

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Charles Foley

Opinion No. 03-25WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Eastern Airlines, LLC

For: Michael A. Harrington
Commissioner

State File No. PP-61139

OPINION AND ORDER

Hearing held via Microsoft Teams on December 4, 2024
Record closed on January 17, 2025

APPEARANCES:

Daniel D. McCabe, Esq., for Claimant
James M. O’Sullivan, Esq., for Defendant

ISSUES PRESENTED:

1. Which, if any, of Claimant’s injuries, symptoms and medical treatments are causally related to a decompression event that took place at work on March 12, 2021?
2. To what, if any, workers’ compensation benefits is he entitled?

EXHIBIT:

Joint Medical Exhibit (“JME”)

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. § 642
Permanent partial disability benefits pursuant to 21 V.S.A. § 648
Medical benefits pursuant to 21 V.S.A. § 640(a)
Interest, costs and attorney fees pursuant to 21 V.S.A. §§ 664 and 678

FINDINGS OF FACT:

1. Claimant is a 64-year-old man who resides in Sheffield, Vermont. He has worked as a commercial airline pilot for a variety of employers since 2000.
2. In March 2020, Claimant began working as a pilot for Defendant, with the rank of captain.

The March 12, 2021 Decompression Event

3. In March 2021, Defendant assigned Claimant and a first officer to fly an airplane from Kansas City, Missouri, to Lima, Peru, where Defendant's fleet of airplanes undergoes maintenance and repairs. The plan was for them to drop one airplane off for maintenance and retrieve another one, a Boeing 767 aircraft, that would be ready to return to the United States.
4. Once the Boeing 767 was ready to fly, Claimant and the first officer departed from the Lima airport on March 12, 2021, bound for Miami. The airplane was not carrying any passengers or cargo.
5. When the aircraft reached an altitude of 38,000 feet, alarms went off in the cockpit, indicating that the aircraft was undergoing rapid uncontrolled decompression and losing oxygen. Claimant credibly testified that, during a decompression event, a pilot has 15 to 20 seconds to get the situation under control before losing consciousness from lack of oxygen.
6. Claimant and the first officer donned their oxygen masks as Claimant tried to control the aircraft. However, with the onset of decompression, he had sudden hearing loss in both ears and was unable to hear the control tower or the first officer in his headset. Claimant ordered the first officer to handle communications with the control tower, while Claimant intentionally sent the airplane into an emergency nosedive. They quickly descended to 10,000 feet, the decompression danger subsided, and Claimant turned the controls over to the first officer to complete their landing back in Lima.
7. In addition to sudden hearing loss in both ears during the decompression and rapid descent, Claimant also experienced pain in both ears. By the time the airplane landed, fluid was draining from his left ear.
8. When they landed back in Lima, Claimant and the first officer were not permitted to deplane, as they had not cleared Peruvian customs. Instead, they were required to remain on board the airplane for several hours in a maintenance hangar while the crew performed repairs. The repairs included three pressurization tests.¹ During the tests, Claimant experienced severe ear pain and pressure, as well as ringing in his ears. He did not experience dizziness at that time, but he was not getting up from his seat or changing positions during the tests. Claimant credibly described the pain from the second pressurization test as "unbearable" and compared it to having someone whack him upside the head with an open hand.
9. Later that day, Claimant and the first officer were cleared through customs and taken to a hotel. At the hotel, Claimant began to experience a sense of imbalance, and he continued to experience drainage from his left ear. The next morning, when he rose from bed, he had a spinning sensation; he also felt unbalanced when he bent over to tie his shoes.

¹ The pressurization tests consisted of closing and locking all openings in the aircraft, including the outflow valve, and then reducing pressure inside the aircraft to simulate conditions at high altitude. (JME 306).

10. Claimant and the first officer spent five days in Peru, waiting for the Boeing 767 to be repaired so they could fly it back to the United States. Claimant continued to experience ear pain and fluid discharge during that time; he put cotton toilet tissue in his left ear canal to absorb the liquid. He also continued to experience spatial and visual balance issues, becoming dizzy when he changed positions. He called his primary care physician from Peru and scheduled an appointment for shortly after his return home.
11. Eventually, the aircraft was deemed safe for travel, and Claimant flew it from Lima to Orlando, Florida. During the trip, he experienced serious ear pain during ascent and descent. After landing in Florida, he piloted another airplane for Defendant from Orlando to El Paso, Texas, as part of his regular work duties. He then flew as a passenger from El Paso to Dallas to undergo training related to his employment. Unfortunately, the flight simulator needed for training was not available, so the training was delayed. By that time, Claimant was anxious to return home to see his primary care physician. Defendant allowed him to leave Dallas without undergoing the required training, and he flew as a passenger back to his home base in Boston.
12. For each of Claimant's flights after the decompression event, he experienced significant ear pain upon ascent and descent. Accordingly, he has neither flown nor ridden as a passenger in an airplane since March 2021.
13. Claimant has not worked for any employer since he left Dallas in late March 2021. He is not medically released to work as a pilot, and he has been approved for Social Security Disability Benefits. Defendant's First Report of Injury lists the onset date of disability as April 2, 2021. *See Employer's First Report of Injury (Form 1)*, filed April 29, 2021.²
14. Claimant continues to experience ear pain, ear fullness and vertigo. Notably, he lives in a mountainous area, at 1,750 feet above sea level. Whenever he drives into town for errands or shopping, he must descend to about 200 feet above sea level. This change in elevation causes ear pain, pressure and headaches. Further, he must drive on bumpy dirt roads around his home; driving on bumpy roads causes dizziness and nausea. As a result, Claimant consolidates his trips into town and goes only once or twice per week. He also experiences positional vertigo in his home, while standing up, moving his head too quickly, or bending over. His episodes of vertigo last up to 30 minutes. Claimant also reports some hearing loss and tinnitus. He had no perception of hearing loss or tinnitus prior to the decompression event.
15. Claimant's vertigo has impacted his ability to garden, mow the lawn, and plow his driveway. He can no longer go into the woods with a chainsaw to cut firewood. Even bending over to pet the dog causes vertigo. As Claimant credibly explained, there is a learning curve to what he can and cannot do. For example, if he stands straight up when he wakes up in the morning, he will experience vertigo that makes him feel like he is spinning straight into the floor. Accordingly, he has learned to sit up gradually on the edge of the bed before fully rising.

² On April 30, 2021, Defendant filed a denial of the entire claim on the grounds of "No medical to support a work related injury/disability." *See Defendant's Denial (Form 2)*.

Claimant's Subsequent Medical Course

16. On April 2, 2021, following his return to the United States, Claimant saw family medicine practitioner Akash Patel, MD, for ear pain and pressure. Dr. Patel noted that Claimant had been experiencing ear pain and pressure since the decompression event in Peru 20 days earlier. Claimant also reported a liquid discharge from his left ear and a sensitivity to loud noises. (JME 49).³ Dr. Patel assessed Claimant with otic barotrauma⁴ caused by decompression, advised him not to fly, and referred him to an ear specialist. (JME 49).
17. On April 14, 2021, Claimant saw ear, nose and throat (ENT) specialist Christin Hoffstadt, MD. Dr. Hoffstadt noted that Claimant had constant severe left ear pressure, muffled hearing, and positional dizziness and nausea since the decompression event. Claimant also reported a left-sided headache and some visual symptoms. (JME 59). Dr. Hoffstadt assessed Claimant with otic barotrauma, otalgia (ear pain), and a possible perilymphatic fistula. A hearing examination performed the same day was largely within normal limits. (JME 55-58). Dr. Hoffstadt referred Claimant to an otologist at Tufts Medical Center in Boston. (JME 60).
18. On April 27, 2021, and again on May 19, 2021, Claimant saw neuro-otologist Jonathan Sillman, MD, at Tufts. (JME 63, 69). Dr. Sillman's area of specialty is disorders of hearing and balance. Claimant reported left ear pain and fullness, as well as dizziness when he looks up or lies back. (JME 63). Dr. Sillman performed testing of Claimant's ear systems at the May 19, 2021 examination. Testing identified left eustachian tube dysfunction and abnormalities in Claimant's right semi-circular canals (which are a part of the vestibular apparatus). (JME 69-70). Dr. Sillman was concerned that Claimant might have uncompensated peripheral vestibulopathy, and he recommended additional testing of the vestibular apparatus. (JME 75, 77).
19. On May 24, 2021, Claimant went to the Mass General Brigham Eye and Ear Clinic to see Ameer Dharia, MD, for a blocked left ear, tinnitus and positional vertigo. (JME 77). Dr. Dharia assessed him with left eustachian tube dysfunction, tinnitus and non-allergic rhinitis. (JME 80). She thought Claimant's eustachian tube was irritated by post-nasal drip, and she prescribed a steroidal nasal spray. (JME 80).
20. On June 15, 2021, Claimant began a course of physical therapy for left-sided neck pain, ear pain when driving through various elevations, and positional dizziness. (JME 81).
21. Claimant returned to Dr. Sillman at Tufts on August 31, 2021 for re-evaluation of dizziness and ear pain. (JME 137). He reported left ear pressure related to barometric and elevation changes while driving. Dr. Sillman found evidence of right peripheral

³ The parties did not number the pages of the Joint Medical Exhibit. Accordingly, page references in this Opinion and Order are the page numbers that are displayed in Adobe Reader. The JME index displays as pages 1 through 3, and the first page of the medical record displays as page 4.

⁴ Barotrauma is "physical tissue damage caused by a pressure difference between an unvented space inside the body and surrounding gas or fluid." See <https://www.ncbi.nlm.nih.gov/>, last accessed on February 18, 2025, at 4:04 PM.

vestibulopathy and eustachian tube dysfunction with barometric changes; he recommended balance rehabilitation therapy. (JME 139). Claimant continued his ongoing physical therapy and expanded its scope to include balance rehabilitation. (JME 141).

22. Claimant was discharged from physical therapy on March 9, 2022. (JME 262-265). At the last visit, he reported that he was still experiencing episodes of dizziness and that he had achieved little to no improvement in his stability with somatosensory stability interventions. The physical therapist recommended that he continue to increase his activities to challenge his vestibular system and habituate himself to a higher activity level. (JME 264).
23. On November 22, 2022, Claimant was seen at Tufts Medical Center's audiology department. (JME 274). He reported "constant pressure, pain, muffled hearing, and high-pitched tinnitus in his left ear. Symptoms are worsened with pressure changes. He reported room-spinning vertigo when getting out of bed in the morning and when bending over." (JME 274). The audiologist's evaluation found both ear canals to be clear and both eardrums intact. Further testing found normal middle ear function in both ears and hearing essentially within normal limits. (JME 274). However, he was also found to have difficulty understanding speech in adverse listening situations, as with background noise. (JME 275).
24. Also on November 22, 2022, Claimant underwent an evaluation of his vestibular system with Dr. Sillman at Tufts. (JME 278). Dr. Sillman noted mild and symmetric hearing loss, some tinnitus, and persistent vestibulopathy on the right side. He recommended additional vestibular testing. (JME 279-280).
25. On December 20, 2022, Claimant returned to Dr. Sillman. Dr. Sillman documented Claimant's ongoing balance disorder, finding that his vertigo and imbalance were most likely related to right peripheral vestibulopathy in his inner ear. As Claimant did not significantly improve with physical therapy, Dr. Sillman planned to speak to his colleagues for their input about Claimant's treatment options. (JME 285, 288). The medical records do not include any subsequent treatment options recommended by Dr. Sillman.
26. Claimant went to the Mass General Brigham Otoneurology Clinic on October 3, 2023 for dizziness. The clinical impression there was "chronic dizziness and oscillopsia with head movement as well as visual flow sensitivity. His symptoms are concerning for bilateral peripheral vestibular hypofunction." (JME 295).
27. On November 21, 2023, Claimant returned to the Mass General Brigham Eye and Ear Clinic, where he saw otoneurologist Adrian Priesol, MD, for ongoing dizziness. (JME 327). Dr. Priesol's specialty is managing dizziness and balance disorders. Dr. Priesol attributed Claimant's persistent dizziness to poorly compensated right peripheral vestibular hypofunction; he recommended compensatory exercises, tai chi, and medication. (JME 327-329).

28. On January 15, 2024, Claimant resumed participation in physical therapy to treat his dizziness. (JME 330).
29. On February 29, 2024, Claimant underwent auditory function testing again. (JME 355). The findings were stable, with his hearing essentially unchanged from his prior testing on November 22, 2022. (JME 360). Claimant saw Dr. Sillman the same day. (JME 364). Dr. Sillman noted that Claimant has permanent right vestibular hypofunction without compensation and is unable to perform the occupation of airline pilot. (JME 364). Claimant continued his physical therapy through at least May 1, 2024, the date of the most recent medical record offered into evidence. (JME 365-382).

Expert Medical Opinions

30. Claimant presented expert testimony from Steven Levine, MD. Defendant relied upon an independent medical examination report prepared by David Vernick, MD.

(a) Steven Levine, MD

31. Steven Levine, MD, is a board-certified otolaryngologist and head and neck surgeon. He graduated from the University of Rochester Medical School in 1981 and completed a surgical residency at the Pennsylvania Hospital. He then completed a residency at the University of Pennsylvania Medical School's Department of Otorhinolaryngology. Dr. Levine has treated patients in his specialty areas for more than 35 years, including patients with tinnitus, hearing loss, and vertigo; he has treated patients who have experienced sudden decompression events, otic barotrauma, perilymphatic fistula and other traumas to their vestibular systems. Dr. Levine has retired from surgery, but he still sees patients in private practice two days a week. (JME 320-324).
32. On August 9, 2023, Claimant's counsel engaged Dr. Levine to perform a medical records review and interview of Claimant. Dr. Levine interviewed Claimant for an hour using the zoom platform on August 24, 2023 and conducted a second interview on September 13, 2023. He also reviewed Claimant's medical records through December 20, 2022 and the report of Defendant's expert, David Vernick, MD. Dr. Levine prepared his written report on October 24, 2023 (JME 297-324) and testified at the hearing.

The Injuries Sustained in the Decompression Event

33. In Dr. Levine's opinion, to a reasonable degree of medical certainty, Claimant suffered injuries to both ears on March 12, 2021, causing vertigo, eustachian tube dysfunction, tinnitus, and diminished hearing. Dr. Levine explained that both the rapid decompression of the airplane's cabin, and the rapid increase in pressure when the airplane went into a nosedive, caused severe barotrauma. The aircraft pressure tests conducted later that day caused additional barotrauma to Claimant's ears.
34. Dr. Levine based his opinion on Claimant's credible account of experiencing severe ear pain, sudden temporary hearing loss, and ringing in his ears during the events of March 12, 2021, all of which are hallmarks of barotrauma. Dr. Levine noted that Claimant did

not experience dizziness or vertigo during the decompression events, but he explained that motion is required to experience disequilibrium related to the inner ear's vestibular apparatus. Claimant was seated during the decompression event and subsequent pressure testing, but once he went to his hotel and moved around that evening, he experienced dizziness and vertigo.

35. Dr. Levine explained the mechanism of injury in terms of the structure of the ear. The middle ear is separated from the outer ear by the eardrum. The middle ear contains air; the equilibrium of pressure is maintained in the middle ear by the eustachian tube, which acts as a pressure valve. If the atmospheric air pressure outside suddenly drops, then the normal air pressure in the middle ear will push outwards onto the eardrum. This pressure differential can rupture the eardrum and injure the eustachian tube. Symptoms of a ruptured eardrum include ear pain, fluid drainage, tinnitus and sudden hearing loss. Claimant experienced all these symptoms during the decompression event on March 12, 2021. In Dr. Levine's opinion, these events likely ruptured Claimant's left eardrum and affected his left eustachian tube.
36. Dr. Levine further explained that the openings between the middle ear and inner ear are called the round window and the oval window; each of these openings is covered by a membrane similar to the eardrum. The fluid within the inner ear is called perilymph. When the air pressure outside is too low, the pressure within the inner ear will push the round and oval window membranes outward. This pressure differential can rupture either of these membranes, creating a hole or fistula; the perilymph fluid may leak through the hole into the middle ear. Symptoms of this condition (called a perilymphatic fistula) include sudden ear pain and hearing loss, tinnitus, and vertigo. Claimant experienced all these symptoms on March 12, 2021. In Dr. Levine's opinion, the decompression event likely caused a perilymphatic fistula in Claimant's right ear and damage to the inner ear structures, in particular to the vestibular apparatus, which is responsible for balance and spatial orientation.
37. In short, when Claimant experienced the severe decompression event, his left ear relieved pressure by puncturing the eardrum and damaging the eustachian tube, and his right ear relieved pressure by creating a tear in the inner ear membrane and damaging the vestibular apparatus. Dr. Levine explained that such injuries, especially perilymphatic fistula, are common in divers and pilots because they experience extreme pressure changes.
38. In addition to the ruptured left eardrum, Dr. Levine offered his opinion that Claimant suffered injury to his left eustachian tube in the decompression event. He based this opinion on the ear pain and pressure that Claimant still experiences when he drives through hilly terrain. Dr. Levine explained that these are "classic" symptoms of eustachian tube dysfunction.
39. Finally, Dr. Levine opined that the ear pressure, tinnitus, and subjective hearing loss that Claimant continues to report is related to the decompression event. He explained that Claimant likely has so-called "hidden" hearing loss due to the March 12, 2021 barotrauma. He explained that, although Claimant's hearing tests are mostly within

normal limits, he exhibits symptoms of hearing loss, including his perception of muffled hearing in his left ear and his increase of the television volume since the decompression event. Further, his episodes of non-localizing tinnitus are associated with bilateral hearing loss. Hidden hearing loss is a relatively new concept in otolaryngology and audiology; it is a clinical diagnosis based on a patient's symptoms that may or may not be corroborated by the currently available testing techniques.⁵

40. I find all of Dr. Levine's causation opinions to be clear and credible, well-grounded in Claimant's medical history, and well-supported by his knowledge, training and experience as a board-certified otolaryngologist.

Medical Treatment

41. In Dr. Levine's opinion, all the medical services that Claimant has received for his work-related medical conditions to date have been medically reasonable and causally related to the decompression events at work. Further, in Dr. Levine's opinion, Claimant will likely need ongoing treatment from an otolaryngologist for ear issues for his lifetime.
42. Dr. Levine also offered his opinion on the physical therapy that Claimant underwent. Although physical therapy ultimately did not improve Claimant's vestibular symptoms, it was reasonable for his treating provider to have recommended physical therapy based on the available information at the time of the recommendation. Dr. Levine explained that, because Claimant did not receive prompt treatment for his vestibular injury when it first occurred, his subsequent treatment options were limited. Under the circumstances, with few options available, it was reasonable to try physical therapy.
43. In Dr. Levine's opinion, medication for vertigo would be reasonable if Claimant decides to try it. Unfortunately, vertigo medications have undesirable side effects, including drowsiness, and patients often decide that the side effects outweigh the benefits, as Claimant has decided to date.
44. Finally, in Dr. Levine's opinion, Claimant does not need hearing aids at this time, but he may need them in the future, depending on the progression of his condition.
45. I find Dr. Levine's opinions concerning Claimant's past and future medical treatment to be clear and credible, well-grounded in Claimant's medical history, and well-supported by his knowledge, training and experience as a board-certified otolaryngologist.

⁵ Dr. Levine cited the following article in support of his opinion that Claimant has hidden hearing loss: David Kohrman et al., *Hidden Hearing Loss: A Disorder with Multiple Etiologies and Mechanisms*, Cold Spring Harbor Perspectives in Medicine, vol. 10, issue 1 (January 2020) (Abstract: "Hidden hearing loss (HHL), a recently described auditory disorder, has been proposed to affect auditory neural processing and hearing acuity in subjects with normal audiometric thresholds, particularly in noisy environments. In contrast to central auditory processing disorders, HHL is caused by defects in the cochlea, the peripheral auditory organ.")

Ongoing Injuries

46. In Dr. Levine's opinion, the vertigo that Claimant suffers from is chronic and unlikely to resolve. In forming this opinion, Dr. Levine relied in part on Dr. Sillman's diagnosis of vestibular dysfunction for which he has not been able to devise an effective treatment. Dr. Levine further opined that Claimant's vertigo prevents him from being able to pilot commercial aircraft.
47. In Dr. Levine's opinion, the eustachian tube dysfunction that Claimant suffers from is also chronic, as he continues to experience left ear pain and pressure when he drives from a higher altitude to a lower one.
48. Finally, in Dr. Levine's opinion, Claimant's tinnitus, sense of ear fullness, and diminished hearing capabilities will likely need medical monitoring for his lifetime. This opinion implies that these conditions are chronic as well.
49. Dr. Levine did not offer an opinion on whether Claimant has reached an end medical result for his work-related ear conditions, nor did he assess Claimant for any permanent impairment.
50. I find Dr. Levine's opinions concerning Claimant's ongoing, work-related medical conditions to be clear and credible, well-grounded in Claimant's medical history, and well-supported by his knowledge, training and experience as a board-certified otolaryngologist.

(b) David Vernick, MD

51. On September 14, 2022, Claimant underwent an independent medical examination at Defendant's request performed by David Vernick, MD. (JME 266-272). Dr. Vernick works for a business called "Scope Medical: Provider of IME's, Record & Film Reviews." He signed his report with the designation "ENT," indicating that he is an ear, nose and throat physician. Dr. Vernick interviewed Claimant, examined his ears, and reviewed his medical records through September 30, 2021. (JME 266-272).

The Injuries Sustained in the Decompression Event

52. In Dr. Vernick's opinion, Claimant suffered barotrauma in the March 12, 2021 decompression event; the barotrauma caused blockage in his ears and drainage from his left ear canal. He explained that these symptoms subsequently "cleared" and that Claimant does not have any lasting symptoms related to the decompression event.
53. In Dr. Vernick's opinion, Claimant did not sustain a perforated left eardrum in the decompression event because later medical examination did not find one. I find this opinion unpersuasive, as Dr. Levine credibly explained that a punctured eardrum will heal itself in short order.

54. Next, in Dr. Vernick's opinion, Claimant did not suffer a perilymphatic fistula in the decompression event. In his opinion, if Claimant had such a tear, he would not have been able to fly home after the decompression event without sustaining hearing loss and he would have experienced vertigo at the time of the event. I do not find this opinion persuasive, either. Claimant experienced hearing loss in both ears during the decompression event and has consistently reported vertigo beginning on March 12, 2021.
55. In Dr. Vernick's opinion, Claimant's equilibrium problems, including dizziness and vertigo, are unrelated to the decompression event. He based this opinion on Claimant's having undergone several hearing evaluations and middle ear evaluations after the decompression event, all of which have been essentially normal. As to the vestibular testing that Claimant has undergone, Dr. Vernick relied solely on the May 19, 2021 medical record. He wrote that the results of that vestibular evaluation were normal except for one test that showed "borderline differences," but he noted that "he has had no subsequent testing to validate that borderline." (JME 270).
56. When Dr. Vernick offered his opinion on September 14, 2022, he did not have the medical record documenting the subsequent evaluation of Claimant's vestibular system performed on August 31, 2021, even though that evaluation was done prior to his independent medical examination.⁶ Further, after Dr. Vernick offered his opinion in September 2022, Claimant underwent additional evaluations of his vestibular system on November 22, 2022, December 20, 2022, October 3, 2023, November 21, 2023 and February 29, 2024. None of these medical records were provided to Dr. Vernick, nor was he given an opportunity to update his opinion, as he did not testify at the hearing. As Dr. Vernick's opinion of Claimant's vestibular dysfunction is based on incomplete information, I find his opinion unpersuasive.
57. In the absence of the relevant medical records, Dr. Vernick attributed Claimant's balance issues to chronic nasal congestion that affects his eustachian tubes when he drives in hilly terrain. I do not find this opinion persuasive. Claimant did not experience dizziness and vertigo due to nasal congestion prior to the decompression event; further, he experiences dizziness and vertigo even inside his home, when he stands up too quickly or bends over.
58. Dr. Vernick also attributed Claimant's dizziness to either his high blood pressure or the medication he takes to treat his high blood pressure; in the alternative, he attributed Claimant's dizziness to severe degenerative changes in his cervical spine. However, Dr. Vernick has not explained the basis for these opinions. Claimant's medical records document high blood pressure and medications for that condition prior to the decompression event, without any reported dizziness. Further, Dr. Vernick offered no explanation for why degenerative changes in Claimant's neck would be associated with vertigo, dizziness, and ear pain, nor how his neck would cause an increase in these symptoms when Claimant drives from 1,750 feet in altitude to 200 feet. For these reasons, I find these opinions unpersuasive.

⁶ Dr. Vernick's report lists the medical records he reviewed. The most recent record he reviewed that pertains to Claimant's vestibular system is dated May 19, 2021. See Dr. Vernick's report, "Review of Records" section, at JME 268.

Medical Treatment

59. In Dr. Vernick's opinion, Claimant's vestibular therapy to date has not significantly improved his vertigo, nor would additional vestibular therapy be beneficial. Based on Claimant's physical therapy records and his own report that the therapy did not provide much benefit, I find this opinion persuasive.

Ongoing Injuries

60. In Dr. Vernick's opinion, the only injuries that Claimant sustained in the decompression event were temporary blockages in his ears and drainage from the left ear, all of which have fully resolved. Dr. Vernick does not attribute any balance or other conditions to the decompression event.
61. Dr. Vernick did not specifically offer an opinion on whether Claimant is at "end medical result" for his work-related injuries, nor did he offer his opinion as to the date when his work-related conditions fully resolved.
62. Having found Dr. Levine's opinion as to Claimant's work-related injuries more persuasive than Dr. Vernick's, I decline to accept Dr. Vernick's opinion that Claimant has made a full recovery from all the injuries and conditions related to the decompression event on March 12, 2021.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
2. Where the causal connection between employment and injury is obscure, and a layperson could have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979).

The Injuries Sustained in the March 12, 2021 Decompression Event

3. Claimant asserts that his ongoing conditions, including vertigo, ear pain and pressure, tinnitus, and hearing loss, arose out of and in the course of his employment when he experienced a decompression event at 38,000 feet in the skies over Peru. Defendant filed a denial of the entire claim, although it does not dispute that the decompression event occurred.
4. The parties presented conflicting medical evidence concerning the causal relationship between Claimant's ear conditions and the decompression event. In such cases, the Commissioner traditionally uses a five-part test to determine which expert's opinion is

the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

5. Here the *Geiger* factors weigh in Dr. Levine's favor. In particular, he examined more of the relevant medical records, including those that diagnosed the injury to Claimant's vestibular apparatus on August 31, 2021, November 22, 2022 and December 20, 2022. In contrast, Dr. Vernick did not review any vestibular-related medical records after May 19, 2021; thus, his opinion was based on incomplete information. Further, I found Dr. Levine's opinions to be clearer, more thorough, and better supported than those of Dr. Vernick.
6. Accordingly, based on the second and third *Geiger* factors, I conclude that Claimant suffered multiple barotrauma injuries on March 12, 2021, including vertigo, vestibular apparatus dysfunction, ear pain and fullness, eustachian tube dysfunction, a ruptured eardrum, a perilymphatic fistula, tinnitus, and subjective hearing loss. Further, I conclude that all the medical treatment for these conditions provided through the date of hearing was reasonable.

Workers' Compensation Benefits to which Claimant Is Entitled

Temporary Total Disability Benefits

7. When a claimant is unable to work as a result of a work-related injury, the claimant is entitled to temporary total disability benefits until he or she reaches an end medical result or successfully returns to work. 21 V.S.A. §§ 642, 642a, 643a; *Britton v. Laidlaw Transit*, Opinion No. 47-03WC (December 3, 2003).
8. Claimant here seeks temporary total disability benefits from the date of injury until such time as the Department approves the discontinuance of those benefits on a properly supported Form 27. *See Claimant's Proposed Findings of Fact and Conclusions of Law*, at 1, 8. According to the First Report of Injury filed by Defendant, Claimant's disability for work began on April 2, 2021. Claimant has not disputed this date. Further, April 2, 2021 is the date when Claimant's primary care physician took him out of work. (JME 49). Accordingly, I conclude that Claimant's entitlement to temporary total disability benefits begins on April 2, 2021.
9. Defendant has offered no evidence that Claimant has either reached an end medical result for his work-related injuries or has successfully returned to work. Further, Defendant does not contend that Claimant's entitlement to temporary total disability benefits is affected by any obligation to perform a good faith job search, as set forth in Workers' Compensation Rule 12.1330. Accordingly, I conclude that Claimant is entitled to temporary total disability benefits from April 2, 2021 until such time as he either reaches an end medical result or successfully returns to work. Unless the discontinuance is due to

Claimant's having successfully returned to work, any proposed discontinuance must be set forth on a properly supported Employer's Notice of Intention to Discontinue Payments (Form 27) and submitted to the Department for approval. *See Workers' Compensation Rule 12.1100.*

Interest on Temporary Total Disability Benefits

10. Claimant also seeks an award of pre-judgment interest on his temporary total disability benefits. Section 664 of the workers' compensation statute governs pre-judgment interest:

Within 60 days after a hearing is held, the Commissioner shall make an award supported by findings of fact and the applicable law and shall send a copy of the award to the parties. If the employee prevails at the hearing, the Commissioner's findings shall include the date on which the employer's obligation to pay compensation under this chapter began. The award shall include interest at the statutory rate computed from that date on the total amount of unpaid compensation.

11. Accordingly, pursuant to 21 V.S.A. § 664, Claimant is entitled to pre-judgment interest at the statutory rate computed from April 2, 2021 through the date of this Opinion and Order. The statutory interest rate is 12 percent per annum. 9 V.S.A. § 41a.

Medical Benefits

12. Under the workers' compensation statute, the employer or carrier is responsible for furnishing "reasonable" medical services to the injured worker. 21 V.S.A. § 640(a). Vermont law defines reasonable medical services as treatment that is both medically necessary and causally related to the work injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010); *Brodeur v. Energizer Battery Mfg., Inc.*, Opinion No. 06-14WC (April 2, 2014).
13. Claimant here is entitled to reasonable medical services for all the injuries he sustained in the decompression event of March 12, 2021, including vertigo, eustachian tube dysfunction, tinnitus, and diminished hearing. The services for these conditions include the cost of all treating providers, diagnostic testing, audiograms, physical therapy, and any and all other reasonable medical treatment for his injuries, as set forth in 21 V.S.A. § 640(a).
14. To the extent that Claimant or his regular health insurance provider may have paid for any of his reasonable medical treatment, Defendant shall reimburse those costs.

Permanent Partial Disability Benefits

15. When an injury results in a partial impairment that is permanent, the workers' compensation statute provides for the payment of permanent partial disability benefits. 21 V.S.A. § 648(a). Pursuant to the statute, the determination of the existence and degree

of permanent impairment shall be made only in accordance with the whole person determinations as set out in the Fifth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. 21 V.S.A. § 648(b). The *AMA Guides*, in turn, require a finding of maximal medical improvement before a patient may be assessed for permanent impairment. *AMA Guides*, § 2.4.

16. Claimant is not seeking permanent partial disability benefits at this time. In his proposed findings, he requests permanent partial disability benefits when he reaches an end medical result in the future. *See Claimant's Proposed Findings of Fact and Conclusions of Law*, at 1, 8.
17. Neither Dr. Levine nor Dr. Vernick offered an opinion that Claimant was at "end medical result" or "maximal medical improvement" for his work-related injuries. In the absence of a persuasive medical opinion that Claimant has reached an end medical result, it is premature to assess any permanent impairment or to conclude that he is entitled to an award of permanent partial disability benefits. As Claimant has requested, he may seek such benefits in the future, once he is placed at end medical result.

Costs and Attorney Fees

18. As the prevailing party, Claimant is entitled to an award of necessary costs pursuant to 21 V.S.A. § 678(b)(1). I also award him reasonable attorney fees pursuant to 21 V.S.A. § 678(b)(2). In accordance with 21 V.S.A. § 678(e), he shall have 30 days from the date of this opinion within which to submit his itemized claim for costs and attorney fees.

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, Defendant is **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant proves his entitlement as causally related to the compensable work injury, including but not limited to the following:
 - (a) Temporary total disability benefits from April 2, 2021 through the date of this Opinion and Order, with interest thereon;
 - (b) Temporary total disability benefits from the date of this Order, until such time as those benefits are properly discontinued;
 - (c) Medical benefits as set forth in 21 V.S.A. § 640(a); and
 - (d) Permanent partial disability benefits, if any, in an amount to be determined once Claimant reaches an end medical result; and
2. Costs and attorney fees in amounts to be determined.

DATED at Montpelier, Vermont this 24 day of February 2025.

Michael A. Harrington
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.