 and 2003 tests. ER at 58. Second, it asserted that if the ALJ still found the difference between the 2002 and 2003 audiograms insufficient to justify relief, then he should consider whether relief was nevertheless available based on the difference between the results of the earlier (1978-2001) tests administered by Matson and the 2003 test. ER at 58-59.

The ALJ agreed that he had mistakenly denied Section 8(f) relief, and granted modification. ER at 54, 59-61. Reversing his prior determination, he concluded that the 2002 and 2003 results were beyond the range of test/re-test variability. ER at 61. Thus, he concluded that Matson was entitled to relief. ER at 63.

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[6] Matson also filed an appeal with the Board, but this appeal was dismissed on account of the company's modification request. *See* 20 C.F.R. § 802.301(c) (requiring dismissal of appeal without prejudice when party seeks modification).

After the ALJ granted Matson's modification request, the Director petitioned for modification on two grounds.[7] ER at 39, 41. First, the Director asserted that the ALJ had made a mistake-in-fact in determining that the 2002 and 2003 audiograms were not within the range of test/re-test variability. ER at 39. Second, the Director asserted that Matson was foreclosed from relying on any of the 1978-2002 audiograms to establish a pre-existing disability because it had not provided the results of these tests to Mr. Kunihiro. ER at 41. In support of his petition, the Director submitted Matson's responses to interrogatories, in which the company admitted that it had not provided the results of any of the 1978-2002 audiograms to Mr. Kunihiro, as required by the regulations.[8] ER at 44, 48.

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[7] The Director also appealed to the Board, but his appeal was dismissed in light of the modification request. *See* 20 C.F.R. § 802.301(c).

[8] Matson also stated that, for one or more of the tests, it might have given Mr. Kunihiro a form notice stating "that the results of your most recent hearing test indicate a decrease in your hearing levels relative to your baseline test." ER at 49, 53. The form notice would not have indicated when Mr. Kunihiro's "baseline test" was performed, or given the results of that test. Likewise, it would not have provided the results of the more recent test. Matson indicated that it would attempt to confirm whether such form notices were provided to Mr. Kunihiro, and would supplement its discovery responses if or when it confirmed the (cont'd . . .)

The ALJ granted the Director's modification petition and again denied Section 8(f) relief. ER at 30, 43. This time, the ALJ concluded that the 2002 and 2003 test results were within the range of test/re-test variability. ER at 39-40. He also found that Matson could not use any of the 1978-2002 audiograms to establish a pre-existing permanent partial disability because the company did not provide the results of any of these tests to Mr. Kunihiro. ER at 42-43. Based on this fact and the plain language of the regulations implementing Section 8(f), 20 C.F.R. §§ 702.321 and 702.441, the ALJ determined that these tests were legally insufficient to establish a pre-existing permanent partial disability. ER at 42-43. Accordingly, he denied Section 8(f) relief. ER at 43.

Matson appealed to the Board. The Board issued a published decision vacating the ALJ's denial of 8(f) relief, and remanding the case for further consideration. *G.K. [Kunihiro] v. Matson Terms., Inc.*, 42 BRBS 15 (2008); ER at 19. Although the Board affirmed the ALJ's determination that the 2002 and 2003 test results were within the

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information. *Id.* The company, however, never submitted any additional response on this point.

range of test/re-test variability, and thus did not support employer's claim for relief, ER at 23-27, the Board held that the ALJ erred in finding that employer could not rely on the 1978-2001 audiograms to establish a pre-existing permanent partial disability. ER at 27-29. The Board premised its holding primarily on its prior decision in *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).[9] ER at 28-29.

In *Harris*, the Board rejected the Director's argument that Section 702.321 mandates that an audiogram comply with the requirements of Section 702.441(b) for an employer to use the audiogram to establish a pre-existing permanent partial disability for 8(f) purposes. 42 BRBS at 7-10. Rather, the Board concluded that an audiogram need only comply with Section 702.441(c) and (d) (regarding when an audiogram should be performed and the standards for measuring hearing loss and the calibration of audiometers). 42 BRBS at 9. In so concluding, the Board relied on prior decisions holding that an employee need not submit an audiogram complying with the stricter "presumptive evidence" requirements of Section 702.441(b) in order to establish a compensable

[9] The Board also relied on its decision in *Fucci v. Gen'l Dynamics Corp.*, 23 BRBS 161 (1988), a case which did not address either Section 702.321 or Section 702.441. ER at 28.

hearing loss under 33 U.S.C. § 908(c)(13). 42 BRBS at 8-9. Based on these precedents, the Board concluded that

> the more reasonable interpretation based on the specific language of Section 702.441 is that the requirements in Section 702.441(b)(1)-(3) apply only for audiograms to be "presumptive evidence" of hearing loss, and that audiograms which do not meet those standards may establish the degree of hearing loss [for purposes of establishing a pre-existing disability under Section 8(f)] if they are nevertheless reliable and probative.

42 BRBS at 9. The Board declined to defer to the Director's interpretation of the regulations, instead preferring its own "more reasonable" interpretation, and opining that the Director's interpretation was merely a "litigation position developed in his role as an advocate on behalf of the Special Fund." 42 BRBS 7, n. 4.

Accordingly, based on *Harris*, the Board vacated the ALJ's decision and remanded the case for him to determine whether Matson was entitled to 8(f) relief based on any of the 1978-2001 audiograms. ER at 29. The Director requested reconsideration of the Board's decision, but the Board denied the Director's motion. ER at 14, 18.

On remand, the ALJ found that Mr. Kunihiro had a binaural hearing loss of 53.1% (as shown on the 2003 audiogram). ER at 8, 11. He also found that Matson established that Mr. Kunihiro had a pre-

existing hearing loss based on the results of the 2001 audiogram administered by the company (showing a 45.3% binaural hearing loss).[10] ER at 12. The ALJ further concluded that Matson had established all other elements necessary to obtain 8(f) relief. ER at 12. Thus, he ordered the company to pay compensation for the disability attributable to Mr. Kunihiro's post-2001 hearing loss (a total of $15,070.85), and ordered the Special Fund to pay compensation for the disability attributable to his pre-existing hearing loss (a total of $87,526.85).[11] ER at 12; *see* 33 U.S.C. § 908(f)(1).

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[10] The Director does not dispute that the difference between the 2001 and 2003 audiograms falls beyond the range of test/re-test variability. Thus, the only remaining issue is whether the 2001 test—or any of the earlier tests—is legally sufficient to support a request for 8(f) relief.

[11] The LHWCA provides for 200 weeks of compensation for a 100% binaural hearing loss. 33 U.S.C. § 908(c)(13)(B). Since Mr. Kunihiro's hearing loss totaled 53.1% (the loss shown on the 2003 audiogram), he was entitled to a total of 106.2 weeks of compensation (.531 x 200). ER at 12. Matson was liable only for the 7.8% hearing loss (53.1-45.3) attributable to Mr. Kunihiro's subsequent injury. *See* 33 U.S.C. § 908(f)(1). Thus, Matson had to pay only 15.6 weeks (.078 x 200) of compensation. ER at 12. Mr. Kunihiro's compensation rate was $966.08 per week. *See* 33 U.S.C. §§ 906, 908(c)(13), 910. Thus, Matson's compensation liability totaled $15,070.85 (15.6 x $966.08).

The Special Fund was liable for the remaining 45.3% hearing loss—the amount of Mr. Kunihiro's hearing loss that pre-existed his subsequent (cont'd . . .)

The Director appealed. The Board had already addressed the pertinent issue—whether a request for relief under 8(f) can be based on audiogram results that were not provided to the injured employee—in its prior decision, and its previous determination on this question was binding as the law of the case. *See Weber v. S.C. Loveland Co.*, 35 BRBS 75, 77 (2001), *aff'd on recon.*, 35 BRBS 190 (2002). As a result, the Director filed a motion requesting that the Board summarily affirm the ALJ's decision on remand. The Board granted the motion, and affirmed the ALJ's decision. ER at 5, 7. The Director then filed a petition for review with this Court. ER at 1.

SUMMARY OF THE ARGUMENT

The award of Section 8(f) relief to Matson should be reversed. The Board held that the company could establish a pre-existing permanent partial disability based on audiogram results which it did not provide to Mr. Kunihiro. This decision was wrong for three reasons.

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injury. 33 U.S.C. § 908(f)(1). Thus, the Special Fund had to pay the remaining 90.6 weeks (.453 x 200) of his compensation, a total of $87,526.85 (90.6 x 966.08).

First, it contravenes the plain language of the regulations. Section 702.321 requires that an audiogram submitted to establish a pre-existing permanent partial disability must comply with the requirements of Section 702.441. Section 702.441(b)(2) requires that the results of an audiogram be given to the injured employee. Since Matson did not provide the results of any of the twenty-two audiograms it conducted between 1978-2002 to Mr. Kunihiro, it cannot use any of those tests to establish that he had a pre-existing hearing loss. And since there is no other evidence of a pre-existing permanent partial disability, Matson cannot establish that it is entitled to relief. Thus, the Court should reverse the Board's decision.

Second, even if the language of Sections 702.321 and 702.441 was ambiguous, the Board should have deferred to the Director's reasonable interpretation of the provisions. The LHWCA does not directly address whether an audiogram submitted to establish a pre-existing disability must comply with the "presumptive evidence" standards. DOL was thus entitled to fill this "gap" by regulation, and the Director's interpretation of the relevant provisions—that such an audiogram must meet the "presumptive evidence" standards, including the requirement

that the results be given to the employee—warrants controlling weight under *Auer v. Robbins*, 519 U.S. 452 (1997). The Board erred in giving the Director's interpretation more limited deference, and in ultimately preferring its own interpretation of the regulations.

Finally, the Board's decision contravenes the fundamental purposes of the LHWCA. Congress intended to give injured workers the opportunity to promptly obtain compensation when they are hurt, and to take steps to protect themselves from further injury. It also intended to give employers an incentive to provide safe working conditions for their employees. The Board effectively determined that these aims were trumped by the purpose of Section 8(f)—encouraging employers to hire or retain employees who had pre-existing disabilities. This was error, as compensation for, and protection of, injured employees are the primary aims of the statute. The award of 8(f) should therefore be reversed.

ARGUMENT

The Board erred in holding that Matson was entitled to relief under Section 8(f).

1. Reviewability and Standard of Review

The issue presented here involves the interpretation of DOL's LHWCA program regulations (20 C.F.R. §§ 702.321 and 702.441). In particular, the issue is whether Section 702.321 mandates that an audiogram must comply with the requirements of Section 702.441(b) in order to establish a pre-existing hearing loss for purposes of 8(f) relief. This issue was raised before both the ALJ and the Board. *See* ER at 6, , 12, 14, 28, 41.

The interpretation of regulations is a question of law, over which this Court exercises *de novo* review. *Gilliland v. E.J. Bartells Co.*, 270 F. 3d 1259, 1261 (9th Cir. 2001). When a regulation is plain and unambiguous, however, the Court will simply apply the regulatory language. *See Siskiyou Reg'l Education Project v. U.S. Forest Serv.*, 565 F.3d 545, 555 (9th Cir. 2009). When there is ambiguity or uncertainty regarding the interpretation of a regulation, the Court "must give an agency's interpretation of its own regulations 'controlling weight unless it is plainly erroneous or inconsistent with the

regulation.'" *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Thus, the Court defers to the Director's reasonable interpretation of the LHWCA regulations. *See Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 969 (9th Cir. 1993).

2. Discussion

The issue in this appeal is whether DOL's regulations mandate that an employer seeking 8(f) relief in a hearing-loss case must establish a pre-existing permanent partial disability based on audiogram results which were provided to the injured employee. The Board held that the regulations do not so require, and granted relief to Matson based on test results that were never provided to Mr. Kunihiro. The Board's decision here—and its decision in *Harris*, on which it premised its decision in this case—are wrong for three reasons: 1) they ignore the plain language of the regulations; 2) they fail to accord appropriate deference to the Director's interpretation of his own regulations; and 3) they contravene the fundamental purposes of the LHWCA.

A. The Board's decision is contrary to the plain language of the regulations.

It is an elementary principle of statutory construction that "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). The same principle governs the construction of plain and unambiguous regulatory language. *See Bowles*, 325 U.S. at 413-14; *see also Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (no need to resort to agency interpretation where regulatory language not ambiguous); *Siskiyou Reg'l Education Project*, 565 F.3d at 555 (same).

Here, Section 702.321 expressly conditions 8(f) relief in hearing loss cases on a pre-existing hearing loss "documented by an audiogram that complies with the requirements of Section 702.441." 20 C.F.R. § 702.321(a)(1). Section 702.441, in turn, requires (among other things) that the employee be "provided with the audiogram and report thereon at the time it was administered or within thirty (30) days thereafter." 20 C.F.R. § 702.441(b)(2). Thus, the plain language of Section 702.321 mandates that an employer submit an audiogram that meets all of the

requirements of Section 702.441(b)—including providing the test results to the employee—in order to establish a pre-existing hearing loss. In other words, entitlement to 8(f) relief in hearing-loss cases is plainly conditioned on the employee having received the written results of the audiogram the employer submits to establish a pre-existing permanent partial disability. If the results of the audiogram on which the employer relies were not provided to the employee, the employer has not established a cognizable pre-existing disability in the prescribed regulatory manner, and may not obtain 8(f) relief based on the undisclosed audiogram results.

Resolution of this case, therefore, should have been simple and straightforward. Matson admitted that it did not provide Mr. Kunihiro with the results of any of the audiograms conducted between 1978 and 2002—despite the fact that those tests showed progressive hearing loss—as required by Section 702.441. Because the audiograms did not comply with Section 702.441, Section 702.321 plainly precluded their use to establish a pre-existing permanent partial disability for purposes of 8(f) relief. Since Matson had no other evidence of a pre-existing disability, it necessarily failed to satisfy one of the essential elements

for 8(f) relief. Accordingly, the Board should have affirmed the ALJ's earlier determination that Matson was not entitled to relief.

The Board, however, refused to follow the plain language of the regulations. Instead, relying on *Harris*, the Board concluded that Matson could obtain relief based on the withheld test results. In *Harris*, the Board had held that an employer may establish a pre-existing hearing loss based on an audiogram that complies only with Section 702.441(c) and (d) (regarding when an audiogram should be performed and the standards for measuring hearing loss and the calibration of audiometers), even if it does not satisfy Section 702.441(b). The Board premised this conclusion on its earlier decisions holding that an employee may obtain compensation based on an audiogram that does not comply with the stricter "presumptive evidence" requirements of Section 702.441(b). *Harris*, 42 BRBS at 8-9. Applying *Harris* in this case, the Board held that Matson could obtain 8(f) relief based on the 1978-2002 audiograms, even though Matson did not give them to Mr. Kunihiro.[12]

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[12] The Board also relied on its decision in *Fucci, v. Gen'l Dynamics Corp.*, 23 BRBS 161 (1988). *Fucci* is inapposite and unpersuasive. In (cont'd . . .)

The results here and in *Harris* directly contravene the plain language of the regulations. In effect, the Board has held that Section 702.321 requires compliance only with *some* of the requirements of Section 702.441. Nothing in the language of Section 702.321 can support such an anomalous result. Indeed, Section 702.321(a)(1) references simply "Section 702.441," not specific subsections of that regulation. By excluding the requirements of subsection (b), the Board added an unauthorized gloss on Section 702.321.

(. . . cont'd)
Fucci, an ALJ awarded 8(f) relief because a pre-employment audiogram showed a pre-existing permanent partial disability. The Board vacated the award because the test, in fact, did not reveal a hearing loss, and remanded the case for the ALJ to determine whether any other audiogram established a pre-existing disability. 23 BRBS at 165. One judge dissented with respect to the remand because there was no evidence that any other audiogram result was provided to the employee. 23 BRBS at 166-68. In response, the majority stated that only an employer's knowledge of the audiogram (not the employee's) was relevant because, for purposes of a claim for 8(f) relief, the pre-existing disability must be manifest only to the employer. 23 BRBS at 165.

Fucci is not persuasive precedent because it did not involve the application or interpretation of Sections 702.321 and 702.441. Neither party appears to have based their arguments on the regulations. More importantly, the decision itself does not discuss or even cite the regulations.

Moreover, the Board incorrectly relied on its earlier decisions addressing whether an employee may establish a hearing loss based on evidence that does not comply with Section 702.441(b).[13] *See*, *e.g.*, *Craig v. Avondale Indus., Inc.*, 36 BRBS 65, 67 (2002), *aff'd sub nom. Avondale Indus., Inc., v. Alario*, 355 F.3d 848 (5th Cir. 2003). At most, these cases stand for the proposition that an audiogram that does not meet the presumptive-evidence criteria may still be probative evidence in determining whether an employee is entitled to compensation and, if so, how much. Contrary to the Board's implication, this rule is equally applicable to both employees and employers: either can base their case as to a claim's compensability on non-presumptive evidence. Section 702.321 governs a completely different question—an employer's right to

[13] We note that two of the cases cited by the Board, *Steevens v. Umpqua River Nav.*, 35 BRBS 129 (2001), and *Norwood v. Ingalls Shipbuilding*, 26 BRBS 66 (1991), do not actually stand for the proposition that an employee may rely on non-presumptive evidence to establish the extent of his hearing loss. In *Steevens*, the ALJ awarded benefits based on test results that apparently did meet the presumptive-evidence criteria. The Board affirmed this finding, holding that an ALJ *may* give less weight to audiograms that do *not* meet the presumptive evidence criteria. 35 BRBS at 135. *Norwood* does not even mention the presumptive evidence criteria, and stands for the unremarkable proposition that an ALJ has discretion in determining which evidence is more credible. 26 BRBS at 68.

8(f) relief—and therefore rationally imposes different standards on that inquiry.

Nothing in the LHWCA's legislative history undercuts reliance on the plain language of the regulations. Rather, requiring an employer to comply with the presumptive-evidence criteria in the 8(f) context directly furthers Congressional intent. *Cf. Dyer v. Cenex Harvest States Cooperative*, 563 F.3d 1044, 1049 (9th Cir. 2009) (quoting *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (*en banc*)) ("[T]he 'purpose of a statute may also provide guidance in determining the plain meaning of its provisions.'"). When Congress amended Section 8(f) in 1984, it intended to limit the number of cases in which the Special Fund could be held liable. *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 77-78 (1st Cir. 1995). In addition, in order to limit employers' resort to the Special Fund, Congress amended 33 U.S.C. § 944 to impose larger assessments on employers obtaining 8(f) relief. *Id.* At the same time, however, Congress intended to give employers in hearing-loss cases favored status by allowing them to pay the lesser of 104 weeks or the compensation owed for the second injury. *See* note 3, *supra*. Section 702.321 (with its unrestricted cross-reference

to Section 702.441), effectuates both of Congress' aims: the provision limits employers' liability in hearing-loss cases in comparison with other injuries, but also limits the liability of the Special Fund by requiring that a pre-existing hearing loss be established based on the more stringent "presumptive evidence" requirements.

In sum, Section 702.321 clearly and unambiguously requires an employer to establish a pre-existing hearing loss with an audiogram that complies with the requirements of the Section 702.441. Section 702.441(b)(2), in turn, clearly and unambiguously requires that an audiogram must be given to the employee in a timely manner. The Board erred in holding that an employer can establish a pre-existing hearing loss based on test results that were not given to the employee. And, thus, the Board erred in holding that Matson could establish a pre-existing hearing loss—an essential element of its claim for 8(f) relief—based on the 1978-2002 audiograms, when the company failed to provide the results of any of the tests to Mr. Kunihiro. The Court therefore should reverse the Board's decision granting relief.

B. The Board failed to give proper deference to the Director's interpretation of his own regulation.

Even if Section 702.321 were ambiguous with respect to whether an audiogram submitted to establish a pre-existing permanent partial disability must comply with the requirements of Section 702.441(b), the Board erred in not deferring to the Director's interpretation of the regulation. Specifically, the Board failed to apply the proper standard to determine the deference owed to the Director's interpretation of Section 702.321, and impermissibly gave greater credence to its own interpretation.

The Supreme Court has established the analytic framework for determining the weight given an agency's interpretation of its own regulation. The first step is to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc., v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Statutes rarely resolve every issue, however, particularly with respect to the operation of a government program such as the LHWCA.

Thus, "the power of an administrative agency to administer a congressionally created program . . . necessarily requires the formulation of rules to fill any gap left, implicitly or explicitly, by Congress." *Long Island Care at Home, Ltd., v. Coke*, 551 U.S. 158, 167 (2007) (internal quotations and citations omitted); *accord U.S. v. Dang*, 488 F.3d 1135, 1140 (9th Cir. 2007). And where such a gap is left because Congress has not "directly spoken to the precise question at issue," the courts will "sustain the [agency's] approach so long as it is 'based on a permissible construction of the statute.'" *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (quoting *Chevron*, 467 U.S. at 842-43). Thus, "[an agency's] interpretation of [its own regulation] is . . . controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations and citations omitted); *accord Public Citizen v. N.R.C.*, 573 F.3d 916, 923 (9th Cir. 2009); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930-31 (9th Cir. 2006).

The "precise question at issue" here is whether audiograms offered to establish the pre-existing-disability element for 8(f) relief must meet the "presumptive evidence" requirements of Section 702.441(b), even if a test that does not meet those requirements may suffice to establish an

employee's entitlement to compensation. Neither Section 8(f) (addressing claims for second-injury relief), Section 8(c)(13) (addressing compensation for hearing loss, and establishing technical standards for audiograms), nor any other provision of the statute addresses this precise question. *See* 33 U.S.C. § 908(c)(13), (f). Thus, the LHWCA neither explicitly mandates nor forbids more stringent requirements for proving a pre-existing hearing loss for 8(f) claims. In other words, Congress left a "gap" in the statute on this issue.

The LHWCA grants the Secretary of Labor broad authority to fill this gap by regulation: "the Secretary shall administer the provisions of this chapter, and for such purpose the Secretary is authorized [] to make such rules and regulations . . . as may be necessary in the administration of this chapter." 33 U.S.C. § 939(a). Pursuant to this authority and in response to the 1984 Amendments to the Act, DOL issued an Interim Final Rule, which became effective on December 27, 1984, and included the relevant language still contained in Section 702.321(a)(1). 50 Fed. Reg. 384 (Jan. 3, 1985). DOL received no comments regarding the incorporation of Section 702.441's

requirements into Section 702.321, and issued a Final Rule containing identical language. 51 Fed. Reg. 4270 (Feb. 3, 1986).

The Director interprets this properly promulgated regulation as mandating that an audiogram submitted to establish a pre-existing permanent partial disability under Section 8(f) must comply with the "presumptive evidence" requirements of Section 702.441(b). In particular, such a test must comply with Section 702.441(b)(2)'s requirement that the test results be given to the employee. This interpretation is neither unreasonable nor is it in any way precluded by the language of the regulation. *Cf. Wheaton v. Golden Gate Bridge, Hwy. & Transp. Dist.*, 559 F.3d 979, 982 (9th Cir. 2009) (quoting *Christensen v. Stevedoring Serv. of Am., Inc.*, 430 F.3d 1032, 1035 (9th Cir. 2005)) ("Where the [LHWCA] is easily susceptible of the Director's interpretation, we need go no further.") (internal quotations omitted). Thus, the Board should have deferred (and the Court should now defer) to the Director's interpretation. *See Auer*, 519 U.S. at 461; *Public Citizen*, 573 F.3d at 923; *Bassiri*, 463 F.3d at 930-31; *Nealon*, 996 F.2d at 969.

The Board's refusal to defer to the Director's interpretation of the regulation in *Harris* runs afoul of the governing law of deference. The Board viewed the Director's interpretation as merely a "litigation position developed in his role as an advocate on behalf of the Special Fund." *Harris*, 42 BRBS at 7, n. 4. Thus, according to the Board, the Director's interpretation was entitled only to *Skidmore* deference. *Id.* In *Skidmore*, the Supreme Court stated that the weight given an agency's interpretation of a statute "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control". *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

This limited deference, however, does not apply when an agency embodies its interpretation of a statute in formal rule-making. *See U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001). Here, of course, there is a formal regulation (Section 702.321) in effect. Thus, the Director's views are entitled to *Auer* deference (controlling unless unreasonable or inconsistent with the regulation), not *Skidmore* deference. *See Bassiri*, 463 F.3d at 930-31. Moreover, contrary to the Board's view, *see Harris*,

42 BRBS at 7, n. 4, the fact that the Director had not previously advanced his interpretation of Section 702.321 before the Board in litigation does not reduce the deference owed to his position. *See Long Island Care at Home*, 551 U.S. at 170-71 (agency's new position entitled to deference where it does not create "unfair surprise").

Likewise, the fact that the Director appeared before the Board in a litigating posture does not detract from the weight owed to his interpretation of Section 702.321. *See Long Island Care at Home*, 551 U.S. at 171 (court "accept[s] that interpretation as the agency's own, even if the agency set those views forth in a legal brief"). Indeed, this Court defers to the Director's views where they are "contained either in a regulation or in the Director's position within an *agency* adjudication, so long as the interpretation is reasonable." *Gilliland*, 270 F.3d at 1262 (emphasis in original); *see also Healy Tibbits Builders, Inc., v. Director, OWCP*, 444 F.3d 1095, 1098 (9th Cir. 2006) (Director's interpretation of LHWCA entitled to "considerable weight," even when advanced in litigation). Here, of course, the Director's views have been set forth in a regulation and in *two* agency adjudications (the instant case and

Harris). Thus, the Board erred in holding that the Director's interpretation of Section 702.321 was entitled to only limited deference.

Further, the Board erred in relying on its own interpretation of the regulation as "more reasonable" than the Director's interpretation. *Harris*, 42 BRBS at 9. Based on the framework established by the Supreme Court, the Director's interpretation need not be "more reasonable" than any competing interpretation; rather, it need only be reasonable and consistent with the regulation.[14] In following its own contrary interpretation of the regulations, the Board overstepped its bounds. Unlike the Director, the Board is not policy-making body, and its interpretation of the LHWCA and the implementing regulations is not entitled to any special deference. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278, n. 18 (1980). Thus, "[f]or guidance, [this Court] look[s] to the Director . . . to whom, not the B[oard], [it] owe[s] *Chevron* deference." *Alexander v. Director, OWCP*, 297 F.3d 805, 807 (2002) (citing *Port of Portland v. Director, OWCP*, 932 F.2d 836, 838-39 (9th Cir. 1991)).

[14] The Board did not conclude that the Director's interpretation of the regulation was wholly unreasonable.

Hence, the Board wrongly discounted the Director's interpretation of Section 702.321, and improperly relied on its own interpretation. Even if the language of the regulations were ambiguous, the Court should uphold the Director's interpretation of DOL's formal regulations and reverse the Board's grant of Section 8(f) relief to Matson.

C. The Board's decision is contrary to the fundamental purposes of the LHWCA.

Finally, beyond the language of the regulations, and the deference owed to the Director's interpretation, the Court should reverse the Board's award of 8(f) relief here because it is contrary to the fundamental purposes of the LHWCA. Congress' overall purpose in enacting the statute was to protect employees from injury and compensate those who were injured. *See*, *e.g.*, *Temporary Employment Servs. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 458-59 (5th Cir. 2001) (citations omitted). This overall purpose encompasses at least three separate aims.

First, injured workers should be promptly compensated for the harm they suffer. *See Stevedoring Servs. of Am. v. Director, OWCP*, 297 F.3d 797, 805, n. 6 (9th Cir. 2002); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 689 (9th Cir. 1997). Second, workers

should be afforded the opportunity to protect themselves from further harm. *See*, *e.g.*, *Jones*, 133 F.3d at 689. Finally, employers should have an incentive to provide safe working conditions for their employees. *See Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 210 (4th Cir. 1990); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 575 (1st Cir. 1978). Indeed, the first two aims are specifically referenced in the legislative history with respect to hearing loss. When Congress amended the LHWCA in 1984, it intended to

> require[] that a report of the audiogram must be provided to the employee at the time the audiogram was administered. Clearly, if that audiogram shows a hearing loss, the claimant may want to file a claim for compensation against a previous employer. Further, he may want to undertake steps in his current employment to limit his exposure to noise, so as to prevent further detriment to his hearing.

H.R. REP. 98-570 (I), at 9 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2742; *see Jones*, 133 F.3d at 689 (acknowledging Congress' intent with respect to employee receipt of test results).[15]

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[15] In this context, the Board's reliance (*see* ER at 28) on this Court's decision in *Port of Portland v. Director, OWCP*, 932 F.2d 836 (9th Cir. 1991), is particularly inapposite. That case did not involve a claim for 8(f) relief. Rather, the issue was which of several employers was responsible for paying the employee's compensation. 932 F.2d at 837. In its decision, the Court rejected the argument that the last employer (cont'd . . .)

By requiring that the results of an audiogram be given to an employee before the employer can use the test to obtain relief under Section 8(f) in a hearing-loss case, DOL's regulations further each of these aims. By ensuring that an employee promptly receives notification of an injury to his hearing, the regulations allow the employee both to seek prompt compensation for the injury that has already occurred, and to take whatever steps (*e.g.*, use of hearing protection devices) are necessary to protect his hearing from further injury. At the same time, the regulatory requirement gives the employer an incentive to improve the safety of the employee's working environment, including protection from excessive noise, in order to protect itself from further liability under the statute.

(. . . cont'd)
before claimant's receipt of an audiogram showing a loss of hearing was responsible for his claim. 932 F.2d at 841. In so doing, it stated that "[t]here is no indication that Congress intended to make the receipt of the audiogram . . . crucial outside the procedural requirements of Sections 12 and 13 [33 U.S.C. §§ 912, 913 (dealing with time requirements for providing notice of an injury and filing a claim)]." *Id.* The Court, of course, had no reason at that time to consider the relevance of an employee's receipt of an audiogram predating his work-related injury (possibly by a number of years) in the 8(f) context. Moreover, the Court did not discuss the legislative history cited both in the text of this brief and in the Court's subsequent decision in *Jones.*

The Board, however, discounted these purposes, and concluded they were outweighed by Congress' intent in enacting 8(f), the general purpose of which is to encourage employers to hire or retain previously injured workers. *See Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 203-04 (1949). The Board's recitation of the purpose of Section 8(f) is correct. Section 8(f), however, does not exist in a vacuum. While Congress certainly intended it as an incentive for employers to hire or retain previously injured workers, Section 8(f) is still part of the LHWCA scheme in which Congress' overall purpose is to protect employees from injury and promptly compensate those who are injured. *See Temporary Employment Servs.*, 261 F.3d at 458-59.

In effect, the Board subordinated Congress' intent to protect workers to an employer's interest in obtaining relief from liability in second-injury cases. Indeed, it rewarded Matson for its failure to provide Mr. Kunihiro with the opportunity to protect his hearing from further damage and to promptly seek compensation for the loss of hearing he had already suffered. And it removed a significant incentive for Matson to provide Mr. Kunihiro and other employees with a safe working environment. This is not what Congress intended. The Court

should reverse the Board's decision awarding Matson relief under Section 8(f).

CONCLUSION

The Court should reverse the decisions of the ALJ and the Board, and hold that Matson is not entitled to relief under Section 8(f).

Respectfully submitted,

DEBORAH GREENFIELD
Acting Deputy Solicitor

RAE ELLEN JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

PATRICIA M. NECE
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Suite N-2117
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT OF RELATED CASES

To the Director's knowledge, there are no related cases pending before the Court.

CERTIFICATE OF SERVICE

I certify that on January 6, 2010, an electronic copy of this brief was served through the CM/ECF system on the following:

Normand R. Lezy, Esq.
Leong, Kunihiro, Leong & Lezy
1212 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

J. Lawrence Friedheim, Esq.
820 Mililani Street
Suite 503
Honolulu, Hawaii 96813

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 8,117 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and 2) the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Century font.

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Date: January 6, 2010

ADDENDUM

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20 C.F.R. § 702.321(a)(1):

Procedures for determining applicability of section 8(f) of the Act.

(a) *Application: filing, service, contents.* (1) An employer or insurance carrier which seeks to invoke the provisions of section 8(f) of the Act must request limitation of its liability and file, in duplicate, with the district director a fully documented application. A fully documented application shall contain the following information: (i) A specific description of the pre-existing condition relied upon as constituting an existing permanent partial disability; (ii) the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability or that the death would not have ensued but for that disability. These reasons must be supported by medical evidence as specified in paragraph (a)(1)(iv) of this section; (iii) the basis for the assertion that the pre-existing condition relied upon was manifest in the employer; and (iv) documentary medical evidence relied upon in support of the request for section 8(f) relief. This medical evidence shall include, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement. If the claimant has already reached maximum medical improvement, a report prepared at that time will satisfy the requirement for a current medical report. If the current disability is total, the medical report must explain why the disability is not due solely to the second injury. If the current disability is partial, the medical report must explain why the disability is not due solely to the second injury and why the resulting disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. If the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram which complies with the requirements of §702.441. If the claim is for survivor's benefits, the medical report must establish that the death was not due solely to the second injury. Any other evidence considered necessary for consideration of the request for section 8(f) relief must be submitted when requested by the district director or Director.

20 C.F.R. § 702.441:

Claims for loss of hearing.

(a) Claims for hearing loss pending on or filed after September 28, 1984 (the date of enactment of Pub. L. 98–426) shall be adjudicated with respect to the determination of the degree of hearing impairment in accordance with these regulations.

(b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:

(1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 CFR 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

(2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.

(3) No one produces a contrary audiogram of equal probative value (meaning one performed using the standards described herein) made at the same time. “Same time” means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue. Audiometric tests performed prior to the enactment of Public Law 98–426 will be

considered presumptively valid if the employer complied with the procedures in this section for administering audiograms.

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

(d) In determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment,* using the most currently revised edition of this publication. In addition, the audiometer used for testing the individual's threshold of hearing must be calibrated according to current American National Standard Specifications for Audiometers. Audiometer testing procedures required by hearing conservation programs pursuant to the Occupational Safety and Health Act of 1970 should be followed (as described at 29 CFR 1910.95 and appendices).