

## **MacPhail, Robert**

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### **SCOPE OF REVIEW**

#### **Rejected claim**

Where the Department rejected a claim on the basis the worker sustained no compensable hearing loss, the issue of permanent partial disability is before the Board if it determines claim should have been allowed. ...*In re Robert MacPhail, BIA Dec., 89 3689 (1991)*

Scroll down for order.



1 Under Washington law, permanent partial disability for hearing loss is governed by RCW  
2 51.32.080. Under subsection (2) of that section, the Department is authorized to consider any  
3 nationally recognized medical guides for determining various bodily impairments. In cases involving  
4 testing for hearing loss and determining the extent of loss, the American Medical Association Guides  
5 to the Evaluation of Permanent Impairments are used. Under the AMA guides, if binaural loss is less  
6 than 1.7% there is no permanent impairment present. Therefore, if we accept the testimony of Dr.  
7 Smersh we must conclude that the claimant has not sustained a compensably disabling hearing loss.  
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11 Dr. Chan did testify to a 17.5% binaural loss of hearing. The testing performed by Dr. Chan is,  
12 however, fatally flawed. The examination was performed at 2:30 P.M. on June 8, 1988 after Mr.  
13 MacPhail had spent a full day teaching band. It is the exposure to loud noises while teaching band  
14 which caused Mr. MacPhail's hearing loss. At the time of Dr. Smersh's evaluation and testing on  
15 November 2, 1988, the claimant had been removed from any workplace exposure for close to five  
16 months. The medical evidence is uniformly to the effect that exposure to noise shortly before testing  
17 for permanent loss will affect the accuracy of the test results. Thus, Dr. Smersh's evaluation must be  
18 accepted in determining that the claimant's hearing loss is not compensably disabling. Furthermore,  
19 his test results were comparable to those obtained at the Mason Clinic in May 1989.  
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22 Our industrial appeals judge determined that this Board lacked authority to determine the extent  
23 to which Mr. MacPhail has a permanent partial disability. As a general proposition it is true that in  
24 reviewing an order rejecting a claim, the Board's scope of review is limited to either affirming the  
25 rejection or reversing the rejection order and remanding the matter for further administrative action on  
26 the claim. We are so limited because the Board's authority is appellate in nature and we may not pass  
27 upon an issue which has not yet been considered by the Department. In the instant case, however,  
28 the Department rejected the claim on the basis that "no compensable hearing loss was sustained as  
29 defined by the Washington State Industrial Insurance Act". The Department, therefore, had the  
30 opportunity to, and did in fact, pass on the issue of permanent partial disability. Therefore such issue  
31 is properly before us.  
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34 Having reviewed the record, we are convinced that the claim should be allowed to make sure  
35 that any and all medical bills incurred by the claimant for treatment, testing, or diagnosis of his hearing  
36 loss are paid. After such payment, the claim should be closed with no permanent partial disability  
37 award.  
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1 Proposed Findings of Fact Nos. 1 and 2 are hereby adopted as this Board's final findings. In  
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3 addition, the Board enters the following findings and conclusions.

4 **FINDINGS OF FACT**

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6 3. As a result of his exposure to loud sounds and music as described in  
7 Finding of Fact No. 2, the claimant developed binaural hearing loss of  
8 0.469%. This minimal level of loss does not constitute a permanent  
9 impairment.

10 **CONCLUSIONS OF LAW**

- 11 1. The Board has jurisdiction over the parties and subject matter of this  
12 appeal.  
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14 2. Claimant's occupational disease of hearing loss is not compensably  
15 disabling.  
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17 3. The Department order of June 26, 1989, which affirmed the provisions of  
18 the May 15, 1989 Department order rejecting the claim for the reason that  
19 there was no compensable hearing loss sustained as defined by the  
20 Washington Industrial Insurance Act, is reversed and the matter remanded  
21 to the Department with direction to allow the claim for the occupational  
22 disease of bilateral hearing loss, to order payment of all medical bills  
23 incurred by claimant for treatment, testing or diagnosis of that condition,  
24 and thereupon to close the claim with no award for permanent partial  
25 disability.

26 It is so ORDERED.

27 Dated this 21<sup>st</sup> day of August, 1991.

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29 BOARD OF INDUSTRIAL INSURANCE APPEALS

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32 /S/  
33 FRANK E. FENNERTY, JR. Member

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36 /S/  
37 PHILLIP T. BORK Member