

Shellum, Clarence

[OCCUPATIONAL DISEASE \(RCW 51.08.140\)](#)

Hearing loss

Although clinically reliable audiograms may present the best measure in determining the extent of hearing loss, industrial audiograms will not be discounted, per se. All relevant evidence is examined to determine the reliability of any audiogram. The industrial audiograms that demonstrated a gradual and consistent increase in loss of hearing and were performed close in time to the end of the worker's exposure to workplace noise were reliable.*In re Clarence Shellum*, BIIA Dec., 99 12154 (2000) [dissent]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: CLARENCE D. SHELLUM**) **DOCKET NO. 99 12154**
2)
3 **CLAIM NO. W-324942**) **DECISION AND ORDER**
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5 **APPEARANCES:**

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7 Claimant, Clarence D. Shellum, by
8 Prediletto, Halpin, Scharnikow & Nelson, P.S., per
9 William T. Scharnikow

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11 Employer, The Boeing Company, by
12 Craig, Jessup & Stratton, per
13 Rebecca D. Craig

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15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 Julian M. Bray, Assistant

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20 The self-insured employer, The Boeing Company, filed an appeal with the Board of Industrial
21 Insurance Appeals on March 3, 1999, from an order of the Department of Labor and Industries
22 dated February 17, 1999. The order closed the claim with an award of permanent partial disability
23 equal to 25.26 percent for complete loss of hearing in both ears, and directed the self-insured
24 employer to purchase hearing aids for the claimant. **REVERSED AND REMANDED.**
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30 **DECISION**

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32 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
33 and decision on timely Petitions for Review filed by the claimant, the Department of Labor and
34 Industries, and the self-insured employer to a Proposed Decision and Order issued on
35 December 28, 1999, in which the order of the Department dated February 17, 1999, was affirmed.
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40 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
41 no prejudicial error was committed and the rulings are affirmed.
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44 The issues presented by this appeal and the evidence presented by the parties are adequately
45 set forth in the Proposed Decision and Order.
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1 Our industrial appeals judge, in the Proposed Decision and Order, relied on an audiogram of
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3 October 1998 in determining the extent of Mr. Shellum's noise induced hearing loss caused by his
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5 occupational exposure while employed by The Boeing Company. The Proposed Decision and Order
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7 affirmed the Department's order, which ordered the self-insured employer to pay a permanent partial
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9 disability award equal to 25.26 percent of the complete loss of hearing in both ears. This
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11 25.26 percent of the complete loss of hearing in both ears represents the hearing loss determined by
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13 the October 1998 audiogram plus an additional 4 percent hearing loss factored in for a tinnitus
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15 condition.

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17 We have granted review because we disagree with the result reached in the Proposed
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19 Decision and Order. We believe the June 1991 audiogram is the most reliable audiogram to use in
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21 determining the extent of Mr. Shellum's noise related hearing loss.

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23 Mr. Shellum received industrial audiograms from The Boeing Company from 1982 through
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25 1991. These audiograms indicated a gradual worsening of Mr. Shellum's hearing. While we
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27 recognize that clinically reliable audiograms may provide the best measure in determining the extent of
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29 a worker's hearing loss, we do not discount industrial audiograms, per se. Rather, we look to all
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31 relevant evidence to determine its reliability.

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33 Mr. Shellum retired on September 30, 1992. The evidence in this record presents us with two
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35 possibilities on a selection of an appropriate and reliable audiogram. The claimant and Department
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37 argue that we should use the 1998 audiogram in determining the extent of Mr. Shellum's noise
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39 induced hearing loss. The self-insured employer, on the other hand, argues that the June 1991
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41 audiogram is closer in time to the date of Mr. Shellum's retirement and is more representative of the
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43 extent of the hearing impairment Mr. Shellum suffered while he was employed by The Boeing
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45 Company.

1 The audiograms administered on site by The Boeing Company indicate a gradual and
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3 reasonably consistent increase in Mr. Shellum's loss of hearing while he was employed by The Boeing
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5 Company. Additionally, the 1991 audiogram is very close in time to Mr. Shellum's retirement from The
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7 Boeing Company, which ended his exposure to workplace noise. The 1998 audiogram shows a
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9 significant increase in hearing loss in the years following Mr. Shellum's retirement. It does not seem
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11 likely that Mr. Shellum would have suffered such a dramatic increase in hearing loss within the last
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13 year of his employment, as suggested by the 1998 audiogram used by the Department of Labor and
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15 Industries in rating his permanent partial disability. On balance, the June 1991 audiogram and
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17 supporting medical opinion of Dr. Palmer Wright is the most persuasive evidence with respect to
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19 determining the extent of Mr. Shellum's permanent industrially related hearing loss.
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21 In the litigation of the issue of permanent partial disability rating for Mr. Shellum's occupational
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23 hearing loss, the parties appear to have been unaware of our significant decision, *In re Robert Lenk,*
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25 *Sr.*, BIIA Dec., 91 6525 (1993). In *Lenk*, we took exception to a Department policy that requires
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27 examining physicians to rate tinnitus as an increase in the percentage of hearing loss. We held that
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29 tinnitus is properly evaluated in terms of a percentage of total bodily impairment (TBI) separate from
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31 hearing loss. In Mr. Shellum's case, both medical experts testified (and the Department ordered) that
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33 Mr. Shellum's tinnitus condition resulted in a 4 percent addition to his industrially related hearing loss.
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35 There is no evidence in this record that would enable us to rate tinnitus as a percentage of total bodily
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37 impairment. Thus, we find that Mr. Shellum suffers an additional 4 percent loss of hearing due to the
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39 tinnitus condition. As of his retirement in September of 1992, Mr. Shellum's industrially related hearing
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41 loss was equal to 10.31 percent binaural impairment, with an additional 4 percent hearing loss for a
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43 tinnitus condition for a total binaural hearing loss of 14.31 percent.
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1 After consideration of the Proposed Decision and Order, the Petitions for Review filed thereto,
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3 and a careful review of the entire record before us, we are persuaded that the Department order dated
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5 February 17, 1999, is incorrect and must be reversed. The matter is remanded to the Department with
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7 direction to issue an order directing the self-insured employer, The Boeing Company, to pay the
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9 claimant a permanent partial disability award equal to 10.31 percent of the complete loss of hearing in
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11 both ears plus an additional 4 percent loss of hearing for tinnitus, for a total of 14.31 percent, and
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13 thereupon close the claim.

14 **FINDINGS OF FACT**

- 17 1. On June 30, 1998, the claimant, Clarence D. Shellum, filed an
18 application for benefits with the Department of Labor and Industries
19 alleging that he developed occupational hearing loss as a result of his
20 employment with The Boeing Company. On February 17, 1999, the
21 Department issued an order allowing and closing the claim with an
22 award for permanent partial disability equal to 25.26 percent for
23 complete loss of hearing in both ears. On March 3, 1999, the
24 self-insured employer appealed the February 17, 1999 order to the
25 Board of Industrial Insurance Appeals. On March 11, 1999, the Board
26 issued an order granting the appeal and assigned Docket No. 99 12154.
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- 28 2. Between 1982 and 1992, Mr. Shellum worked as a waste-water
29 treatment operator at the Kent Space Center for The Boeing Company.
30 During that time, Mr. Shellum worked in Building 18-22 and spent a few
31 weeks a year in Building 18-62.
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- 33 3. Prior to working for The Boeing Company in 1982, Mr. Shellum had not
34 been exposed to injurious levels of noise for any duration sufficient to
35 cause noise induced hearing loss.
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- 37 4. While working in Building 18-22 between 1982 and 1992, Mr. Shellum
38 was exposed to injurious levels of noise from pumps for extended
39 periods of time sufficient to produce noise induced hearing loss and
40 tinnitus. Mr. Shellum's noise induced hearing loss and tinnitus arose
41 naturally and proximately from the distinctive conditions of his
42 employment.
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- 44 5. Between 1982 and 1991, the claimant, Clarence D. Shellum, received a
45 number of hearing tests while working for The Boeing Company. These
46 hearing tests show a reasonably consistent progressive worsening of
47 Mr. Shellum's hearing loss while employed by The Boeing Company. In
1998 Mr. Shellum received a clinical audiogram.

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6. The June 1991 audiogram, which shows a 10.31 percent complete loss of hearing in both ears, most accurately reflects Mr. Shellum's noise induced hearing loss, which arose naturally and proximately from the distinctive condition of his employment with The Boeing Company from 1982 through 1992.
7. As of February 17, 1999, Mr. Shellum's noise induced hearing loss and tinnitus, proximately caused by his exposure to injurious levels of noise while in the course of employment with The Boeing Company between 1982 and 1992 constituted 10.31 percent of total loss of hearing in both ears. Additionally, the claimant suffered 4 percent hearing loss for tinnitus.
8. Mr. Shellum first noticed he was having hearing difficulties after he ceased working for Boeing in 1992. Mr. Shellum did not seek treatment for his hearing condition until 1996.
9. At no time was Mr. Shellum informed in writing by a physician that he had hearing loss and that he had the right to file a claim for such hearing loss.
10. As of February 17, 1999, Mr. Shellum's noise induced hearing loss and tinnitus, which arose naturally and proximately from the injurious noise while employed by The Boeing Company, was fixed and stable and not in need of further necessary and proper medical treatment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter in this appeal.
2. The claimant's hearing loss and tinnitus arose naturally and proximately out of the distinctive conditions of his employment and constitutes an occupational disease under RCW 51.08.140.
3. The claimant's hearing loss is equal to 10.31 percent of total loss of hearing in both ears. Additionally, the claimant suffered a 4 percent loss of hearing related to tinnitus.
4. The Department order dated February 17, 1999, is incorrect and is reversed. This matter is remanded to the Department with direction to issue an order directing the self-insured employer, The Boeing Company, to pay the claimant a permanent partial disability equal to 10.31 percent of the complete loss of hearing in both ears plus an

1 additional 4 percent loss of hearing for tinnitus, for a total of
2 14.31 percent, and thereupon close the claim.

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4 It is so **ORDERED**.

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6 Dated this 13th day of April, 2000.

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8 BOARD OF INDUSTRIAL INSURANCE APPEALS

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12 /s/ _____
13 THOMAS E. EGAN Chairperson

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16 /s/ _____
17 JUDITH E. SCHURKE Member

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20 **DISSENT**

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22 The majority opinion in this case disregards our previous decisions regarding the unreliability
23 of industrial audiograms and uses an industrial audiogram taken 15 months prior to Mr. Shellum's
24 leaving the employment of The Boeing Company to determine the level of his industrially related
25 noise induced hearing loss. In doing so the majority opinion is inconsistent with our decision in
26 *In re Eugene Williams*, BIIA Dec., 95 3780 (1998), ignores the facts in the case, and denies benefits
27 to the injured worker. Therefore, I must dissent.
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34 The Boeing Company required Mr. Shellum to take industrial audiograms from 1982 through
35 1991, approximately 15 months prior to his retirement from The Boeing Company. These
36 audiograms were administered on site at the workplace. The majority notes that these audiograms
37 show a progressive worsening of Mr. Shellum's hearing. The majority also accepts the fact that this
38 worsening is related to noise exposure at Boeing's facilities. The Boeing Company, however, never
39 informed Mr. Shellum of his exposure to noise at its facility, which was causing his hearing loss.
40 Nor did The Boeing Company require that Mr. Shellum have a hearing test on or around the date of
41 his last day of employment. If The Boeing Company was truly committed to a hearing conservation
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1 program, it would not have intentionally exposed Mr. Shellum to harmful levels of noise in his
2 employment from 1982 to 1991. Likewise, if it truly was committed to a hearing conservation
3 program, it would have administered a clinical audiogram on or about the time Mr. Shellum left their
4 employment. In doing so, The Boeing Company could have presented Mr. Shellum with precise
5 information regarding the extent of the disability that he suffered while in its employment. But The
6 Boeing Company chose not to do these things. Instead, The Boeing Company hid the progressive
7 hearing loss information from Mr. Shellum, and now The Boeing Company seeks to profit from
8 these actions at the expense of the injured worker.

9 The record in this case indicates that Mr. Shellum first began to notice some hearing loss
10 after he left the employment of The Boeing Company. The record also indicates that Mr. Shellum
11 was not exposed to any activity that would be sufficient to cause increased noise related hearing
12 loss after he left The Boeing Company. Since it is well established that noise induced hearing loss
13 progresses only if there is exposure to noise at a level which will cause damage, the logical
14 conclusion is that the hearing test of October 1998 accurately establishes the level of hearing
15 impairment caused by exposure of noise while Mr. Shellum was employed at The Boeing
16 Company. Our industrial appeals judge's decision was correct.

17 Additionally, the majority apparently has forgotten the case of *In re Eugene Williams*. In that
18 decision we stated:

19 However, in those instances where the evidence shows a worker
20 continued to be placed in a noisy work environment after the date of a
21 given audiogram, we believe the burden appropriately shifts to the
22 employer to show by persuasive evidence that subsequent workplace
23 noise was **not** injurious to the worker's hearing. . . . The employer
24 controls the workplace environment and is typically the entity
25 responsible for monitoring and addressing work place noise.

26 *Williams*, at 14. But the evidence submitted by the employer in this case regarding the level of
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1 noise that Mr. Shellum was exposed to in the last 15 months of his employment borders on the
2 ridiculous. The Boeing Company had one of its employees monitor noise levels in a facility that
3 was completely different than the facility that Mr. Shellum worked in. This sound level testing was
4 done in 1999, some 7 years after Mr. Shellum had left the employ of The Boeing Company. This
5 evidence is not only of little relevance to the issue regarding the noise level that Mr. Shellum was
6 exposed to, but it borders on the absurd. I am not persuaded that The Boeing Company has met
7 its burden as set forth in *Williams*.
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14 The majority also apparently has forgotten that we stated:
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16 [T]he preferred measure of determining a worker's hearing impairment is
17 an independent, clinically reliable audiogram. Although we do not
18 discount 'on site' or 'industrial' audiograms per se, such audiograms will
19 be carefully scrutinized to determine whether appropriate testing
20 protocol was followed. In any case, where the evidence suggests an
21 audiogram was administered under inappropriate circumstances, the
22 results will be given little weight, irrespective of whether the audiogram
23 is considered 'on site', 'industrial' or 'clinical.'
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26 *Williams*, at 15. There is nothing in the record to establish the appropriate testing protocol for the
27 industrial audiogram that is relied on by the majority in this case.
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30 In summary, I believe that our industrial appeals judge reached the correct decision by using
31 the October 1998 clinical audiogram in this case. I also believe that the self-insured employer, The
32 Boeing Company, has failed in its burden to establish that the worker, Mr. Clarence D. Shellum,
33 was not exposed to industrial noise at a harmful level in his last 15 months of employment. I would
34 not reward The Boeing Company and allow it to profit at the expense of the injured worker when
35 The Boeing Company has intentionally withheld the information regarding the increasing
36 progressive hearing loss from the employee and took no steps to guard against the injury to the
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worker. I would adopt the Proposed Decision and Order and award a permanent partial disability for hearing loss equal to 25.26 percent for the complete loss of hearing in both ears.

Dated this 12th day of April, 2000.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
FRANK E. FENNERTY, JR. Member