

**IN THE NEWCASTLE COUNTY COURT**

Case No: 3 YU 01504

Newcastle Combined Court Centre  
The Quayside  
Newcastle upon Tyne  
NE1 3LA

Date: Thursday, 7<sup>th</sup> May 2015

**Before:**

**HIS HONOUR JUDGE FREEDMAN**

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**Between:**

**MARIAN HOLLOWAY**

**Claimant**

**- and -**

**TYNE THAMES TECHNOLOGY LIMITED**

**Defendant**

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**MR. TIMOTHY GRACE** (instructed by Messrs. Roberts Jackson Limited) for the  
**Claimant**

**MR. DOUG COOPER** (instructed by Clyde & Co. Claims LLP) for the **Defendant**

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**APPROVED JUDGMENT**

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**HIS HONOUR JUDGE FREEDMAN:**

1. I will give an extempore judgment. This is a claim brought by Mrs. Marian Holloway for damages for noise induced hearing loss.

**Background**

2. Mrs. Holloway was born on 7<sup>th</sup> March 1944 so that she is now aged 71. In or about 1992 until in or about 2006, she was employed as a machine operator at the defendant's premises in Gateshead. She worked in the production line. She was required to use and to supervise the folding machines. It is her case that she was exposed to loud noise on a continuous basis, with that noise emanating from the folding machines as well as the bagging machines and the stapling machines. She describes the noise as being "banging" in character. She said that in order to communicate with a colleague who was standing as close as two foot away, she would have to shout. For the major part of her employment, no steps were taken to protect her from the potentially injurious effects of noise; nor was she given any warnings about the effects of noise. But in or about 2003 or 2004 ear muffs were introduced. Mrs. Holloway did not regard those ear muffs as adequate to block out the noise and indeed she did not find them comfortable. There was apparently no enforcement of the wearing of the ear muffs. I infer that because she found them neither satisfactory nor comfortable she may not have worn them all the time.
3. That which I have summarised comes from Mrs. Holloway's own statement. I emphasise that because although Mrs. Holloway has attended throughout the trial, at the outset, Mr. Cooper, on behalf of the defendant, indicated that he did not seek to challenge anything set out in Mrs. Holloway's statement. It was therefore not necessary for Mrs. Holloway to give oral evidence. It necessarily follows that this judgment is predicated on the basis that what is said by Mrs. Holloway in her witness statement is correct.

**Engineering Evidence**

4. Mr. Bernard McFeely of Strange Strange and Gardner was jointly instructed to provide a report with a view to providing some kind of assessment of the likely noise levels to which Mrs. Holloway was exposed. Understandably, Mr. McFeely was not able to give any exact measurement of noise levels not least because he was unable to identify the particular machines on which Mrs. Holloway had to work and which were then used in the production room. He did express some surprise at what the claimant had to say about the continuous banging noise. As I have already indicated, however, I am bound to accept all that Mrs. Holloway says in her statement. In any event, and importantly, Mr. McFeely agrees that if it were the case that Mrs. Holloway had to shout to colleagues who were less than two foot away, that would tend to indicate noise levels in excess of 90dB(A). That, of course, would exceed the second action level under the Noise at Work Regulations 1989.

**Breach of Duty**

5. It seems to me that the statement from Mrs. Holloway, as it stands, makes out a good case for there being excessive noise being within her working environment over an extended period of time. In particular, I accept that she had to shout to colleagues

when standing but two foot away and as Mr. McFeely points out, that tends to show an noise level in excess of 90dB(A). There is a further matter which supports the proposition that noise levels exceeded 90dB(A) and that is the provision of ear muffs. It seems to me unthinkable that these employers would introduce ear protection if there were not real concerns about the noise levels which were being emitted from the various machines.

6. Taking all those matters together, I can safely find that the daily noise dose to which Mrs. Holloway was exposed was in excess of 90 decibels and that was over a period of no less than 10 years. It is also plain that no steps were taken to attenuate noise levels until, at the earliest, 2003 and no protection was provided until 2003, at the earliest; and no warnings were given about the potentially hazardous effects of exposure to noise. I find that even after ear muffs were provided, insufficient measures were taken to protect the Claimant from loud noise.
7. I therefore find that the defendants were in breach of the Noise at Work Regulations 1989 and of their common law duties as well, throughout the Claimant's period of employment

#### Medical Causation

8. This has been the main battleground, All of the oral evidence which I have received has been concerned with the question of medical causation. Before turning to that evidence it is perhaps helpful to set out, in very short form, the parties' respective submissions.
9. On behalf of the claimant, Mr. Grace says that I can be satisfied that Mrs. Holloway has suffered a measurable loss of hearing as a result of the exposure to noise and that that should sound in damages. It is a compensatable loss which is more than trivial. Mr. Cooper, on the other hand, says that in so far as she has suffered any loss of hearing as a result of the exposure to noise it is minimal and the maxim *de minimis non curat lex* should apply.
10. I turn very briefly to the law in that regard. It need only be a passing reference because both counsel are agreed that the legal considerations which arise in this case were addressed fully by the House of Lords in the case of *Johnston v. NEI International Combustion Ltd.* [2007] UKHL 39. That was a case concerned with asymptomatic pleural plaques. In the course of his speech, Lord Hoffman made reference to what needs to be established for an injury to be compensatable. The phrase that was used was "appreciably worse off". Both counsel in this case accept that that is the test: does such diminution in hearing as has been caused by exposure to noise make Mrs. Holloway's ability to hear appreciably worse? Mr. Grace correctly submits, in my judgment, that it is a question of fact and degree for the court to determine. He posed the question, where is the line to be drawn? He reminds me that minor injuries are compensatable. Of course he accepts that the odd scratch or bruise would not be considered to be compensatable being a transient and utterly trivial injury. In *Johnston*, policy arguments were raised to the effect that litigants should be discouraged from litigating over trifling injuries which would not sound in damages, having regard to the maxim *de minimis non curat lex*. I need say no more about the law.

11. I turn then to the question of medical causation. The only evidence which I heard was from Professor Homer, an ENT Surgeon instructed on behalf of the claimant and Prof. Lutman who is the Emeritus Professor of Audiology at Southampton University. There is no doubt that both experts are eminent in their respective fields and that they have a wealth of experience about hearing loss, albeit that they come to the questions of causes of hearing loss from rather different disciplines. I note that Prof. Lutman is one of the authors of the "Guidelines on the Diagnosis of Noise-Induced Hearing loss for Medicolegal Purposes". It is right to observe also that he has carried out a good deal of research in various area of audiology. On the other hand, of course, I have borne in mind that Prof. Homer sees patients clinically with hearing loss and he is very well versed in that area of medicine.
12. Before turning to what they each had to say about the issues which arise, I should also observe that, it seemed to me, that both experts were doing their level best to assist the court. I do not think that there was any bias from either side. Whilst it is true that Prof. Homer was inclined to use phrases such as "it is unfair to the claimant", I do not think in his using of that phrase he was in some way 'siding' with the claimant. He was simply expressing the view that if an adjustment was not made to the Coles Tables then that could result in an incorrect(as he saw it) finding that her hearing loss was not due to noise and therefore work to her disadvantage. I did not detect in the manner in which he gave his evidence that he was in some way being an advocate in the Claimant's cause. I say precisely the same about Prof. Lutman. I did not perceive any bias in favour of the defendant. Both experts, it seemed to me, were expressing their honestly-held views.
13. I turn to what each had to say. Whilst there are material differences (which I will come to shortly) a reasonable starting point is to identify the areas of agreement. First – this really is based upon Mrs. Holloway's own evidence – it appears to be accepted, or at least not challenged, that Mrs. Holloway developed noticeable hearing loss in or about 2010. I interpose to say that as is usually the case in claims of this type, limitation was raised as a defence. That has been effectively abandoned since it could not be suggested that Mrs. Holloway had either actual or constructive knowledge for more than three years before the commencement of these proceedings.
14. Secondly, the account given by the claimant that she finds it difficult to hear sounds clearly and therefore has difficulty in conversation, particularly when there is background noise, is not open to question. Such emerges from her witness statement and what she told Prof. Homer. It also appears in her witness statement and in Prof. Homer's first report that she requires the volume of the television turned up in order to hear and that she struggles somewhat to hear on the telephone.
15. Thirdly, it is accepted that there is no question of apportionment here in the sense that she was exposed to noise elsewhere other than in the work setting when employed by the defendant.
16. Fourthly, there is only one audiogram in this case. That was undertaken on the instruction of Prof. Homer by an experienced audiologist called, I think, Mr. Jackson. The audiogram was done on the same date as the examination, that is on the 11<sup>th</sup> August 2012. There is no dispute as to the correct interpretation of that audiogram. It shows an acoustic bulge at 4 kHz on the right side and a notch at 4 kHz on the left side. It is well established and well known that a depression at 4kHz is the hallmark

of noise-induced hearing loss in circumstances where there has been proven to be exposure to high levels of noise. To explain further the bulge and the notch: the effects of ageing superimposed on noise-induced hearing loss creates the notch at 4 kHz. The additive effects of loss of hearing at higher frequencies converts the notch into a bulge.

17. Fifthly, in light of the bulge and notch demonstrated on the audiogram and having regard to the Coles Criteria, both experts agree that the audiological criteria for a probable diagnosis of noise-induced hearing loss are satisfied.

### **The Issue**

18. Put starkly, it is whether there is measurable loss due to the effects of noise in the sense that Mrs. Holloway is appreciably worse off in consequence of the effects of noise on her hearing or whether in fact any such loss is minimal. It is agreed the method to be deployed for quantifying the degree of hearing loss due to noise is the modified ISO 7029 which has replaced the so-called "black box" method and indeed the original ISO 7029. In particular it seems to be agreed by both Prof. Homer and Prof. Lutman that the modified ISO 7029 is more likely to produce more accurate results than its predecessor.
19. Using the ISO 7029 involves using Table 2 of the Coles Guidelines for typical age associated hearing loss, that is AAHL. This provides a range of hearing threshold levels expected for people of a similar age who have not had noise exposure. It is agreed that the starting point is to adopt the median percentile by reference to the chronological age and sex of the person concerned (the claimant) at frequencies of 1, 2, 3, 4, 6 and 8 kHz and compare the values of what is shown on the actual audiogram. In broad terms, although it is not quite as straightforward as this, the difference between the figures in the table and the decibel loss shown on the audiogram represents the decibel loss due to noise. There are certain adjustments that have to be made so it is not a straightforward subtraction but, in the round, that is what the calculation entails.
20. It is the application of these tables which gives rise to one of the two central disputes in the case. Prof. Homer says that it is inappropriate to do the calculation by reference to the claimant's chronological age, primarily for the reason that at a frequency of 2 kHz, both in the right ear and in the left ear, the claimant's hearing threshold level would appear to be 5 decibels better than a woman of a similar age who had not been exposed to noise. Looking at Prof. Lutman's helpful table appended to his report at page 212 in the bundle, it can be seen that the claimant's threshold level is 15 decibels whereas a lady of a similar age using the median percentile would be expected to have a 20 decibel loss. So Prof. Homer argues that she is not typical and, in fact, but for her loss due to noise, her hearing at least at 2 kHz frequency is better than the median of people of her age. And so, he argues, that in undertaking the calculation, it would be more appropriate to assume that she has a lower chronological age. In his first report he used the values from the table attributed to a lady of 65 years rather than her true age of 68 years. In his addendum report he proceeded on the assumption that the claimant was in fact 60 years. I should add that in his first report Prof. Homer used the black box method of calculation as well as ISO 7029 but not the modified version of ISO 7029. So irrespective of what age he relied upon or assumed by way of comparator, the results cannot be said to be accurate.

21. In his addendum report he did use the Modified ISO. As I say, rather than Mrs. Holloway being 68, in extrapolating data from the table, he assumed she was 60 years of age. Carrying out that calculation the overall binaural hearing loss over 1 to 3 kHz was 90 decibels. Prof. Homer calculated that 6 decibels of that loss was due to noise. At 1, 2 and 4 kHz he quantified the overall hearing loss to be 24 decibels with 9 decibels being due to the effects of noise. In evidence Prof. Homer told me that if it were assumed that Mrs. Holloway was aged 65, the loss at 1, 2 and 3 kHz would be 3 decibels. In relation to the loss at 4 kHz he told me that if the comparator was aged 70 the loss in the right ear would be 11 and the loss in the left ear 16. Those are the values that Prof. Lutman uses. If the comparator was aged 60, he says that the loss due to noise in the right ear would be 18 decibels and in the left ear 23 decibels.
22. Prof. Lutman roundly rejects the approach adopted by Prof. Homer. He says that it is entirely appropriate to make the comparison between Mrs. Holloway and a 68-year old lady who has not been exposed to noise. In fact he goes further when he plots his graph (which I will come to in a moment); he is precise at 68 years and 9 months and a few days. On the graph which he has drawn, which is appended to his report, there is a line which shows the hearing loss in the median interquartile range for a lady of 68 years 9 months. Prof. Lutman has then superimposed the results of the claimant's audiogram. He told me in evidence, having done that graph, the starting point is to see whether there is a significant disparity at frequencies where noise-induced loss had no or no significant part to play; that is to say at frequencies of 250, 500 1, 2 and 8. So he then forms an impression as to whether it is appropriate to adhere to the correct chronological age of the individual in seeking to quantify the extent of noise-induced hearing loss.
23. Looking at this graph, he told me that he thought there was broadly a match. He said only if there was a mismatch at a number of frequencies might he consider not using the median percentile for someone of the same age. He said in no circumstances would he assume a different age by way of a comparator; he would simply use a different percentile. In relation to the apparent mismatch at 2 kHz, he said that this could readily be explained by individual differences: for example physiological differences or the way in which the headphones might fit on the ears. Moreover, he pointed out that in any audiometric measurement, allowance was made for error, for plus or minus 10 decibels. Prof. Homer agreed that there was an allowance made for error but he put it at plus or minus 5 decibels. I should add that whilst Prof. Homer said it was not uncommon to use a different age for the purposes of this exercise, Prof. Lutman was very clear that he had never, in his experience, used anything other than the actual age and he was not aware of that happening elsewhere.
24. So I need to make a finding as to which approach should be preferred. Mr. Grace urges me to follow the route taken by Prof. Homer because he says, to adopt Prof. Homer's phrase, it would be unfair not to do so. There is evidence, says he, of the claimant having rather better hearing, at least at 2 kHz, than an average 68-year old lady and if an adjustment is not made then the extent of hearing loss due to noise is under-estimated. He says there must be scope for flexibility and what has been done by Prof. Homer reflects that and reflects the true position.
25. I am unable to agree that Prof. Homer's approach is the more logical and more likely to lead to a more accurate result. On the balance of probabilities I find that Prof. Lutman's approach is to be preferred. My reasons for coming to that view are these.

26. First, I agree with Prof. Lutman that it is very helpful to look at the matter graphically. I have looked carefully at the graph prepared by Prof. Lutman. It seems to me that Prof. Lutman is right when he says looking at the graph there is a broad match. It is, of course, out of kilter at 3 and 4 kHz but that is to be expected where there is a noise element. On the graph the variation at 2 kHz can be detected but it is modest.
27. Secondly, it needs to be emphasised that the difference is a 2 kHz alone. When one looks at the graph it is apparent at 250 kHz, 500 kHz, 1 kHz and indeed at 8 kHz, where there might be some small component of the effects of noise, it matches precisely with the comparator.
28. Thirdly, in the context of an allowance for audiogram error of plus or minus 10 or even plus or minus five, it seems to me that it cannot be said that a difference of 5 decibels is truly significant. It is in any event explicable in the ways suggested by Prof. Lutman.
29. Fourthly, although I have already commented that both experts bring considerable expertise to this field of medicine, it cannot be overlooked that Prof. Lutman, as the author of the Coles Guidelines, can speak with considerable authority as to the general approach to be taken to the Tables. I accept his evidence that it would be rare for a different age to be adopted.
30. Fifthly, I add this: the inaccuracy of the approach adopted by Prof. Homer is well illustrated by the fact that in his first report he assumes an age of 60 and then, in his second report, moves to an assumed age of 65. He provides no reason or explanation for changing from 60 to 65. This strikes me as being a somewhat random attempt to find a solution to what he perceives to be a problem.
31. I find that if any adjustment were to be made, it would have to be to the percentile but I agree, for the reasons stated, with Prof. Lutman that there is no justification for moving away from the median percentile. So I accept Prof. Lutman's quantification of noise-induced hearing loss at 1, 2 and 3 kHz. His calculations produced noise-induced hearing loss at being either at 0.8 or 1.3 decibels depending upon whether it is accepted that there may be some noise-induced hearing loss at 8 kHz. Whether it is 0.8 or 1.3, Prof. Homer accepts at that level there would be no noticeable difference to the claimant's hearing over those three frequencies.
32. I should add this: that even if I were to find that over 1, 2 and 3 kHz the decibel loss was 3 (which would be the calculation if one assumed that the claimant is aged 65) whilst I would be able to find that that would give rise to a noticeable loss, I would not be satisfied that there was an appreciable loss. In coming to that view, I accept what Prof. Lutman said to me that a 2 decibel loss would not produce a noticeable loss whilst a 3 decibel loss might, subject to individual susceptibility but it would not have any real impact.
33. I turn now to the other major area of dispute, namely, whether the undoubted decibel loss due to noise at 4 kHz makes a material difference to the claimant's hearing at that frequency. It is emphasised by Mr. Cooper that the usual approach to assessing hearing loss is to look at the loss over frequencies of 1, 2 and 3 kHz. If I accept Mr. Grace's submission that it is not uncommon for hearing loss to be calculated over 1, 2 and 4 kHz then in this instance it is acceptable and appropriate to investigate whether



at a level of 4 kHz there is a material loss. Since I preferred the methodology used by Prof. Lutman in relation to calculating loss at 1, 2 and 3 kHz, it follows that I also adopt his values at 4 kHz. It would be illogical to do otherwise. It follows that on my findings there is an 11 decibel loss in the right ear and a 16 decibel loss in the left ear due to exposure to noise, but this must be seen in the context that the claimant would have had a hearing loss of 30 decibels in each ear due to age.

34. Prof. Homer addressed the question of hearing loss at 4 kHz twice in his written evidence. He was asked questions about loss at 4 kHz and he said this. 4 kHz is a frequency critical for hearing discrimination and this is the cause of a hearing disability, inability to hear consonants and connected speech, i.e. hearing discrimination. He went on to say that there is evidence to show that 4 kHz is a very important frequency for hearing discrimination in every-day hearing, particularly hearing connected speech in background noise. Then at paragraph 8 of the joint statement at page 220 he said this:

“The importance of 4 kHz in hearing connected speech is not a controversial concept. 4 kHz is very important for hearing consonant sounds such as ‘f’, ‘S’, and ‘th’ and these are sounds that patients with this type of hearing loss tend to have trouble hearing as they are softer speech sounds and therefore connected speech with regard to these sounds tends to be dominated by the adjacent vowel sounds. Hence just looking at this aspect of hearing, she has lost hearing ability relevant to the above needing sound to be at least twice as loud and possibly three to four times as loud in order to hear, compared to the situation where it is not for noise damage.”

35. However, I cannot overlook the fact that in cross-examination Prof. Homer accepted that two of the sounds that he identified in paragraph 8, “f” and “th” have a wide frequency spread. That seems to me to be highly relevant. Paragraph 8 of the joint statement gives the impression that they are confined to a 4 kHz frequency but in fact, as he accepts, that is not the case. So the fact that there may be impairment at 4 kHz does not mean necessarily that there will be difficulty in hearing “f” and “th” sounds. It is also right to observe that in oral evidence, he focused on the sounds “sh” and “stuh”. “Stuh” does not appear in his written evidence.
36. I do not intend to place undue emphasis on such inconsistencies when assessing and determining who is more likely to be correct but I do take into account what I perceive to be some slight shift in Prof. Homer’s evidence.
37. Prof. Homer told me that what he says about the importance of 4 kHz sounds 4 kHz is standard teaching to ENT surgeons. He said that if that was wrong then it would have been challenged by now. For my part, I do not doubt that the importance of sounds at 4 kHz is part of teaching to ENT doctors or indeed students. That does not necessarily answer the question which arises in this case. Prof. Homer, as he was bound to do, accepted that he knew of no research into the appreciation of noise levels at various frequencies. Nevertheless, he was unequivocal in his view that the loss of an extra 10 or 15 decibels at 4 kHz would make a material difference to Mrs. Holloway’s ability to hear in conversation. He also said that the complaints which she presented were consistent with a decibel loss at 4 kHz level.



38. Prof. Lutman did not agree. In the joint report at paragraph 14 Prof. Lutman said this:

“Despite the conventional wisdom of using the 1-2-3-kHz average, additional hearing loss at 4 kHz, as appears to be the case in the claimant, may theoretically confer some additional hearing difficulty in certain specific situations, as outlined in my primary report. I disagree with Prof. Homer’s assertion that hearing at 4 kHz is very important for distinguishing consonants such as “th” or “f”, as a simple acoustical analysis shows that those sounds are very relatively broad frequency spectrum.” – I interpose to say that that is something that Prof. Homer, as I have indicated, agreed in oral evidence though not alluded to in his written evidence. I return to what Prof. Lutman said – “It is possible that consonant “s” as spoken by some people may be restricted between the range around 4 kHz but in normal conversational speech the intensity of the “s” sound, when it occurs, is generally above the claimant’s threshold at 40 decibels in the right ear or 45 decibels in the left ear.”

39. Prof. Lutman was asked about the “s” sound in his oral evidence. What he told me was this. He said he had measured the intensity of the “s” sound and that the sound pressure level would be about 55 decibels which is approximately the same level of speech. He said the speech volume average is about 60 decibels; quiet speech may be in the order of 55 decibels.
40. That evidence seemed to me to be of some importance for this reason. Prof. Lutman explained the phenomenon of loudness recruitment. I do not think this was a phenomenon which was challenged by Mr. Grace. Put shortly, it comes to this. Once the level of intensity is 15 decibels above the THL, so in this case broadly 55 or 60, Mrs. Holloway will be able to hear as well as someone who has no noise-induced hearing loss. It is a gradual process to recruit or recover the ability to hear. But if that is right (and, as I say it is not challenged) then if “s” is being spoken at or around 55 or 60 decibels then on the figures presented to me by Prof. Lutman, the claimant is scarcely disadvantaged. Of course there is individual variability and susceptibility both in the speaking and in the hearing of sounds and it is impossible to be precise. Prof. Lutman correctly acknowledges that. On the other hand, by reference to data, it seems to me, he has been able to demonstrate that it is improbable that the 10 or 15 decibel loss at 4 kHz is likely materially to impair ability to hear the sound “s”. Of course he accepted that in that small window between 30 and 45 decibels, at the level of 4 kHz, Mrs. Holloway would have impaired hearing. But that has to be looked at in the context of the real world which Mr. Cooper reminds me. Conversation at that level does not happen. Prof. Lutman told me that speech cannot be produced between 35 or 40 decibels that is speech which involves vocalisation; only whispering is at that level. I have already said quiet speech is at 55 decibels, the average conversational level is 60-65 decibels.
41. Having listened very carefully to both experts I make this finding of fact: whilst the loss at 4 kHz in Mrs. Holloway’s case would make some (to use the words of Prof. Lutman) theoretical difference to her hearing, I cannot be satisfied that she would be appreciably worse off. I come to this conclusion primarily, as I have already said,

because Prof. Lutman has been able to provide some data to support what he says. I do not criticise Prof. Homer for not being able to provide any data, but the fact remains that all he can do is express an opinion without providing any research or science to support what he says. Of course, he relies upon what is taught to medical students about the importance of a 4 kHz frequency but that, as I say, does not answer the question as to whether loss of decibels at the level of 10 or 15 in the range of 30 to 45 would produce a material as opposed to a minimal hearing loss.

42. It also seems to me to be relevant that in his first report, a report appended to the particulars of claim – and it is perfectly conceivable that he would never have been asked to provide any further report – he makes no reference at all to loss at 4 kHz nor any reference to loss over 1, 2 and 4 kHz. I rather think that if Prof. Homer thought that loss at 4 kHz was a matter seriously to be considered, there would have been reference to it in that first report. It is not upon that matter that I resolve the issue but I do bear it in mind. It is principally on the basis that I was impressed by Prof. Lutman's reasoned, logical arguments to support the opinion which he comes to. In contrast, Prof. Homer was forced to accept that whilst he remained of the view that there would be a difference, it was his opinion; and he accepted that it was not possible to measure in any meaningful way what that loss actually would be.
  43. In the result, therefore, the claimant has not satisfied me on the balance of probabilities that she has suffered an appreciable injury. I find that she has suffered no more than a minimal hearing loss as a result of exposure to noise which is not capable of being compensated. Accordingly, there must be judgment for the defendant.
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