BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

THOMAS KAPA,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1406213
	)	
CITY OF WILMINGTON,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on June 20, 2014, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

LOWELL L. GROUNDLAND

MARY MCKENZIE DANTZLER

Deborah J. Massaro, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Samuel D. Pratcher, Attorney for the Employee

Maria P. Newill, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On October 3, 2013, Thomas Kapa, ("Claimant"), filed a Petition to Determine Compensation Due, alleging that he developed bilateral hearing loss as a result of the cumulative detrimental effect of the noises which he is exposed to a work as a firefighter for the City of Wilmington, ("Employer"). The asserted manifestation date according to the petition is October 4, 2011. At the hearing Claimant propounded a manifestation date of March 19, 2012. Claimant seeks compensation in order to obtain bilateral hearing aids.

Employer maintains that Claimant's petition is barred by the Statute of Limitations and/or that Claimant has forfeited his right to benefits by his wilful failure or refusal to utilize ear protection. DEL. CODE ANN. tit. 19, § 2353(b). Alternatively, Employer disputes causation.

A hearing was held on Claimant's petition on June 20, 2014. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified at the hearing on his own behalf. He is fifty-two years old. He has worked for Employer for twenty-seven years. For the last twelve years he has been a supervisor at Station 4 on Ladder 1. In the past he has worked at several other Station Houses. He also works part-time for the State of Delaware Fire Marshall's Office as a Fire Inspector.

During his employment Claimant has been exposed to occupational noise including sirens, power tools and alarm systems. He uses power saws in his job to gain access or to ventilate a roof during a fire.

Claimant undergoes annual work related physical examinations. He knows that he has a problem with his hearing. His hearing tests have been abnormal for many years and notice has been forwarded by his Employer to his primary care physician.

Claimant agrees that there have been recommendations over the years that he utilize earplugs while at work, and these earplugs are provided by Employer. However, he explained that in most instances firefighters cannot use earplugs. A firefighter must be able to hear the radio at all times. Claimant cannot wear the sponge type of earplugs which are provided by Employer while he is performing his job also because he must be able to hear the orders of his Commander instantly. For example, if he were on a roof at a fire scene and was told to get off because it is dangerous he could not hear such an order while utilizing the earplugs.

Claimant underwent a hearing test with Dr. Joseph Ramzy in 1999. He later started seeing Dr. Paul Imber in 2011 who has seen him annually ever since. Claimant reported that he has ringing in his ears all the time and difficulty understanding people in restaurants where there is background noise.

Over his twenty-seven years with Employer Claimant's hearing has progressively worsened. The first year that he saw Dr. Imber hearing aids were not recommended, but the second year, 2012, they were recommended and this was the first time that hearing aids were recommended to Claimant.

At work Claimant must always keep the microphone close to his ears. He turns his radio up and can hear pretty well, except when using power tools. He used to be able to hear the radio with headsets, but now the headsets do not work so he has to leave the right ear out in order to hear.

Claimant saw Dr. Medford for a DME, who also recommended hearing aids and related the hearing loss to Claimant's firefighting duties and the tools that he has used over the years.

Outside of his job Claimant is not exposed to loud noises. He attributes his hearing loss to being a firefighter. He does not have a gun, so he does not shoot. He has never been in the military.

On cross-examination Claimant agrees that on June 1, 1999 he saw to Dr. Joseph Ramzy and reported constant bilateral high pitched tinnitus in both ears. Claimant agrees that Dr. Ramzy found hearing loss, but Claimant says it was only slight. Claimant's hearing loss was attributed to his work noise exposure at that time. Claimant knew it would be permanent. He says that he did not know that continued exposure would cause such a loss that he would need hearing aids. So he agrees that he knew that he had hearing loss and that it was work related going back to 1999. Claimant agrees that all doctors have recommended wearing hearing protection.

Claimant's 2014 records from Dr. Imber reveal that Claimant indicated that he had been using ear protection for the last seven years. Claimant explained at the hearing that the only protection is on the fire apparatus, or the headsets. He says that in the past he was able to hear

the fireboard through the headsets, but now he has to take off the one side so that he can hear the radio. He takes the right side off because the other firefighter's voices are streaming through the left side. Use of the headsets did not start until 1998, so this is when he started wearing ear protection for a few years until he says that they no longer worked.

Also, when Claimant is using power tools in the station and he had the ability to do so he used protection. Employer supplies earplugs and periodically checks to make sure he has them.

Claimant explained again that he does not use ear protection on the fire ground because he has to hear. He uses the headset, which he says does not necessarily protect his hearing. He says that the headsets are not rated for such, but he has no documentation regarding this claim.

Claimant lives in a house with his wife and children. He uses power tools at home and wears ear protection. Claimant agrees that he is a life member of the Elsmere Fire Company and while he was active initially, he says that he has not been on any fires through that Company for at least fifteen years.

Upon questioning by the Board Claimant testified that Dr. Ramzy did not tell Claimant that the hearing loss would get worse over time, but did recommend hearing protection. Dr. Ramzy did not indicate that the loss was age related. The tinnitus began in the 1990s. Claimant says that since 1999 or so the firefighters have been given earplugs by Employer. He has had the headset apparatus since 2005.

On re-direct examination Claimant clarified that he does not wear hearing aids. It has been recommended that he get them, but his health care plan does not cover the cost.

Dr. Paul Imber, otolaryngologist, testified at the hearing by deposition on Claimant's behalf, (Claimant's Exhibit No. 1). He began treating Claimant on March 7, 2011 and reviewed the pertinent medical records. In his opinion Claimant requires hearing aids due to his work

related noise exposure. Claimant's progressive hearing loss is caused by this ongoing, persistent noise exposure over the years.

At his initial visit Claimant was forty-eight years old and complained of ringing in the ears, medium to high pitch, over a ten year period. It had started to involve the low pitches as well in the left ear for the past month or two. Claimant had been told twelve to fifteen years prior that he had hearing loss and it was permanent. He had some difficulty with speech, particularly with background noises and speech discrimination.

Claimant had a history of noise exposure working around sirens, power tools and air horns in the workplace. He had no other otologic history at that time. He denied any dizziness or lightheadedness, ear drainage, fullness or ear pain. He denied any previous ear infections.

On physical examination Claimant had a little ear wax in his right ear that was cleaned out. Otherwise his ear examination was normal. An audiogram showed a moderate sensory neural hearing loss from 3,000 hertz through 8,000 hertz in both ears, slightly worse in the left ear than the right. It showed that when amplified Claimant had excellent discrimination. He was able to recognize one hundred percent out of both ears. His middle ear function was normal, meaning no fluid, negative pressure or other issues that could be contributing to his hearing loss. Dr. Imber diagnosed Claimant with sensory neural hearing loss and tinnitus secondary to noise exposure. It was recommended that Claimant use appropriate ear protection in the noise environment and have annual audiologic studies performed. Dr. Imber explained that Claimant's hearing loss is all due to cochlear damage.

Claimant returned on March 19, 2012 still complaining of hearing loss. His television was turned up more loudly and he was having more difficulty with speech discrimination, particularly with background noise. His tinnitus was worse when quiet and had been bilateral. It

was noted that Claimant is a fireman with loud siren exposure. He does not wear ear protection. Claimant explained that in his particular job he requires a lot of communication and he must be able to hear what is going on around him to be able to converse and communicate with those around him.

At this second visit Claimant's audiogram started to involve hearing loss in the lower frequencies. Both ears were kind of matching up at this point. So his hearing loss, although it was still moderate, was now involving a mild hearing loss in the 2,000 range as well. Dr. Imber explained that with speech discrimination more of the frequencies are involved, even if it is only by 10 or 15 decibels superimposed on an already existing hearing loss at higher frequencies, such that the ability to understand speech goes down, missing more parts of the word. So it is not that one cannot hear the word, rather one cannot discriminate between "top" and "pop" because the "T" and "P" are high pitched sounds. Particularly with a woman's voice, if there is background noise competing, it is more difficult to understand.

So Claimant still had noise-induced sensory neural hearing loss and continued tinnitus secondary to noise exposure. Dr. Imber recommended that Claimant consider amplification, or hearing aids, because this was now involving more frequencies with the speech range, as well as annual hearing testing and ear protection.

Claimant was next seen in April of 2013 reporting that the tinnitus becomes louder occasionally. He had been reporting tinnitus, high pitch worse when quiet, bilaterally for years. It gets louder and occasionally he has some improvement, which in not uncommon. His audiogram was almost identical to that in 2012, except that he was starting to drop down even a little further. This is consistent with long-term exposure to loud noises, such as those described at his work. The persistent exposure to noise does not have to be as loud as a jet plane

constantly, rather any significant loud noise will cause damage to the inner ear. There are small hair follicles, sensory neural fibers, that become damaged from the constant trauma of the vibration of the sound wave. Hearing aids, ear protection and annual audiograms continue to be recommended.

Claimant was last seen in April of 2014 when he was continuing to complain of ongoing ringing in both ears with some fluctuation. It is becoming more of a nuisance as it is significantly worse in a quiet setting. The hearing loss is continuing with difficulty with speech discrimination. There has been no significant change over the past year. Claimant has been relatively stable from Dr. Imber's perspective. Claimant indicated that he had been wearing ear protection for the last seven years or so. In contradiction to this, it is also noted that he has worn no protection in the past for twenty-five years. Claimant was still using power tools at work with intermittent ear protection, depending on the circumstances. The audiogram was similar to Claimant's previous one. However, his left ear had dropped a little bit, five or ten decibels, while his right ear was essentially the same. From 2011 to 2014 there has been a significant decrease in his hearing acuity in the mid-range of speech. Dr. Imber recommended hearing aids, ear protection and a repeat audiogram in one year. A hearing aid evaluation has been suggested, but has not been arranged.

As far as Claimant's history, Dr. Imber believes that Claimant saw Dr. Ramzy in 1999 with a hearing loss, a little worse in the left ear than the right. Some screening audiograms done in the industrial setting going back to the early 1990s showed high frequency loss as well. In reviewing the records there was no indication that Claimant's hearing loss was at a level that hearing aids were recommended. There was a worsening of his hearing loss between the 2011 and 2012 visits to the point that hearing aids were needed. That is when the hearing loss started

to involve 2,000 hertz and now lower frequencies are becoming more involved and are going to start to have impact on his discrimination skills.

Dr. Imber opines that the progressive worsening of Claimant's sensory neural hearing loss is attributable to the noise exposure at work. He explains that Claimant is a relatively young man and there is nothing else that would make sense. Considering the progression of his hearing loss over a ten to fifteen year period or more indicates the classic pattern of a progressive hearing loss related to noise exposure. Dr. Imber agrees that the noise exposure was a substantial cause to Claimant's worsening condition, to the point that in 2012 hearing aids were recommended.[1]

Dr. Imber recommends programmable aids that have the ability to enhance sounds at certain frequencies. The need for these hearing aids is related to Claimant's work activities. This is based on Claimant's progressive hearing loss secondary to ongoing persistent noise exposure over the years causing hearing loss in the frequencies of speech and the patient subsequently having tinnitus and communication issues because of that.

On cross-examination Dr. Imber agrees that Claimant's Medical History Form indicates sensory neural hearing loss and tinnitus, but does not refer to noise exposure. As far as the test results showing a moderate loss and the actual reports referring to a mild to moderate loss Dr. Imber explained that it is a moderate loss at its extreme end and mild at its lower end. He agrees that his opinion as to causation is exclusively based upon the history provided by Claimant.

Dr. William L. Medford, Jr., otolaryngologist, testified by deposition at the hearing on Employer's behalf, (Employer's Exhibit No. 1). He examined Claimant on March 6, 2014 and

[1] Dr. Imber was asked about the average cost for hearing aids in his practice, but an objection was raised because the information had not previously been produced. Claimant maintains that the costs for hearing aids were attached to the Pre-Trial Memorandum. The Board notes that there is no attachment to the Board's copy of the Pre-Trial Memorandum although it is referred to. So while the Board reserved its decision during the hearing, the Board now sustains Employer's objection to this evidence.

reviewed the pertinent medical records. In his opinion the combination of the OSHA analysis of the noise levels in the workplace and the potential for outside noise sources make the noise-induced hearing loss in the workplace etiology less likely. He also would have expected the hearing loss progression to be much faster if it were related to Claimant's work noise. Overall, Dr. Medford believes that it cannot be put forth that the noise in the workplace produced Claimant's hearing loss. It may be a possibility, but not a probability.

Dr. Medford reviewed testing of Claimant's hearing loss dating back to 1991. Audiograms have been performed just about annually since 1991. In 1991 Claimant was beginning to develop significant hearing loss, slightly greater in the left ear than the right. This continues to be documented through his testing on an annual basis.

Dr. Ramzy's report in 1999 indicates Claimant had twelve years of service in the Wilmington Fire Department and reported that he had occasional problems with speech discrimination and noisy backgrounds. He also reported constant bilateral non-pulsatile high-pitched tinnitus. Claimant had been exposed to noise of air horns, sirens, power tools and engines. At that time he had bilateral high frequency sensorineural hearing loss, worse in the left ear than the right, with what is described as asymmetry. The hearing loss in the left ear peaked at 4,000 hertz, the pattern which is most consistent with noise-induced hearing loss. Claimant indicated noise exposure at work and denied any other industrial, occupational or recreational noise.

Dr. Medford explained that from 1991 to the present there has been a very slight progression of hearing loss. Dr. Medford would have suspected a greater progression of hearing loss if, in fact, Claimant's hearing loss was coming from noise-induced hearing loss in the

workplace. Dr. Medford agrees that in a 1996 questionnaire Claimant indicates that he operates power tools at home.

At the time of his DME Claimant reported that he had a history of noise exposure in the workplace over many years working as a firefighter and he was complaining of hearing loss and tinnitus in both ears. He denied any pre-existing ear problems or hearing loss that would have been related to other factors, such as non-job related noise exposure. Claimant indicated that he used ear protection when possible, but that his job required the use of a radio and at times he was not able to wear protection because he needed to listen to the radio and, therefore, the ear protection would not have allowed him to appropriately perform that responsibility. He denied any leisure activities, sports or anything else that would contribute to noise-induced hearing loss.

On physical examination Claimant had normal external canals and tympanic membranes bilaterally. His hearing status was reviewed based upon a March 19, 2012 audiogram which showed bilateral high frequency sensorineural hearing loss with very minimal asymmetry with slightly greater loss in the left ear, but minimal. Dr. Medford initially issued his opinion without the noise testing levels from the City of Wilmington Fire Department. He initially opined that based on Claimant's reports it appeared that all of his noise exposure had occurred on the job and that there were no other leisure activities or other activities outside of the workplace that could account for his noise exposure. For that reason Dr. Medford felt that possibly the workplace was the source of Claimant's hearing loss and his hearing loss configuration was consistent with noise-induced hearing loss.

Since Dr. Medford issued his report he has had opportunity to review an August 28, 2012 report from PMA Companies and a May 13, 2014 report from National Forensic Consultants. In both reports the conclusion was that the level of noise during occupational employment for a

firefighter does not to rise to the level of requiring hearing protection by OSHA. Thus, Dr. Medford believes that the cause of Claimant's hearing loss becomes uncertain for various reasons.

First, Claimant reported the use of power tools which implies the possibility of noise exposure outside of the workplace. Also, the report that the noise levels in the workplace were not of sufficient intensity to produce hearing loss raises a question as to whether his hearing loss is work related. Lastly, Claimant's 1991 audiogram showed some significant hearing loss at that time. Dr. Medford believes that the progression of it over a twenty year period would have been greater if it was related to the workplace. So the combination of these concerns raises questions as to the etiology of Claimant's hearing loss and whether it was solely related to workplace noise or not.

Another factor is that presbycusis, hearing loss associated with aging, occurs in some patients with a very similar pattern to the noise-induced hearing loss pattern and at times patients can experience presbycusis and that could have played some additional role in further producing hearing loss in Claimant's case. So the picture has become a little more cloudy with this new information. If noise is ruled out as the cause for Claimant's hearing loss, Dr. Medford agrees that hearing loss can also be caused by unknown etiologies. Patterns such as that seen here can have the same exact pattern with a history of no noise exposure.

Dr. Medford opines that the OSHA analysis of noise levels in the workplace make Claimant's noise-induced hearing loss in the workplace etiology less likely than if the noise levels were found to be at the level that did produce noise-induced hearing loss. This analysis calls into question the possibility of noise-induced hearing loss in his workplace. Therefore, in view of the audiograms provided since 1991, the workplace analysis of noise levels that were

found to be insufficient to cause noise-induced hearing loss and the findings that Claimant may have experienced noise exposure with power tools and other factors outside of the workplace, Dr. Medford cannot state that the hearing loss was totally related to the workplace noise levels. There is great uncertainty as to what produced the hearing loss. It cannot be put forth that the noise in the workplace produced Claimant's hearing loss. It may be a possibility, but not a probability.

On cross-examination Dr. Medford agrees that he has only seen Claimant one time for purposes of a DME. He agrees that in his report he indicated that Claimant's treatment was reasonable, necessary and related, including the hearing aids. Dr. Medford obtained the audiogram history within the past week. Dr. Medford agrees that Claimant denied any activities or hobbies outside of work that would contribute to his hearing loss. Dr. Medford agrees that his report indicates that the audiogram was consistent with noise reduced hearing loss from the workplace. He agrees that he modified his opinion subsequent to his report based on new information. He now believes that causality has been brought into question. He still agrees that Claimant would benefit from a hearing aid due to the hearing loss, but causation is in question. He did not have certain information when he rendered his initial report. He also did not have the noise evaluation form from Dr. Ramzy. Dr. Medford clarified that his opinion is that with reasonable medical probability the etiology of Claimant's hearing loss is uncertain.

On re-direct examination Dr. Medford agrees that the primary noise testing upon which he is relying is the National Forensic Consultant report which is dated May 13, 2014 so he did not have that report at the time of his March 6, 2014 examination.

Roger L. Boyell, Electronics Analyst, testified at the hearing on Employer's behalf. He serves as a consultant to National Forensics Consultants Incorporated. He is a licensed professional engineer and board certified as a forensic engineer.

Mr. Boyell has a Bachelor's degree in Electrical Engineering and a Master of Science in Applied Science. He has experience in electronics and acoustics. He has served in legal matters involving audibility and acoustics, including noise in workplace. He has testified twice in Delaware State Court. He does not recall exactly what he testified regarding, but notes that he testifies frequently in court throughout the country and simply cannot recall the cases. It may have been environmental acoustics. He has testified on behalf of both defendants and plaintiffs. His Curriculum Vitae was entered as an exhibit without objection, (Employer's Exhibit No. 2).[2] He will testify as to a reasonable scientific certainty that the noise level at Claimant's workplace does not rise to a level that causes injury.

Mr. Boyell partly relied upon an August 28, 2012 study conducted by Joseph Knapp, an industrial hygienist, in reaching his conclusions. Mr. Knapp concluded that noise levels in the firefighter's workplace, after reduction to time weighted averages, were less than what would be considered a hazard to hearing in the workplace.

Mr. Knapp had six individual firefighters wear noise recording monitoring devices throughout their entire shift. This recorded the sound pressure levels over a period of performance and used the algorithms and time weighted average over the day which OSHA applies. The OSHA requirement is that the permissible limit for sound is 90 decibels. Protection is required if the sound is at 85 decibels or greater. The time weighted averages over an eight hour day for the six firefighters were as follows: 75, 69, 70, 74, 73 and 65 decibels. These are

[2] Claimant objects to the extent that he is not sure if Mr. Boyell has been qualified as a noise expert. Based on Mr. Boyell's knowledge, skill, experience and training the Board accepts his testimony as such.

all lower than the 85 decibel threshold. This is the basis of Mr. Knapp's conclusion and that of Mr. Boyell. The actual testing was performed August 23, and 25, 2012.

Mr. Boyell also performed his own independent testing at the City of Wilmington Fire Station Headquarters on May 7, 2014. He used instruments to measure sound pressure levels under conditions where firefighters reported loud noises. He performed this testing as a check on the other information and partly for confirmation of his own beliefs. He measured certain devices and conditions as to the sound pressure levels which were obtained. Using circular saws, chain cutters and siren horns with ventilation blowing, both inside and outside the truck he ultimately found that although the noise levels are high for short periods they are short enough in duration that they do not contribute to the time weighted average. Mr. Boyell explained that essentially, because the disturbances are short they do not contribute to hearing loss, which is based on an occupational noise exposure that is established by OSHA standards.

Mr. Boyell opines that Claimant's noise exposure at work does not rise to a level that causes injury. There are some noise producing devices that subject the operator to noise levels above 100 decibels, but it is only for a short time. Although there is a temporary threshold shift and Claimant may become locally less sensitive to noise, bit the behavior attenuates with time and his hearing returns to normal. Mr. Boyell clarified with examples, such as that of a loud thunder clap or concert where the hearing may be affected temporarily, but it soon returns to normal. The duration of the noise does not pose any permanent hazard to hearing. Similarly, use of power saws represents a temporary short term noise. So although the noises are loud, they are not long enough in duration to cause a permanent hearing loss. At end of day Claimant is no longer subject to the noise and his hearing returns to normal.

Dr. Imber opines that based upon Claimant's history the exposure to noise is persistent and constant, or a constant trauma. Mr. Boyell points out that Claimant's actual exposure is neither persistent nor constant trauma.

On cross-examination Mr. Boyell explained that OSHA standards are not minimum or maximum requirements, rather they are the standards which are required of employers. He agrees that employers can go beyond those standards.

Mr. Boyell explained that the calculations are reduced to an equivalent of eight hours. He measured sound decibels while various equipment was in operation. He did so where the firefighters utilize the ventilation blowers. He measured both inside and outside of the cab of the truck with the siren and horn blowing and measured sound in the cab with engine running. Mr. Boyell also measured sound in the garage of Station 6 with no equipment running. His testing was done within one day.

Mr. Boyell relies on an eight hour day standard because that is the standard which OSHA utilizes. OSHA assumes an eight hour work day, or that the employee works part of day, so they reduce it to an eight hour day. For example, the chain saw was the loudest at 117 decibels for one fifth of an hour, which is not more severe than 90 decibels for eight hours. So the short term exposure is the same as long term continuous when adjusted for time. Everything in OSHA is reduced to eight hours a day for a reference. He refers to the OSHA standard of a permissible exposure level of 90 decibels and the fact that hearing protection is recommended for 85 decibels or above. He opines that this does not occur in the Wilmington Firefighters workplace.

Mr. Boyell does not know exactly what Claimant does in his workplace. During Mr. Boyell's testing he spoke with firefighters about their duties. He performed fire truck testing and

was on the truck long enough to make measurements and check meter readings and record it. He did not use the radio on the fire truck.

While working Mr. Boyell utilizes earplugs during testing. He explained that there are hundreds to choose from and some are deficient earplugs which mask sound entirely. He uses earplugs for protection that do not provide distortion, but only reduce the overall volume. He points out that the foam rubber Styrofoam type of earplugs which the firefighters are issued allow them to hear, but reduces the level of exposure. Improper earplugs reduce all sound.

On re-direct examination Mr. Boyell explained that during his testing firefighters were present to demonstrate the equipment and he measured the sound.

That Claimant works one twenty-four hour shift and is off for three days does not change his opinion. The noise level averaged over the work day does not exceed the guidelines and therefore does not impair hearing.

Upon questioning by the Board Mr. Boyell explained that when one is exposed to noise levels for a short duration, then over time the hearing levels return back to normal, but he agrees that the hearing returns to its baseline or the level of hearing that the person had prior to exposure.[3] He further explained that the effect of a loud noise reduces sensitivity of ones hearing until it restores, or goes back to normal whether it is that of a twenty year old or sixty year old.

Michael Donohoe, Deputy Chief of Operations for Employer, testified at the hearing on Employer's behalf. Mr. Donohoe has known Claimant the entire twenty-seven year duration of his employment.

Mr. Donohoe explained that Employer provides small earplugs which can be inserted into the ear. On a quarterly basis Firefighters must complete a form which lists all of their equipment

[3] Mr. Boyell then indicated that he has a comparable hearing loss to Claimant's and his recovery time is not different than others. Although this improper testimony was provided in response to questioning by the Board, it wishes to make clear that it did not rely upon Mr. Boyell's personal hearing loss experience in the deliberation process.

and request any equipment necessary. He disagrees with Claimant with respect to the radio not functioning properly. He explained that the integrated radios with ear protection are on the fire trucks which Claimant utilizes and have been since 2006. Claimant has not complained to Employer or the Union about not getting ear protection or that he does not have the right equipment in relationship to his hearing loss

Claimant works twenty-four hours on and seventy-two hours off, which equates to seven days for one month and eight days the next month, or a total of ninety days per year. When Claimant is not working Mr. Donohoe does not know exactly what he is doing. He agrees that Claimant has a second job as a fire inspector and is also involved with the Elsmere Fire Department.

Claimant is a Lieutenant. Mr. Donohoe and Claimant were promoted on the same day, July 2, 2001. A Lieutenant sometimes uses a saw on the scene of the fire. It depends on magnitude of fire. However, a Lieutenant's primary responsibilities are search, rescue and ventilation inside.

Mr. Donohoe investigated the number of responses to fire on average at Claimant's station. Claimant is assigned to Ladder 1 and for 2013 it made 1,343 responses. To date there have been 632 responses this year. It is a four platoon system which averages to about 335 runs a year per platoon or four runs per day average. Stations are responsible for a geographic area, but for certain runs they only have two ladders in the city and both platoons must respond. It takes two to five minutes on average to respond. The siren is not used for the return ride back to the station. So during a twenty-four hour shift four runs on average are possible.

On cross-examination Mr. Donohoe socializes with Claimant. He does not recall a lot of noise when socializing with Claimant. Mr. Donohoe also does not utilize earplugs at an actual

fire scene due to communications. He agrees that there are difficulties with hearing commands from a supervisor during an actual fire on the fire grounds. He points out that if Claimant has a problem with hearing then he could report it to the medical dispensary at any time. Physicals are mandatory annually and Employer pays for those physical examinations. He agrees that Claimant reports to a doctor who is paid by Employer for his annual physical examinations. Mr. Donohoe agrees with Claimant's description of his job duties.

On re-direct he does not believe that Claimant exaggerated in his description of noise exposure. He agrees that there are times during the day at the fire house when there are no calls and no communication problems. At these times there is no reason to have noise exposure and ear protection could be used.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

Employer raises the statute of limitations as a defense alleging that Claimant believed at least by 1999 that he had a work related hearing problem, yet the current petition seeking to find his hearing loss compensable was not filed until October of 2013, many years later. "The statute of limitations for filing a workers' compensation claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable nature of the injury or disease." *Geroski v. Playtex Family Products*, 676 A.2d 903 (Del. 1996)(Order); *Anderson v. State*, 1992 WL 115948 (Del. 1992)(Order). Claimant contends that he did not understand the seriousness of his injury until he was seen a second time by Dr. Imber on March 19, 2012 and was told that he needed hearing aids. The Board finds that Claimant should have recognized the seriousness of his condition previously, or as early as 1999.

The Board must first consider whether Claimant, as a reasonable person, understood the nature and probable compensable nature of the injury. Even assuming that Claimant was aware of the seriousness of his condition prior to October of 2011,[4] which the Board believes he should have known as early as 1999, that still does not necessarily equate to recognition of its nature or compensability. *See Wright v. United Medical & Home Health, Inc.*, 2002 WL 499889 at **3 (Del. Super. Ct.). Claimant must recognize all three components before the statute of limitations begins to run. *Id.*

First, as far as the nature of his injury Claimant began his testimony by conceding that he participates in annual physical examinations through Employer and has been aware of his hearing problems for years. He underwent annual testing and was well aware of his hearing loss.

[4] This is the earliest time that the statute of limitations could begin to run in this case since Claimant filed the petition in October of 2013.

So there is not much of a dispute that Claimant is aware of the nature of his condition, which is hearing loss. This is not a hidden or latent condition, such as a rotator cuff tear or osteoporosis. In that type of situation the exact nature of the injury might not be as easily known.

Next, as to the probable compensable nature of his injury Claimant also concedes that he believed there was a nexus between his hearing loss and his work noise exposure at least since he was seen by Dr. Ramzy in 1999. At that time Claimant reported noise exposure at work for the previous twelve years, which included air horns, sirens, power tools and engines. Claimant also denied any other industrial, occupational or recreational noise.

Here, importantly, there is no denial that Claimant and Dr. Ramzy discussed his work exposure to noise and its alleged relation to his hearing loss. Conversely, in *Seaford Machine Works v. Johnson*, 1997 WL 818014 (Del. Super. Ct.), the claimant had complained of wrist problems and his doctor did not provide a detailed diagnosis of carpal tunnel syndrome at that time. The doctor merely mentioned to the claimant that he "thought" such a problem was "usually" work related. No treatment was given and the claimant was not referred to a specialist. *Seaford Machine*, 1997 WL 818014 at **7. The Superior Court agreed with the Board that such evidence was not sufficient to meet the *Geroski* factors. "The record does not reveal that a nexus existed between what [the doctor] 'thought' and what Claimant, as a reasonable person, should recognize." *Id.*

Quite the opposite is true in the instant case as Claimant knew that his condition was specifically hearing loss, he had been seen by a specialist annually since around 1991 and underwent testing focused on his condition. As well, Claimant himself believed that there was a causal connection, as recorded in his medical records since at least 1999. Moreover, he admits that he knew it was a permanent condition at that time. All of this evidence helps to convince the

Board that Claimant recognized the compensable nature of his condition. Again, most importantly Claimant does not deny that he has believed since at least 1999 that there was a nexus between his hearing loss and work noise exposure. Given this admission and supporting evidence the Board finds that Claimant has been aware of the probable compensable nature of his condition.

Therefore, the Board finds that Claimant was aware of the nature and probable compensability of his condition. The crux of the matter in this case is whether Claimant, as a reasonable person, knew or should have known the seriousness of his injury. Here the Board, after careful consideration of the totality of the evidence, believes that Claimant, as a reasonable person, should have recognized the seriousness of his hearing loss.

Many factors in this case lead the Board to its conclusion. The Board believes that Claimant's annual testing by specialists, his tinnitus and lack of ability to hear with background noise present, the progression of his hearing loss over the years, the provision of ear plugs at work and the recommendation from his treating doctors for at least twelve years that he wear this ear protection should have caused him to recognize the seriousness of his injury.

Each year Claimant participated in annual physical examinations at work which led to recommendations for follow-up with respect to his hearing loss wherein he underwent audiological testing just about annually since 1991. Claimant admits that he believed his hearing loss was work related as early as 1999. Dr. Ramzy's record reflects this as well. Claimant even admits that he knew the condition was permanent. Also, in 1999 Claimant reported to Dr. Ramzy constant bilateral high pitched tinnitus in both ears. Interestingly, and of significance to the Board, is that at this time Claimant reported occasional problems with speech discrimination

and noisy backgrounds. This is similar in nature to his current complaints, although since the hearing loss has progressed this symptom has worsened.

Claimant testified that he did not know that continued exposure would cause such a loss that he would eventually need hearing aids. This testimony is simply not believable to the Board, especially given that he was seen by a specialist annually for audiological testing since approximately 1991. It is not believable that this eventuality never occurred to Claimant, or his otolaryngologists, during these years of annual testing and progression of his hearing loss. At the very least, Claimant should have recognized this possibility. Beyond this, it is more than just the need for hearing aids that makes his condition a serious one.

Claimant alleges that he did not know it was serious until 2012, yet he was progressively losing his hearing. While it is true that the medical records show that hearing aids were not recommended until 2012, this is not the only indicator of the seriousness of his injury. Claimant had to live with many symptoms which were documented in the records since at least 1999 and should have alerted him, as a reasonable person, to the seriousness of his condition.

As Dr. Imber described by 2012 Claimant was turning up his television more loudly and having more difficulty with speech discrimination, particularly with background noise. This did not happen overnight, but progressively. Claimant described some of the same symptoms back in 1999. The Board does not believe that Claimant was unaware of these progressive changes, or the seriousness of his condition. Thus, the Board finds that a reasonable person would realize the seriousness of the injury given the annual testing, permanency and progression of Claimant's hearing loss.

The reasonable person test does not "mean that a claimant must be told by his or her doctor the problem is work-related," *Willis v. American Original*, 1991 WL 215888 at *2 (Del.

Super. Ct.), although, of course, if a claimant was so told, then that claimant would be on notice that the condition was connected to work. The Court in *Willis* observed that the type of knowledge of work-related injuries sufficient "to establish what a reasonable person should have known could come, to name a couple of sources, from educational programs initiated by the employer or from other knowledge of co-workers experiencing similar problems." *Willis,* at *3. In the instant case there is documented evidence that Dr. Ramzy connected Claimant's hearing loss and work noise in 1999, which is far beyond the time allowed by the statute of limitations.

Moreover, the Board finds that the fact that Employer provided ear plugs for firefighters is another indication of the seriousness of Claimant's hearing loss problem. As well, Claimant was told by his treating specialists to wear ear protection. He admits that he uses protection outside of work. All of these factors do not support Claimant's assertion that he did not realize the seriousness of his condition.

Another detail detracting from the credibility of Claimant's assertion that he did not know of the seriousness of his injury until his second visit with Dr. Imber on March 19, 2012, is the fact that when he filed his initial claim on October 3, 2013 the asserted manifestation date is October 4, 2011. This date appears to be more related to the date of filing the claim than any date seen in evidence. If Claimant did not realize the seriousness of his injury until the second time that he saw Dr. Imber one would expect it to be the manifestation date on his petition. While the Board is not solely relying on this factor, this still gives the Board some pause when considering Claimant's assertion that all along he did not know the seriousness of the injury as he annually underwent audiology testing at the referral of his family doctor after each annual physical at work. If he did not realize the seriousness until March of 2012 this date should have been reflected on his petition.

In conclusion, the Board finds that Claimant, as a reasonable person, should have recognized the nature, compensability and seriousness of his hearing loss injury at least by 1999 and therefore his claim is barred by the statute of limitations. The Board sympathizes with Claimant, but the legislature has prescribed a specific limited time in which to bring workers' compensation claims against an employer, and this limitation must be respected. The Delaware Supreme Court has repeatedly stated that the courts of this State (and, by extension, administrative bodies exercising quasi-judicial functions) cannot rewrite clear statutes of limitations, no matter what hardship results, to provide exceptions where the legislature made none. *See Ewing v. Beck*, 520 A.2d 653, 660 (Del. 1987); *Reyes v. Kent General Hospital, Inc.*, 487 A.2d 1142, 1146 (Del. 1984); *Layton v. Allen*, 246 A.2d 794, 798-99 (Del. 1968); *Hurwitch v. Adams*, 155 A.2d 591, 593 (Del. 1959); *Lewis v. Pawnee Bill's Wild West Co.*, 66 A. 471, 474 (Del. 1907).

Furthermore, the Board wishes to note that even though it finds in Employer's favor on the basis of the statute of limitations, the Board still finds Employer's causation arguments credible as well.

Causation

The Delaware Workers' Compensation Act states that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment." DEL. CODE ANN. tit. 19, § 2304. Claimant filed the current petition and has the burden of proof. DEL. CODE ANN. tit. 29, § 10125(c).

When there has been a distinct, identifiable work accident, the "but for" standard is used "in fixing the relationship between an acknowledged industrial accident and its aftermath." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). In this case, however, there is no

distinct or specific accident. Thus, the "but for" standard of causation is inapplicable. Instead, Claimant seeks to establish a compensable injury resulting from the cumulative effect of his ordinary work activities. An injury that arises out of a cumulative detrimental effect is only compensable "if the ordinary stress and strain of employment is a substantial cause of the injury." *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989). Thus, in a cumulative detrimental effect claim, work need not be the "sole" or "primary" cause but, unlike the "but for" standard, it must be a substantial one.[5]

Specifically, the Board finds the testimony of Mr. Boyell compelling. The Board agrees with Dr. Medford and Mr. Boyell that any actual causal relationship between Claimant's hearing loss and his noise exposure at work is doubtful given the noise testing performed by Mr. Boyell. Dr. Medford, after careful consideration of Mr. Boyell's environmental audiological testing, determined that it was no longer believable that Claimant's hearing loss was causally related to his exposure at work. The Board finds that based on these tests and the weighted averages of the noise at work that Claimant's work as a firefighter is not a substantial cause of his condition. Ultimately, even if Claimant's petition survived the statute of limitations defense, the evidence presented does not satisfy his burden of proof with respect to causation. This is largely because the Board finds that Mr. Boyell's opinion, in concordance with Dr. Medford's opinion, most convincing in this case.

The Board recognizes that Dr. Medford first opined that Claimant's hearing loss was more likely than not work related and then, after consideration of the 2012 PMA report and May

[5] The "cumulative detrimental effect" standard was first established in *General Motors Corp. v. McNemar*, 202 A.2d 803, 806 (Del. 1964), *overruled in part by Page v. Hercules, Inc.*, 637 A.2d 29, 33 (Del. 1994), although the term itself was not used in that case. The term was coined to describe the *McNemar* holding in *Chicago Bridge & Iron Co. v. Walker*, 372 A.2d 185, 187 (Del. 1977), *overruled in part by Duvall*, 564 A.2d at 1136-37. Basically, the doctrine is the logical outgrowth of the "usual exertion" rule of workers' compensation. *See Duvall*, 564 A.2d at 1136.

13, 2014 report from National Forensic Consultants, his opinion changed. The reason for Dr. Medford's change in position is that based upon specific testing of firefighters in their work environment results show that the noise exposure does not rise to a level that causes injury. The time weighted averages over an eight hour day were all lower than the 85 decibel threshold established by OSHA. The Board finds Mr. Boyell's testimony credible that what distinguishes the noise exposure here is that the disturbances are short and do not contribute to hearing loss. Overall, the Board agrees with his opinion that Claimant's noise exposure at work does not actually rise to a level that causes injury. The noise producing events, which can be higher than 100 decibels at times, are short lived and temporary and afterward the hearing returns back to its normal state. The duration of the noise does not pose any permanent hazard to hearing. Thus, the Board finds Dr. Medford's testimony believable that work noise is not a substantial cause of Claimant's hearing loss.

As well, Claimant's expert, Dr. Imber, does not satisfy Claimant's burden of proof partly because Dr. Imber focuses on persistent and constant noise over the years which is not the case here. Dr. Imber does not specifically address the fact that Claimant's noise exposure is short in duration. Nor does he explain how Claimant's hearing loss is different from age related loss other than noting that Claimant is a relatively young man. Moreover, he concedes that he bases his opinion upon the history provided to him by Claimant. All of these factors cast doubt on the doctor's causation theory.

As to the time weighted averages being based on an eight hour day and Claimant actually working a twenty-four hour day the Board agrees with Mr. Boyell that this does not detract from his findings. He explained that the noise level averaged over the work day does not exceed the OSHA limits, and therefore does not impair hearing. As Mr. Donohoe points out, in total

Claimant works ninety days a year and participates in an average of four runs per day. If anything this further solidifies Mr. Boyell's assertion that the noise exposure is short in duration, and the evidence shows that it is spread out over time.

Employer also points out that under Delaware law, an employer is under no obligation to identify or prove the existence of a non-work cause of the injury. To defend against Claimant's petition, it is sufficient for Employer merely to present evidence rebutting Claimant's claim that the injury was work related. *See Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985); *Alfree v. Johnson Controls, Inc.*, 1997 WL 718669 at *7 (Del. Super Ct.). Here, Employer has done so with the credible testimony of its experts that the noise exposure at work does not rise to the level of causing injury. Additionally, Dr. Medford testified credibly that Claimant's hearing loss progression is consistent with presbycusis, or age related hearing loss.

Lastly, Employer also argues that Claimant forfeited his workers' compensation benefits by his wilful failure or refusal to utilize ear protection. DEL. CODE ANN. tit. 19, § 2353(b). This argument will not be addressed by the Board as it has found in Employer's favor with respect to the statute of limitations and causation. For the same reasons discussed above, the failure of Claimant to use ear protection is irrelevant to the cause of his hearing loss.

In conclusion, Claimant's petition is time barred by the statute of limitations. The Board finds that even if this were not so, Claimant's has not satisfied his burden of proof with respect to causation. As such, Claimant's petition is denied.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant's petition it is barred by the statute of limitations. Beyond this, the Board finds that Claimant's workplace noise exposure is not a substantial cause of his progressive hearing loss. As such, Claimant's petition is **DENIED**

IT IS SO ORDERED THIS 18th DAY OF JULY, 2014.

INDUSTRIAL ACCIDENT BOARD

LOWELL L. GROUNDLAND

MARY MCKENZIE DANTZLER

I, Deborah J. Massaro, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: 7-21-14

OWC Staff