

**THREE NEW CASES  
INTERPRETING ACT 1 OF 1995 (HEARING LOSS)  
BRING ADDITIONAL CLARITY TO LAW\***

by  
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*Workers' Compensation Judge, Allegheny County*

*City of Philadelphia v. WCAB (Seaman)*, 8 A.2d 1004 (Pa. Commw., filed November 5, 2010, Leavitt, J.).

*Duncannon Borough & Authority v. WCAB (Bruno)*, 8 A.3d 389 (Pa. Commw., filed November 10, 2010, Butler, J.).

*Joy Mining Machinery Co. v. WCAB (Zerres)*, 8 A.3d 444 (Pa. Commw. , filed November 19, 2010, Friedman, S.J.).

I. Introduction

The Commonwealth Court has issued three new cases interpreting the 1995 amendments to the Act governing the compensability of hearing loss. These 1995 changes were and are, of course, commonly referred to as Act 1 of 1995.

The new cases bring new clarity to certain aspects of the law.

In the first case, the court clarifies that while a claimant must have at least a 10% binaural loss before his hearing loss is compensable, the claimant need not necessarily be tested at this 10% (or greater) level on his last date of work. Instead, claimant may be tested at a later date (though within the statute of limitations) with an impairment rating of 10% or more and still be entitled to compensation for the hearing loss. This is so held in *City of Philadelphia v. WCAB (Seaman)*.

In the second case, the court clarified that when the claimant has a monaural (one-sided) hearing loss caused by trauma, as opposed to long-term exposure to hazardous noise, the impairment rating is still to be derived from the *AMA Guides* based upon the overall binaural loss. Thus, even if claimant has a percentage loss over 10% in the affected, traumatized ear, he may still not be able to establish a claim. This is so if the overall binaural loss is still below 10%. This is the holding in *Duncannon Borough & Authority v. WCAB (Bruno)*.

In the third case, the court held that a WCJ can reject the expert opinion of an industrial hygienist that claimant did not experience exposure to hazardous levels of occupational noise in his work environment. The WCJ may do so, and instead credit claimant that he was exposed to hazardous noise. The court held, as it had in the past, that it is not claimant's burden to show, initially, that he has been "exposed to hazardous occupational noise ...." It is the employer's task, as an affirmative defense, to show that the exposure was not hazardous or long term. In the case at

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hand, the court was unconvinced that the employer had met its burden of proof on the affirmative defense. This is the holding in *Joy Mining Machinery Co. v. WCAB (Zerres)*.

## II. Ten Percent Loss, Time of Measurement, and Cognizability of Claim

In *City of Philadelphia/ Seaman*, the claimant was a forty-year firefighter for the City. He retired on July 8, 2006. Roughly one year later, he filed a claim petition alleging a binaural hearing loss because of long-term exposure to hazardous occupational noise. Claimant's expert testified that claimant had a 53.1% hearing impairment. This percentage loss was based upon an audiogram taken on May 15, 2007, or about ten months after the retirement. During the litigation, employer had claimant attend an IME with another expert. She found a loss of 62.1%, but opined that this loss was not caused by occupational noise.

Ultimately, the WCJ credited the claimant's expert, and he awarded benefits. The Board affirmed.

In Commonwealth Court, employer argued that claimant was obliged to prove that he had a loss of 10% or more at the time of his retirement. For this proposition, employer cited *Maguire v. WCAB (Chamberlain Manufacturing Company, Inc.)*, 821 A.2d 178 (Pa. Commw. 2003). In the present case, employer argued that claimant's expert was obliged, specifically, to state that, in his opinion, claimant had a 10% or greater loss *at retirement*.

The court rejected this argument. It was true that, in *Maguire*, a claimant was unsuccessful in his hearing loss claim. There, just before his retirement, Maguire had a 4% loss by audiogram, but then showed up a year later, after retirement, with 16%. Because occupational hearing loss does not normally worsen after removal from exposure, the claimant's hearing loss was held not compensable.

However, the *Maguire* court had held that it was *not deciding* "whether the Act requires, in every case, that a claimant show a hearing loss of [more than] 10% on or before the claimant's last day of work."

While employer asserted that this, indeed, should be the rule, and hence that Mr. Seaman should be barred from benefits, the court declined to impose such a blanket requirement. The court insisted, "Section 306(c)(8) does not require that a hearing loss of greater than 10% be measured on or before the claimant's last day of work. Indeed, claimants have three years after leaving work to seek compensation for a hearing loss, and this is the only deadline imposed on those seeking compensation for a work-related hearing loss. ... *Maguire* does not otherwise direct."

Because this was the law, the court necessarily rejected the employer's argument that claimant's expert was equivocal in his opinion "because he did not explain how Claimant's hearing loss could manifest itself so many months after retirement." Indeed, claimant did not even assert that this was when the hearing loss first manifested itself. The court reiterated:

Section 306(c)(8) does not require a claimant to produce evidence that his hearing loss was greater than 10% at the time of retirement. Rather, it requires a claimant to show that he has permanent hearing loss greater than 10%; that the hearing loss is work-related; and that an application for compensation be filed within three years of retirement ....

### III. Monaural Loss from Trauma: Compensated Based on Binaural Formula

In the second case, *Duncannon Borough/Bruno*, the claimant was a police officer for his municipal employer. He was injured in a motor vehicle accident on October 15, 2007. As a result of the motor vehicle accident, claimant sustained a “cochlear concussion, which caused ringing in the right ear and permanent loss of hearing in the right ear.”

The accident also caused claimant other injuries. In December 2007, employer voluntarily accepted the case by including, in an NCP, the body parts: “shoulder, neck and low back strain.” Within a few months, however, claimant filed a review petition seeking specific loss benefits under Section 306(c)(8)(ii) of the Act, 77 P.S. § 513(8)(ii). He maintained that he had permanent hearing loss in the right ear.

It was undisputed that claimant had a 31.88% right monaural hearing loss. Based on this evidence, the WCJ awarded benefits. The Board affirmed. Commonwealth Court, however, reversed. It is true that under Section 306(c)(8)(ii) (providing for compensation for traumatic hearing loss in one ear), one multiplies, at least initially, the hearing loss percentage by 60 weeks. However, subsection (iii) specifically states that, “notwithstanding the provisions of subclauses (i) and (ii) of this clause, if there is a level of binaural hearing impairment ... which is equal to or less than ten per centum, no benefits shall be payable ....”

In Mr. Bruno’s case, it was true that he had hearing loss in the right ear of 31.88%. The uncontroverted medical evidence, however, showed that when bilateral hearing loss was taken into account, the total hearing impairment was “less than 10%.” Thus, necessarily, no benefits were payable.

### IV. Industrial Hygiene Evidence and Burden of Proof

In the third case, *Joy Mining/Zerres*, claimant was a longtime employee of employer, Joy Mining Machinery Company. He worked in a noisy environment. In the late 1980’s, he developed some noticeable hearing loss. Ultimately, an otolaryngologist, Dr. Bell, examined claimant, and told him that his audiogram showed a hearing loss in excess of 10%.

Claimant was still working at the company when, in December 2006, he filed a claim petition under Act 1 of 1995 alleging occupational hearing loss.

The WCJ awarded benefits. She found that claimant had a 13.125% loss. In the course of the decision, the WCJ credited the claimant’s expert, Dr. Bell, and discredited that of employer, Dr. Arriaga. Dr. Arriaga had stated that “non-work-related factors were causative” of a material portion of the claimant’s hearing loss.

Employer, however, also presented the testimony of one of claimant's supervisors, who testified, among other things, that workers could talk normally in claimant's work area (though making other admissions as to noise.) Finally, employer presented the testimony of an industrial hygienist, Dr. Callen. He was a contractor of the company, monitoring noise levels at the plant by attaching a dosimeter to employees, an effort "which allows him to determine a time-weighted average of the noise level for the period the employee wears it."

With regard to this evidence, the WCJ, in granting benefits, found Dr. Callen credible "with respect to employer's attempts at hearing conservation, [but he] failed credibly to establish that claimant was not exposed to hazardous occupational noise."

The Board affirmed, as has Commonwealth Court.

Employer's first argument was that claimant did not satisfy the statutory requirement of filing a claim "within three years after the date of last exposure to hazardous occupational noise." Section 306(c)(8)(viii) of the Act, 77 P.S. §513(8)(viii). According to employer, "claimant never specifically addressed this time period during his testimony, and the WCJ did not consider this relevant time period in his findings..." The court, however, reminded employer that the claimant's burden is not heavy in this regard; all the claimant need do to meet the burden "is to *prima facie* establish that the claim was timely filed by showing he or she was exposed to occupational noise while working for the employer during the three years preceding the claim." Claimant had provided such testimony. Indeed, even at the time of hearings, his workplace was noisy and he was wearing hearing protection. (For claimant's limited burden, the court quoted as precedent *Flatley v. WCAB (Mallinckrodt Chemical)*, 803 A.2d 862 (Pa. Commw. 2002)).

The employer's second argument was that the WCJ had "improperly rejected" the evidence presented by the industrial hygienist in his noise level studies. According to the employer, the WCJ could not credit claimant's "personal impressions of his noise exposure" over the studies.

The court once again cited *Flatley* for the proposition that it is not claimant's burden to show, initially, that he has been "exposed to hazardous occupational noise ...." It is the employer's task, as an affirmative defense, to show that the exposure was not hazardous or long-term. *See also Joy Mining Machinery v. WCAB (Noggle)*, 805 A.2d 1279 (Pa. Commw. 2002).

The court was unconvinced in the present case that the employer had met its burden of proof on the affirmative defense. The WCJ legitimately rejected the noise studies; indeed, "there is no evidence that Employer conducted a test of Claimant's personal exposure to noise. None of the dosimetry readings presented as evidence are for claimant." While the proofs submitted by the industrial hygienist may have demonstrated that the individuals he tested were not exposed to occupational noise, "the WCJ could still conclude that those noise levels did not reflect claimant's individual exposure."

Finally, the court rejected the proposition that claimant's expert's opinion was not supported by the record. Employer's specific allegation was that the doctor's report (reports were admissible

in the case) was riddled with inaccuracies – working to undermine, thereby, the certainty of the opinion. The court, however, reviewed these purported inaccuracies and did not find them material. The court also noted, miscellaneously, that a “medical expert’s opinion is incompetent only if it is based solely on inaccurate or false information.” (Citing *DeGraw v. WCAB (Redner’s Warehouse Market)*, 926 A.2d 997 (Pa. Commw. 2007)).