

Alaska Workers' Compensation Appeals Commission

Kamil Maalah,
Appellant,

vs.

Trident Seafoods and Liberty Insurance
Corporation,
Appellees.

Final Decision

Decision No. 263

July 1, 2019

AWCAC Appeal No. 18-022
AWCB Decision No. 18-0106
AWCB Case No. 201514367

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0106, issued at Anchorage, Alaska, on October 15, 2018, by southcentral panel members Henry Tashjian, Chair, Nancy Shaw, Member for Labor, and David Kester, Member for Industry.

Appearances: Kamil Maalah, self-represented appellant; Jeffrey D. Holloway, Babcock Holloway Caldwell & Stires, PC, for appellees, Trident Seafoods and Liberty Insurance Corporation.

Commission proceedings: Appeal filed November 26, 2018; briefing completed April 4, 2019; neither party requested oral argument.

Commissioners: Michael J. Notar, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Kamil Maalah reported hearing loss that he attributes to his work with Trident Seafoods (Trident) where he worked seasonally from 2008 through 2015.¹ The Alaska Workers' Compensation Board (Board) heard his claim on July 25, 2018, in Anchorage, Alaska. The Board re-opened the record on August 30, 2018, asking for additional information, and closed the record on September 24, 2018.² The Board issued its decision

¹ *Maalah v. Trident Seafoods and Liberty Ins. Corp.*, Alaska Workers' Comp. Bd. Dec. No. 18-0106 (Oct. 15, 2018) (*Maalah*).

² *Id.* at 1.

denying Mr. Maalah's claim on October 15, 2018.³ Mr. Maalah timely appealed to the Alaska Workers' Compensation Appeals Commission (Commission). Neither party requested oral argument and the Commission decides this appeal based on the parties' briefings. The Commission now reverses the Board's decision in part, affirms the decision in part, and remands this matter to the Board for action consistent with this decision.

*2. Factual background and proceedings.*⁴

Trident requested a report dated June 20, 2014, entitled "Employees with a Possible Recordable Hearing Loss" for Trident's plant in Akutan, Alaska.⁵ The report listed Mr. Maalah with a hearing test date of June 6, 2014, and showed recordable hearing loss in the left ear. The report summary indicated that, of 208 employees tested, 6 (2.9%) showed recordable hearing loss.⁶ Trident's most recent hearing test was done on June 8, 2015, which was the latest of eight such tests performed by Washington Audiology Services, Inc. In addition to the 2015 test, three tests were performed in 2014, one in 2012, two in 2011, and one in 2008.⁷

On June 30, 2014, Yasiris Gonzalez filled out an Occupational Safety and Health Administration Form 301 (Injuries and Illnesses Incident Report), noting, "The Program STS and OSHA Recordable in his left ear were both still persistent (Confirmed) on (confirmed) on June 26, 2014."⁸

On August 5, 2014, Ryan Vandehaar, of Washington Audiology Services, Inc., sent an email noting retest results for some employees at Trident's Akutan plant. Mr. Maalah

³ *Maalah* at 29.

⁴ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

⁵ *Maalah* at 2, No. 1.

⁶ *Id.*

⁷ *Id.*, No. 2.

⁸ *Id.*, No. 3.

was noted as having OSHA recordable hearing loss in his left ear that was still persistent from June 26, 2014.⁹

Terri Douglas, FNP-BC, at Trident's Akutan medical clinic, saw Mr. Maalah on August 5, 2015, when he reported ear drainage starting a few days earlier, and left ear hearing loss starting a few months earlier, though he denied trauma to his ear. Ms. Douglas diagnosed otitis externa (ear infection) and left ear hearing loss, and prescribed Ciprodex. She indicated the symptoms were not work-related, and returned Mr. Maalah to work.¹⁰

Cheryl-Ann Leslie, PA-C, at Trident's Akutan clinic, saw Mr. Maalah on August 17, 2015, who diagnosed otitis externa, and stated she would administer ear drops four times daily to ensure Mr. Maalah complied with the treatment. She indicated the symptoms were not work-related, and returned Mr. Maalah to work.¹¹

On September 3, 2015, William Newberry, PA-C, at Trident's Akutan clinic, saw Mr. Maalah and noted Mr. Maalah believed his otitis externa was caused by standing near a generator at Trident's plant for 45 to 60 minutes. He noted blood behind Mr. Maalah's eardrum, and stated that several courses of antibiotics had not helped. He opined there was a remote possibility that barotrauma caused the symptoms. He stated Mr. Maalah could return to work with normal duties, and Mr. Maalah planned a follow-up in Anchorage.¹²

On September 4, 2015, PA-C Newberry issued a "medical action request" to various managers for Trident. He noted Mr. Maalah had been evaluated on several occasions at that clinic and a separate clinic in Akutan village, but his symptoms had not improved. He referred Mr. Maalah off-island for further evaluation not available locally, and stated Mr. Maalah could work until his departure.¹³

⁹ *Maalah* at 2-3, No. 4.

¹⁰ *Id.* at 3, No. 5.

¹¹ *Id.*, No. 6.

¹² *Id.*, No. 7.

¹³ *Id.*, No. 8.

On September 16, 2015, Paul Henry Bikhazi, M.D., examined Mr. Maalah at Evergreen Health in Kirkland, Washington, "for a consultative opinion" regarding his ear symptoms. Mr. Maalah had an audiologic assessment at the clinic the previous day. Dr. Bikhazi diagnosed otitis externa, and recommended Ciprodex.¹⁴ Dr. Bikhazi again examined Mr. Maalah on September 25, 2015, and stated his hearing test records showed high-frequency hearing loss, without conduction problems. He continued treating for otitis externa.¹⁵

On October 1, 2015, Trident controverted temporary total disability (TTD) and temporary partial disability benefits, stating that "medical documentation received does not support disability from working due to a work-related injury or illness."¹⁶ On October 20, 2015, following regular visits of at least once per week, Dr. Bikhazi stated Mr. Maalah's ear infection was "finally . . . substantially improving."¹⁷

On February 25, 2016, Mr. Maalah filed a claim for permanent partial impairment (PPI) benefits and unfair or frivolous controversion. Mr. Maalah later amended this claim on March 10, 2016, to include TTD and permanent total disability (PTD), and on February 13, 2018, to include medical costs.¹⁸ Attached to Mr. Maalah's February 25, 2016, claim was a statement regarding the circumstances of the case, and stating that Stephen Francis was with him when he worked and would be familiar with the work. Mr. Maalah did not obtain Mr. Francis' testimony for hearing.¹⁹

On April 1, 2016, Trident filed two controversions denying all benefits. Trident stated Mr. Maalah's claim was barred under AS 23.30.100, or otherwise barred by law or

¹⁴ *Maalah* at 3, No. 9.

¹⁵ *Id.* at 4, No. 10.

¹⁶ *Id.*, No. 11.

¹⁷ *Id.*, No. 12.

¹⁸ *Id.*, No. 13.

¹⁹ *Id.*, No. 14.

equity, and Mr. Maalah had not attached the presumption of compensability as required for the highly complex medical issues involved in this claim.²⁰

At a prehearing on April 18, 2016, the Board Designee noted Mr. Maalah had filed claims based on two different dates of injury. Since both related to hearing loss, and hearing loss tends to be a gradual and progressive process, the two claims would be addressed together.²¹

On May 10, 2016, Dr. Bikhazi opined Mr. Maalah's ongoing otitis externa "[appeared] to have been obtained at work with his exposure to multiple bacteria."²²

On January 30, 2017, Mr. Maalah attended an employer medical evaluation (EME) with Jackson R. Holland, M.D., an otolaryngology specialist. Dr. Holland stated Mr. Maalah's duties for Trident were unknown, but Trident's representatives had stated he was an environmental technician. He indicated Mr. Maalah appeared to have worked for Trident for approximately seven years, with 12 to 16-hour workdays prior to the work injury. He diagnosed chronic bilateral otitis externa, binaural neurosensory hearing loss, tinnitus, and left external auditory canal mass of unknown origin. He diagnosed hearing loss partly based on the audiometry records produced by Trident between 2008 and 2015. He further opined Mr. Maalah's hearing loss formed "a pattern of progression judged to be typical for high frequency impairment linked with the likely presence of hazardous levels of workplace noise," though he did not have enough information about the categories of hazardous noise exposure Mr. Maalah may have been subjected to. Dr. Holland stated Mr. Maalah's chronic ear canal infection was "likely linked with factors and circumstance of employment with [Trident]" based on the June 2015 onset of symptoms, documented infection at Trident's Akutan clinic, and the "requirements of employment, housing, and circumstance largely associated with facilities provided by Trident. The infection had been undertreated and was not medically stable. He opined Dr. Bikhazi provided competent and appropriate treatment, but Mr. Maalah's stated

²⁰ *Maalah* at 4, No. 15.

²¹ *Id.*, No. 16.

²² *Id.*, No. 17.

inability to afford treatment would have deeply impacted its effectiveness. He opined Mr. Maalah needed urgent attention at a tertiary-level treatment facility, and stated more causes for the ongoing disabling infection, such as diabetes, immune system compromise, and ongoing compliance concerns could be investigated.²³

On February 28, 2017, Dr. Holland issued a letter in response to correspondence and questions from Trident. Dr. Holland stated he found no basis for total disability from Mr. Maalah's position with respect to the hearing impairment shown on Trident's audiology exams. He stated that pain associated with external otitis typically does not last more than two to four days, and the chronic form Mr. Maalah presented with was "rarely characterized by any interference with activities of daily living greater than nuisance or annoyance. Pain in a setting of chronic otitis externa is rare and virtually never disabling." He opined Mr. Maalah's ongoing ear canal disease was associated with the start of symptoms while working for Trident.²⁴

On May 4, 2017, Mr. Maalah testified to the following at deposition, through an Arabic interpreter: From 2002 to 2007, he worked as a cleaner at a food processing company in North Dakota, where he was required to wear hearing protection, although he didn't work in noisy areas. He moved to Seattle in 2007, where he worked for another employer for a short time and applied to work with Trident, where he started in 2008. He had not worked for any other company since 2008, and had not been self-employed. He did not remember when he transitioned to an environmental technician. When his work seasons ended and he returned to Seattle, he did not work. He worked two seasons per year. He worked for Trident for the entire 2008 to 2015 period. He first noticed reduced hearing possibly as early as 2014, though the noisy environment on Akutan made it difficult to assess. He was required to wear earmuff-style hearing protection inside the plant, which he provided himself and cleaned daily. He did not work at any point after the work injury. His regular daily activities were "sitting there suffering," though he could go outside, go to medical appointments, walk, and do household chores. He self-

²³ *Maalah* at 5, No. 19.

²⁴ *Id.* at 5-6, No. 20.

administered all medications for his ear infections as prescribed. He did not treat between October 2015 and May 2016 because medical coverage had been controverted.²⁵

The Board found in his deposition testimony that Mr. Maalah's answers were frequently non-responsive to the questions asked. The Board further stated it was difficult to determine the precision of Mr. Maalah's statements regarding the years and seasons he worked for Trident.²⁶

Alan W. Langman, M.D., at NW Hearing and Balance, on June 5, 2017, released Mr. Maalah to return to work.²⁷ On July 11, 2017, Nicholas L. Tamburri, PA-C at the emergency department of Swedish Medical Center, examined Mr. Maalah and diagnosed acute otitis externa of both ears, though mild on the right, unspecified type, and prescribed Ciprodex, ibuprofen, and tramadol.²⁸

On July 19, 2017, Dr. Bikhazi noted Mr. Maalah's otitis externa symptoms tended to wax and wane over the previous months, and appeared to have somewhat improved recently. He recommended a hearing aid for Mr. Maalah's hearing loss and tinnitus.²⁹ Dr. Bikhazi, on August 23, 2017, examined Mr. Maalah, and recommended further topical treatment for Mr. Maalah's otitis externa, and a hearing aid for Mr. Maalah's hearing loss and tinnitus.³⁰

On September 6, 2017, Mr. Maalah sought treatment from Dr. Bikhazi, stating he was having ear pain.³¹ Dr. Bikhazi, on October 12, 2017, examined Mr. Maalah, noting he had not obtained a topical powder prescribed at the previous appointment, though it

²⁵ *Maalah* at 6-7, No. 23.

²⁶ *Id.* at 7, No. 24.

²⁷ *Id.*, No. 25.

²⁸ *Id.*, No. 26.

²⁹ *Id.*, No. 27.

³⁰ *Id.*, No. 28.

³¹ *Id.* at 8, No. 30.

appeared to have been approved by his insurance. He noted mild inflammation of Mr. Maalah's external ear canal, and placed the powder treatment.³²

Jay Tal Rubinstein, M.D., an otolaryngology specialist, examined Mr. Maalah on November 14, 2017, and diagnosed chronic diffuse otitis externa of both ears. He stated he needed more testing by a threshold ABR examination to evaluate adequately Mr. Maalah's hearing loss.³³

On December 5, 2017, Mr. Maalah attended an employer's medical evaluation (EME) with James Rockwell, M.D., an otolaryngology specialist. Dr. Rockwell interviewed Mr. Maalah regarding his symptoms. Through an interpreter, Mr. Maalah stated he had no excess noise exposure in the years prior to 2008; he worked essentially in seafood processing from 2008 to 2015; during that time, "he had daily excess noise exposure working around extremely loud generators; he wore hearing protection compulsively; he felt his hearing got worse over the years; he had some tinnitus." Dr. Rockwell noted no apparent infection of the ear at this exam. He assessed 16.875 percent mono hearing loss in the left ear, 30 percent mono hearing loss in the right ear, and 19.06 percent binaural hearing loss, resulting in 7 percent whole person impairment, diagnosing sloping mild to severe sensorineural hearing loss bilaterally. He opined "100 percent of Mr. Maalah's hearing loss [was] substantially caused by the injurious long-term noise exposure as it relates to Mr. Maalah's employment at Trident Seafoods from 2008 to 2015," and noted that audiogram results previously taken in this case ranged from "mild to severe sensorineural hearing loss bilaterally" to "profound hearing loss." He opined Mr. Maalah was medically stable in 2015, when he stopped working for Trident. He further opined that Mr. Maalah's hearing loss and external otitis conditions had been well-treated, and the work injury had been the substantial cause of the treatment required. He concluded, "This claimant is a solid candidate for a bilateral hearing aid placement."³⁴

³² *Maalah* at 8, No. 31.

³³ *Id.*, No. 32.

³⁴ *Id.*, No. 33.

On December 15, 2017, Dr. Rubenstein analyzed the result of Mr. Maalah's threshold ABR exam. He stated the results were incomplete because "Mr. Maalah moved around too much" during the exam, but the results indicated a hearing aid was recommended. Mr. Maalah showed low-grade otitis externa bilaterally, and was prescribed betamethasone ointment.³⁵

On January 12, 2018, Dr. Rockwell issued an addendum report, stating he had received additional records from Trident. He stated:

I have reviewed additional information regarding his exact employment at Trident Seafoods. It does seem that Mr. Maalah did not work for Trident Seafoods continuously from 2008 through 2015, nor did he worked [sic] year round. He works seasonally usually in the summer from June to September, but also occasionally worked in the winter from January to April. Again though he did not work on a continual basis. With this new information regarding his temporary work status at Trident Seafoods, I would like to change my overall opinion regarding etiologic factors of his hearing loss.

It is my opinion after reviewing this additional information regarding his employment at Trident Seafoods that he did not sustain industrial-related hearing loss as relates to his employment at Trident Seafoods.

In responding to additional questions, Dr. Rockwell noted he was now unsure of the cause of the hearing loss, but was suspicious that it was due to injurious long-term noise exposure, noting that Mr. Maalah's hearing loss was "classic for a long-term injurious noise exposure issues [sic]." He opined Mr. Maalah's work for Trident was not the substantial cause of his bilateral hearing loss, and "would not have been the key contributing factor. . . ."³⁶

On February 13, 2018, Mr. Maalah verbally amended his prior claim for benefits to include a claim for medical costs, and he requested a hearing. The Board Designee advised Mr. Maalah that he has a right to request information from Trident regarding the

³⁵ *Maalah* at 8-9, No. 34.

³⁶ *Id.* at 9, No. 35.

facts of his case, and should send a written request to Trident listing the requested information and documents if he wished to do so.³⁷

On April 19, 2018, Dr. Bikhazi responded to an inquiry from Trident. Trident had provided a copy of Dr. Rockwell's EME and addendum, and asked whether Dr. Bikhazi concurred with Dr. Rockwell's opinions. Dr. Bikhazi checked the box labelled "Yes, I concur."³⁸

On June 14, 2018, Dr. Rockwell testified by deposition. At his initial December 5, 2017, examination of Mr. Maalah, Mr. Maalah had stated, though an Arabic interpreter that he worked continuously for Trident from 2008 to 2015, and had daily noise exposure. Dr. Rockwell wrote his initial report with this understanding. On examination, he saw no evidence of otitis externa. Otitis externa could be chronic, normally due to other dermatologic issues or inadequate treatment, and was almost universally caused by water exposure in the ear canal. Mr. Maalah's infection had likely become chronic due to inadequate treatment, including failure by Mr. Maalah to follow recommended treatment regimens. No physiologic explanation existed for the development of otitis externa in the workplace without exposure to water, and essentially all cases of otitis externa, also known as "swimmer's ear," arise from water exposure. Hearing protection worn by Mr. Maalah would not cause otitis externa. Prior to issuing his amended report, Dr. Rockwell received information indicating Mr. Maalah was a seasonal worker, who worked for three to four months during the summer, and occasionally in the winter. Seasonal work, such as Mr. Maalah's January to April and June to late September periods, which were divided by off-work time, would not cause the hearing loss observed. Mr. Maalah's 12-hour shifts, each involving approximately 1.5 hours of time in noisy areas, would not cause the hearing loss observed. Mr. Maalah's work for Trident was not the substantial cause of his hearing loss. His hearing loss could have been caused by an inner ear infection, or could be congenital or idiopathic. Neither Mr. Maalah's otitis externa nor his hearing loss were disabling, and Mr. Maalah could have continued working

³⁷ *Maalah* at 9, No. 37.

³⁸ *Id.* at 10, No. 39.

as an environmental technician or a seafood processor from the date of injury. He rated Mr. Maalah for PPI based entirely on his hearing loss. None of the PPI was attributable to his work for Trident.³⁹

On July 5, 2018, Jose Pena testified by deposition. Mr. Pena is an environmental lead, acting as a supervisor for Trident, and had been for years. Environmental technician job duties included generator meter readings, data entry, data collection, compost collection, sending samples to third-party laboratories, and conducting testing of water and air quality. Environmental technicians would only spend time in the noisy plant area when they needed to perform readings or monitoring there. Approximately 70 percent of their time was spent in the quiet office, entering data and performing other tasks. An estimated 2-3 hours of each shift was spent working outside the office. When in the plant, employees were required to wear provided earmuff-style hearing protection to avoid noise-related symptoms. Mr. Maalah had not complained to Mr. Pena or other supervisors about hearing loss.⁴⁰

At the July 25, 2018, hearing, Trident stated that the records that had been provided to Dr. Rockwell between his original and amended EME reports consisted of 177 pages of employment records that had been filed with the Board. These records generally show that Mr. Maalah worked the seasons noted in factual findings below. They also contain a drug test conducted on September 26, 2012, and an hourly employment agreement dated December 29, 2012, indicating Mr. Maalah would be hired for six months following the date of Mr. Maalah's departure for Akutan, which was not noted.⁴¹

At the July 25, 2018, hearing, Mr. Maalah testified. He only filed one page of his recent medical report because faxing documents is expensive, and the other pages are not important. He stopped going to medical treatment in October 2015 because Trident denied benefits. He worked in a noisy environment with Trident, and Stephen Francis was a manager who witnessed the injury. He worked near 10 generators that produced

³⁹ *Maalah* at 10, No. 40.

⁴⁰ *Id.* at 11, No. 41.

⁴¹ *Id.*, No. 43.

high frequency sound, and would take samples of dirty and bacteria-laden water every three days.⁴²

On August 30, 2018, the Board panel issued a letter to the parties stating that the hearing record would be re-opened for additional information. The letter required Trident to state “whether additional records exist showing Mr. Maalah’s periods of employment, positions of employment, payroll history, dates and hours worked, and year-to-date figures on Mr. Maalah’s hours, dates, and pay,” and provide any such records by September 18, 2018. Mr. Maalah was advised to file any employment records differing from those already in the record by the same deadline. Both parties were allowed to file briefs by September 24, 2018, concerning whether Dr. Rockwell’s amended opinions were based on accurate information concerning the duration, continuity, seasonality, and noise exposure of Mr. Maalah’s work.⁴³

On September 11, 2018, Trident filed a petition to vacate the August 30, 2018, letter, and attached a brief in support. Trident objected to re-opening the record, contending the panel had acted improperly and beyond its authority, and that the action would harm Trident’s due process rights. Trident did not comply with the requirements of the letter, but stated that Dr. Rockwell had been provided accurate information concerning the dates of Mr. Maalah’s employment and time spent around noisy areas. Trident requested that the letter be vacated entirely, or that the Board panel issue an interlocutory decision and order in its place.⁴⁴

On September 24, 2018, Mr. Maalah filed documents in response to the Board’s August 30, 2018, letter. Mr. Maalah provided documents that were either already in the record or not relevant to the question. He also provided legal arguments concerning Dr. Rockwell’s report.⁴⁵

⁴² *Maalah* at 11, No. 44.

⁴³ *Id.* at 12, No. 45.

⁴⁴ *Id.*, No. 46.

⁴⁵ *Id.*, No. 47.

The Board found, based on the documents in the file, that Mr. Maalah worked the following periods of time:

Start Date	End Date	No. of Days
6/9/08	9/26/08	109
6/15/09	10/2/09	109
7/28/13	11/3/13	98
1/26/14	4/20/14	84
6/15/14	10/12/14	119
1/21/15	4/21/15	90
6/10/15	9/10/15	92

During his periods of employment as an environmental technician, Mr. Maalah worked over 12 hours each day, on average, and did not take weekends off. His work as an environmental technician consisted mostly of office work, and he was required to collect data from generators, boilers, flow meters, and other areas in the plant for 2 to 3 hours of each 12-hour shift. The inside of the plant was a noisy environment, and employees were required to wear hearing protection when working there. Mr. Maalah consistently cleaned and wore his hearing protection.⁴⁶

The dissent stated that additional employment records must exist, citing to two different hearing tests undertaken in 2011, a year for which no other employment records were provided. In addition, the dissent noted that incomplete records were provided for the years Trident Seafoods conceded Mr. Maalah had worked for it.⁴⁷ The dissent pointed out the amount of time Mr. Maalah most likely worked at Trident, using the scattered and incomplete documents provided by Trident:

- 2008** Employment agreement 6-10-08
Personnel Action Form showing date of employment 6-10-08
Separation notice dated 9-27-08
- 2009** Employment agreement 6-15-09 (reflecting prior employment of 109 days)
Separation notice indicating last day worked was 10-2-09
- 2010** No records
- 2011** No records

⁴⁶ *Maalah* at 12-13, No. 48.

⁴⁷ *Maalah* Dissent at 32.

- 2012** Employment agreement 12-29-12 for six months' employment
- 2013** Application summary 3-18-13
Hourly employment agreement 6-6-13 for six months
Application summary 10-22-13
Payroll data sheet showing 1371.08 hours paid from 8/2/13 to 11/1/13
- 2014** Hourly agreement dated 1-26-14 for six months
Application summary dated 4-7-14
Hourly agreement effective 6-6-14 for six months
Application summary 9-15-14, signed 10-18-14
Payroll data sheet showing 2708.9 hours paid from 1/31/14 to 10/15/14
- 2015** Agreement dated 1-4-15 for six months
Pay detail report showing 1806.62 hours worked through 8-5-15
Pay stub showing 2237.9840 hours worked through 9-13-15.⁴⁸

The amount of hours worked in each year is equal to or exceeds the amount of time for standard full-time work.⁴⁹

Mr. Maalah was released from work from September 16, 2015, to October 5, 2015, from October 13, 2015, to October 16, 2015, and from October 20, 2015, to October 27, 2015. Mr. Maalah was later released from work from July 11, 2017, to July 13, 2017. Dr. Bikhazi's work releases stated they were for the purpose of appointments, evaluation, and treatment.⁵⁰

Mr. Maalah was paid TTD for the period from September 11, 2015, through October 27, 2015. An initial payment covering all of that period except for the last two days was issued on March 2, 2017, and payment for the additional two days was issued April 23, 2018.⁵¹

3. Standard of review.

The findings of fact by the Board are to be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a

⁴⁸ *Maalah* at 31-32.

⁴⁹ *Id.* at 32.

⁵⁰ *Id.* at 13, No. 49.

⁵¹ *Id.*, No. 50.

whole.⁵² Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁵³ “The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.”⁵⁴

The weight given to witnesses’ testimony, including medical testimony and reports, is the Board’s decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁵⁵ The Board’s findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.⁵⁶

On questions of law and procedure, the Commission does not defer to the Board’s conclusions, but rather exercises its independent judgment. “In reviewing questions of law and procedure, the commission shall exercise its independent judgment.”⁵⁷

4. Discussion.

The main issue in dispute is medical treatment for an ongoing ear infection and hearing loss. Mr. Maalah asserts his ear infection began in 2015 while working for Trident at Akutan. He was treated at Trident’s Akutan medical clinic in August 2015 for what was diagnosed as otitis externa (ear infection) and left ear hearing loss. Terri Douglas, FNP-BC, indicated the symptoms were not work related, although developed on the work site. Dr. Bikhazi opined on May 10, 2016, that Mr. Maalah’s ongoing otitis externa “[appeared]

⁵² AS 23.30.128(b); *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000).

⁵³ *See, e.g., Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁵⁴ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

⁵⁵ AS 23.30.122.

⁵⁶ AS 23.30.122.

⁵⁷ AS 23.30.128(b).

to have been obtained at work with his exposure to multiple bacteria.”⁵⁸ Mr. Maalah also complained of diminished hearing, substantiated by Trident’s hearing tests in 2015, 2014, 2012, 2011, and 2008.⁵⁹

Trident relied on the amended EME report of Dr. Rockwell that Mr. Maalah’s hearing loss was not due to his seasonal employment with Trident. The Board agreed with Trident that Mr. Maalah was not entitled to TTD, PTD, PPI, or medical costs.

In addressing whether an injury is work-related and compensable, there is a presumption that “in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter. . . .”⁶⁰ A three-part analysis is used to evaluate a claim. At the first stage, an employee must introduce some evidence connecting his disability to his work, i.e., to establish the presumption of compensability. In cases that are medically complicated, medical evidence may be required to establish the employment connection.

Once the employee has raised the presumption of compensability, the employer must produce substantial evidence that “provided an alternative explanation that would exclude work-related factors as a substantial cause of the disability, or (2) directly eliminated any reasonable possibility that employment was a factor in causing the disability.”⁶¹ The Board, in evaluating whether the presumption is overcome, must “evaluate the relative contribution of different causes of the disability . . . or need for medical treatment.”⁶²

Since relative causes must be considered, it is not sufficient for the employer to provide an opinion stating that work is not the substantial cause of the disability if the

⁵⁸ *Maalah* at 4, No. 17 (The Commission notes that Akutan should qualify as a remote site)(*See, e.g., Doyon Universal Servs. v. Allen*, 999 P.2d 764 (Alaska 2000)).

⁵⁹ *Id.* at 2, No. 2.

⁶⁰ AS 23.30.120(a).

⁶¹ *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611 (Alaska 1999).

⁶² *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 917 (Alaska 2016) (*Huit*) citing AS 23.30.010(a).

opinion does not evaluate all relative possible causes.⁶³ The employer's opinion "must provide substantial evidence that the disability was not work-related."⁶⁴ "[W]hen there is no competing cause, the standard for rebutting the presumption is essentially unchanged from prior cases; the requirement in subsection .010(a) that the Board 'evaluate the relative contribution of different causes' when assessing work-relatedness presupposes the identification of more than one cause."⁶⁵ The employer's evidence is viewed in isolation and without regard to credibility.⁶⁶

If the presumption is not overcome with substantial evidence, the employee prevails and no further evidence is needed.⁶⁷ If the employer has rebutted the presumption, then the employee must prove his claim by a preponderance of the evidence.⁶⁸

In *Huit*, the Alaska Supreme Court (Court) addressed the test for rebutting the presumption of compensability.⁶⁹ The Court stated there that where, as here, there is no competing cause to explain the disability, "the standard for rebutting the presumption of compensability is essentially unchanged from prior cases: the requirement in subsection .010(a) that the Board 'evaluate the relative contribution of different causes' when assessing the work-relatedness presupposes the identification of more than one cause."⁷⁰ The Court then stated that for doctors' opinions "to meet the affirmative-evidence standard, they needed to provide substantial evidence" of an alternative cause

⁶³ *Huit*, 372 P.3d 917.

⁶⁴ *Safeway, Inc. v. Mackey*, 965 P.2d 22, 27- 28 (Alaska 1998).

⁶⁵ *Huit*, 372 P.3d at 919.

⁶⁶ *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁶⁷ *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997).

⁶⁸ *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991).

⁶⁹ *Huit*, 372 P.3d at 919.

⁷⁰ *Id.*

for the employee's condition.⁷¹ The mere possibility of another unknown cause is not substantial evidence with which to rebut the presumption.⁷²

Mr. Maalah raised the presumption of compensability as to the compensability of his hearing loss and ear infection with several medical opinions. On May 10, 2016, Dr. Bikhazi opined Mr. Maalah's ongoing otitis externa "[appeared] to have been obtained at work with his exposure to multiple bacteria."⁷³ The presumption of compensability for the hearing loss and infection was bolstered by the opinion of the first EME physician, Dr. Holland.

Dr. Holland stated Mr. Maalah's hearing loss formed "a pattern of progression judged to be typical for high frequency impairment linked with the likely presence of hazardous levels of workplace noise," though he did not have enough information about the categories of hazardous noise exposure Mr. Maalah may have been subjected to. Dr. Holland stated Mr. Maalah's chronic ear canal infection was "likely linked with factors and circumstance of employment with [Trident]" based on the June 2015 onset of symptoms, documented infection at Trident's Akutan clinic, and the "requirements of employment, housing, and circumstance largely associated with facilities provided by Trident. The infection had been undertreated and was not medically stable."⁷⁴

The second EME physician, Dr. Rockwell, in his first report, stated Mr. Maalah worked essentially in seafood processing from 2008 to 2015; during that time "he had daily excess noise exposure working around extremely loud generators; he wore hearing protection compulsively; he felt his hearing got worse over the years; he had some tinnitus." Dr. Rockwell noted no apparent infection of the ear at this exam. He assessed 16.875 percent mono hearing loss in the left ear, 30 percent mono hearing loss in the right ear, and 19.06 percent binaural hearing loss, resulting in 7 percent whole person impairment, diagnosing sloping mild to severe sensorineural hearing loss bilaterally. He

⁷¹ *Huit*, 372 P.3d at 920.

⁷² *Id.*

⁷³ *Maalah* at 4, No. 17.

⁷⁴ *Id.* at 5, No. 19.

opined "100 percent of Mr. Maalah's hearing loss [was] substantially caused by the injurious long-term noise exposure as it relates to Mr. Maalah's employment at Trident Seafoods from 2008 to 2015," and noted that audiogram results previously taken in this case ranged from "mild to severe sensorineural hearing loss bilaterally" to "profound hearing loss." He opined Mr. Maalah was medically stable in 2015, when he stopped working for Trident. He further stated that Mr. Maalah's hearing loss and external otitis conditions had been well-treated, and the work injury had been the substantial cause of the treatment required. He concluded, "This claimant is a solid candidate for a bilateral hearing aid placement."⁷⁵

Trident needed to overcome the presumption of compensability with substantial evidence. The Board found that the amended report of Dr. Rockwell did this. At the request of Trident, Dr. Rockwell issued an amended opinion on January 12, 2018, based on the incomplete employment records supplied by Trident. Dr. Rockwell noted that

[Mr. Maalah] works seasonally usually in the summer from June to September, but also occasionally worked in the winter from January to April. Again though he did not work on a continual basis. With this new information regarding his temporary work status at Trident Seafoods, I would like to change my overall opinion regarding etiologic factors of his hearing loss.

It is my opinion after reviewing this additional information regarding his employment at Trident Seafoods that he did not sustain industrial-related hearing loss as relates to his employment at Trident Seafoods.⁷⁶

He did not offer an alternative explanation for Mr. Maalah's hearing loss. In fact, Dr. Rockwell indicated he was at a loss to explain Mr. Maalah's hearing loss. "I am unsure exactly as to the overall etiologic factor of his hearing loss and continue to be suspicious that this claimant's hearing loss is due to injurious long-term noise exposure issues."⁷⁷

The Board erred in finding Trident overcame the presumption of compensability as to the ear infection and hearing loss. Trident did not rebut the presumption of

⁷⁵ *Maalah* at 8, No. 33.

⁷⁶ *Id.* at 9, No. 35.

⁷⁷ Exc. 101.

compensability regarding Mr. Maalah's hearing loss and ear infection, because Dr. Rockwell's amended report is not substantial evidence. Dr. Rockwell indeed says the work was not the substantial cause of the hearing loss, but was unable to explain why Mr. Maalah has substantial hearing loss. Both EME doctors and the treating physician agree the kind of hearing loss Mr. Maalah sustained is typical of hearing loss caused by industrial noise. Trident, through incomplete employment information, tried to demonstrate that work with Trident did not cause the hearing loss, but no doctor was able to explain what caused or exacerbated Mr. Maalah's hearing loss. Pursuant to *Huit*, this inability to find an alternative explanation for Mr. Maalah's hearing loss means Dr. Rockwell's amended report is not substantial evidence to rebut the presumption of compensability for the hearing loss, ear infection, and PPI for the hearing loss.

Mr. Maalah, in his deposition taken on May 4, 2017, denied any head traumas or engaging in any sports such as boxing.⁷⁸ He also denied using guns or listening to loud music.⁷⁹ He further denied heart disease, diabetes, hepatitis, autoimmune disorders or having polio.⁸⁰ He did admit to smoking.⁸¹

Moreover, as the dissent discussed, Mr. Maalah worked substantial hours and time periods for Trident between 2008 and 2015. The dissent pointed out the amount of time Mr. Maalah most likely worked at Trident, using the scattered and incomplete documents provided by Trident:

- 2008** Employment agreement 6-10-08
Personnel Action Form showing date of employment 6-10-08
Separation notice dated 9-27-08
- 2009** Employment agreement 6-15-09 (reflecting prior employment of 109 days)
Separation notice indicating last day worked was 10-2-09
- 2010** No records

⁷⁸ Kamil Maalah Dep., May 4, 2017, at 23:12-18.

⁷⁹ Maalah Dep. at 23:19-25.

⁸⁰ Maalah Dep. at 24:1-20.

⁸¹ Maalah Dep. at 24:22 – 25:5.

- 2011** No records
- 2012** Employment agreement 12-29-12 for six months' employment
- 2013** Application summary 3-18-13
Hourly employment agreement 6-6-13 for six months
Application summary 10-22-13
Payroll data sheet showing 1371.08 hours paid from 8/2/13 to 11/1/13
- 2014** Hourly agreement dated 1-26-14 for six months
Application summary dated 4-7-14
Hourly agreement effective 6-6-14 for six months
Application summary 9-15-14, signed 10-18-14
Payroll data sheet showing 2708.9 hours paid from 1/31/14 to 10/15/14
- 2015** Agreement dated 1-4-15 for six months
Pay detail report showing 1806.62 hours worked through 8-5-15
Pay stub showing 2237.9840 hours worked through 9-13-15.⁸²

These calculations are in direct contradiction to the findings of the majority which, for example, showed Mr. Maalah as working only from July 28, 2013 through November 3, 2013, a total of 98 days.⁸³ Further, as the dissent pointed out, Mr. Maalah had two hearing tests in 2011, one on January 13, 2011, and one on May 27, 2011, a year in which Trident provided no employment records.⁸⁴ The dates of the 2011 hearing tests are a strong indication that he worked a substantial portion of 2011 for Trident. However, Trident claimed to have no employment information for that year, a gap which perhaps helped lead Dr. Rockwell to the conclusion Mr. Maalah did not work for Trident in 2011 and worked only sporadically in other years.

Dr. Holland, the first EME physician, stated that Mr. Maalah's hearing loss showed "a pattern of progression judged to be typical for high frequency impairment linked with the likely presence of hazardous levels of workplace noise,' though he did not have enough information about the categories of hazardous noise exposure Mr. Maalah may

⁸² *Maalah* at 31-32.

⁸³ *Id.* at 12, No. 48.

⁸⁴ R. at 000946.

have been subjected to.”⁸⁵ Dr. Holland further opined Mr. Maalah’s “ongoing ear canal disease was associated with the start of symptoms while working for [Trident].”⁸⁶ Dr. Holland also stated Mr. Maalah denied exposure to firearms, chain saw devices, motorcycles, all-terrain vehicles, skydiving, motor racing, scuba diving, home power tool use, and military service.⁸⁷

Trident then had Mr. Maalah examined by Dr. Rockwell, who also noted that Mr. Maalah had no military service, and did not hunt or use guns. He did note that Mr. Maalah had a history of ear infections over the last few years. In Dr. Rockwell’s first report, he stated, “it is my medical opinion that the substantial cause of 100 percent of his hearing loss is due to long-term injurious exposure as it relates to his employment at Trident Seafoods from 2008 to 2015.”⁸⁸ He found Mr. Maalah to be a candidate for bilateral hearing aid placement.⁸⁹

After Dr. Rockwell was provided with incomplete employment records showing gaps in employment and advised that Mr. Maalah’s work at Trident was seasonal, Dr. Rockwell revised his opinion. He also added, “I am unsure exactly as to the overall etiologic factor of his hearing loss and continue to be suspicious that this claimant’s hearing loss is due to injurious long-term noise exposure issues. Having stated that though with his new information as to the noncontinuous employment at Trident Seafoods, I do not feel that that employment is the key contributing factor to his hearing loss.”⁹⁰ However, he added that, “certainly [Mr. Maalah] has hearing loss that is classic for a long-term injurious noise exposure issues.”⁹¹ Given what was described as sporadic, temporary employment at Trident Seafoods, he did not think the employment with

⁸⁵ *Maalah*, at 5, No. 19; Exc. 043.

⁸⁶ *Id.*; Exc. 042.

⁸⁷ Exc. 037.

⁸⁸ Exc. 097.

⁸⁹ Exc. 098.

⁹⁰ Exc. 101.

⁹¹ *Id.*

Trident was the key contributing factor.⁹² More importantly, he could not offer an alternative explanation for Mr. Maalah's hearing loss.

It is disconcerting that Trident explicitly refused to comply with the Board's order for additional information regarding Mr. Maalah's employment with Trident. The Board has the authority to investigate claims "in the manner by which it may best ascertain the rights of the parties."⁹³ By requesting additional employment records from Trident, the Board proceeded to attempt further investigation into Mr. Maalah's claim for hearing loss benefits. From the records provided, there is evidence, including the hearing tests, demonstrating that Mr. Maalah worked substantial periods of time for Trident and worked in years for which Trident implied he did not. The records provided are incomplete. Moreover, records for some years differ from records available in other years. Significantly, Trident offered no reason for the lack of complete employment records.

Since Trident did not provide the Board with complete information regarding the extent of Mr. Maalah's employment with Trident, the Board lacked substantial evidence with which to evaluate the revised medical report from Dr. Rockwell. This failure to provide complete employment records as requested by the Board is grounds for excluding Dr. Rockford's revised report. More importantly, Dr. Rockwell admits he had no alternative basis or reason for Mr. Maalah's hearing loss, which he described is typical of industrial noise exposure. Therefore, Dr. Rockwell's revised opinion is not substantial evidence with which to rebut the presumption of compensability that Mr. Maalah's hearing loss and chronic external auditory canal disease were caused by his employment with Trident.

Pursuant to the Court's decision in *Huit*, this matter is reversed as to the issue of hearing loss and ear infection, which includes PPI and ongoing medical treatment, because Trident was unable to rebut the presumption of compensability.

Mr. Maalah also sought PTD and TTD benefits. Mr. Maalah barely raised the presumption of compensability through his own testimony, given that hearing loss is a

⁹² Exc. 101.

⁹³ AS 23.30.135(a).

somewhat complicated medical issue. Trident was able to rebut the presumption of compensability through the reports of Drs. Bikhazi, Holland, and Rockwell, who all stated Mr. Maalah was able to work. Having rebutted the presumption of compensability, Mr. Maalah needed to prove his claim for TTD and PTD by a preponderance of the evidence. However, he offered no evidence his hearing loss prevented him from working. In fact, his treating physician Dr. Bikhazi said he could return to work. Both the EME doctors indicated Mr. Maalah was able to work despite his hearing loss. Therefore, he is not entitled to either TTD or PTD because disability under the Act "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."⁹⁴ He was unable to meet his burden of proof.

The Board's decision as to PTD and additional time loss is affirmed because there is no evidence in the record to support a claim for TTD or PTD.

5. Conclusion.

The Board's decision denying Mr. Maalah medical benefits and PPI for the hearing loss and ear infection is REVERSED. The Board's decision denying Mr. Maalah TTD and PTD benefits is AFFIRMED. The matter is REMANDED to the Board for action consistent with this decision.

Date: 1 July 2019 Alaska Workers' Compensation Appeals Commission



Signed

Michael J. Notar, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner *pro tempore*

Signed

Deirdre D. Ford, Chair

⁹⁴ AS 23.30.395(16).

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission’s notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission’s notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 263, issued in the matter of <i>Kamil Maalah vs. Trident Seafoods and Liberty Insurance Corporation</i> , AWCAC Appeal No. 18-022, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 1, 2019.	
Date: <u>July 2, 2019</u>	 <i>Signed</i> _____ K. Morrison, Appeals Commission Clerk