BRB No. 97-960

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| MARTHA D. MOWL | ) | |
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| Claimant-Respondent | ) | DATE ISSUED:_____ |
| | ) | |
| v. | ) | |
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| INGALLS SHIPBUILDING, INCORPORATED | ) | |
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| Self-Insured Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order -- Awarding Benefits, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order -- Awarding Benefits, the Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (95-LHC-1637) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if

they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was exposed to noise during the course of her employment with employer, and the parties agree that she has a work-related hearing loss. In 1988, claimant underwent an audiometric evaluation at employer's facility which revealed a 31.88 percent binaural impairment. Cl. Ex. 7; Jt. Ex. 1. Although she testified she does not remember receiving the audiogram and an accompanying report, Tr. at 14-15, 19, her signature appears on a receipt stating she received the audiogram. Emp. Ex. 7; Tr. at 19. She underwent three additional evaluations in 1994. Claimant and employer agreed to average the results of two of those evaluations. Thus, the parties agree claimant has a binaural impairment of 40.16 percent.[1] Jt. Ex. 1; *see also* Cl. Exs. 7-8, 10. Claimant filed a claim for benefits on May 19, 1994, which employer timely controverted. Jt. Ex. 1. On August 18, 1994, employer voluntarily paid claimant compensation in the amount of $6,855.34 for an 8.28 percent binaural impairment.[2] Cl. Ex. 20; Emp. Exs. 10-11.

The only issues remaining for the administrative law judge to address were

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[1]In May 1994, claimant underwent an audiometric evaluation at employer's facility, the results of which revealed a 42.8 percent binaural impairment. Hearing aids and referral to a specialist were recommended. Cl. Ex. 7. On July 18, 1994, claimant underwent an audiometric evaluation which revealed a 38.8 percent binaural impairment, and on July 25, 1994, tests revealed a 41.57 percent binaural impairment. Cl. Exs. 8, 10. The parties agreed to average the two July results.

[2]This represents the difference between the stipulated current impairment of 40.16 percent and the 1988 impairment of 31.88 percent.

whether claimant's claim for benefits for the initial 31.88 percent binaural impairment is barred by the statute of limitations, whether employer is liable for a Section 14(e), 33 U.S.C. §914(e), penalty, and whether claimant's counsel is entitled to an attorney's fee. The administrative law judge found that in 1988, the requirements of Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D) (1994), were satisfied as claimant received an audiogram and accompanying report at that time. He then stated that had claimant ceased employment with employer or been removed from further noise, she would have been barred from seeking benefits for the hearing loss assessed by the 1988 audiogram as she did not file her claim until 1994. However, because she continued to work for employer and continued to be exposed to harmful noise, her hearing loss worsened and she is entitled to benefits for the entire loss pursuant to the aggravation rule. Decision and Order at 3-4. In a footnote, the administrative law judge stated that employer may have been entitled to Section 8(f), 33 U.S.C. §908(f), relief had it pursued that remedy. Decision and Order at 4 n.1. Additionally, the administrative law judge found that employer had knowledge of claimant's injury in 1988 which was sufficient to require either that employer pay benefits or file a notice of controversion. As employer did neither, the administrative law judge held it liable for a Section 14(e) penalty on the 31.88 percent hearing loss evidenced on the 1988 audiogram. Decision and Order at 4. Employer filed a motion for reconsideration. The administrative law judge summarily declined to reconsider the case, and as to Section 8(f) relief, he stated that the issue was not timely presented to his office. Employer appeals these decisions. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to employer's appeal.

Thereafter, claimant's counsel filed a request for an attorney's fee for 18.875 hours of service at an hourly rate of $150, plus $18 in expenses. Employer filed its objections. The administrative law judge reduced the hourly rate to $135, but rejected the remainder of employer's objections. Therefore, he awarded claimant's counsel a total fee of $2,548.12, plus $18 in expenses. Supp. Decision and Order. Employer appeals this award. Claimant has not responded.

Employer first contends the administrative law judge erred in awarding benefits for claimant's initial 31.88 percent binaural impairment. Specifically, it argues that benefits for that portion of her hearing loss are barred by the application of Section 13(a) of the Act, 33 U.S.C. §913(a). Section 13(a) provides a claimant with one year after the injury within which he or she may file a claim for compensation for the injury. Because this case involves a hearing loss, Section 8(c)(13)(D) is also pertinent. That section states:

The time for filing a notice of injury, under section 912 of this title, or a

> claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

33 U.S.C. §908(c)(13)(D) (1994). To commence the running of the statute of limitations it is necessary that the claimant be aware of a causal relationship between her employment and her hearing loss. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Thus, employer argues that claimant had one year after she received the 1988 audiogram with its accompanying report indicating a work-related hearing loss in which to file a claim for compensation for her 31.88 percent hearing loss, and as she failed to do so, she is now barred from receiving compensation for that loss. We reject this argument.

In this case, claimant underwent an in-house audiogram on March 7, 1988, which revealed a hearing loss. Attached to the audiogram is a statement which is entitled "Receipt of Audiogram." The statement provides:

> I, M.D. Mowl, hereby acknowledge that I have been furnished a copy of my audiogram performed on 3/7/88. My hearing condition was fully explained to me by a member of Ingalls' audiology department. I have been properly instructed to wear hearing protection when in noisy areas. If a hearing loss is indicated, I understand it may be job related. [31.9 percent impairment indicated in each ear and statement signed, dated and witnessed]

Emp. Ex. 7. Based on this signed statement, the administrative law judge found that claimant received an audiogram and accompanying report in 1988 as required by Section 8(c)(13)(D) of the Act.[3] Decision and Order at 3. However, because of claimant's continued employment and exposure to noise, the administrative law

[3]We need not determine whether this evidence is sufficient to satisfy the requirements of Section 8(c)(13)(D), as no party has challenged the administrative law judge's finding in this regard and as it is not relevant to our disposition of the case.

judge found the claim was not time-barred and applied the aggravation rule to find that claimant's entire impairment is compensable. Decision and Order at 3-4. Employer argues that this result permits the aggravation rule to take precedence over the language of Section 13, and thus the award should be reversed.

Initially, claimant filed a timely claim in this case following her 1994 audiogram. She was working at that time for employer and continued to be exposed to noise; her 1994 examinations indicated an increased hearing loss since the 1988 test. The issue here is not the timeliness of the 1994 claim but the extent of her compensable hearing loss at that time. Under the aggravation rule, if an employment injury aggravates, accelerates, or combines with a pre-existing impairment, the entire resulting disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*). The aggravation rule applies to cases involving pre-existing hearing loss. *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT); *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986) (Brown, J., concurring). Relevant to the present case, moreover, each aggravation constitutes a new injury. *See Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem.*, No. 81-7801 (9th Cir. 1982); *see generally Spear v. General Dynamics Corp.,* 25 BRBS 254 (1991) (continued exposure resulting in increased hearing loss demonstrates aggravation and thus a new injury for purposes of determining claimant's awareness of her injury).

The administrative law judge found that both claimant and employer were alerted to claimant's possible work-related hearing loss in 1988, yet both continued the working relationship, and during that time claimant was exposed to injurious stimuli which resulted in a greater hearing loss. Thus, claimant's continued work aggravated her hearing loss. *See Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 141 (CRT). As claimant's continued exposure resulted in a work-related aggravation, claimant sustained a new injury and was entitled to file a claim for this injury. As claimant is entitled to be compensated for the entire disability resulting from the combination of her current loss and her pre-existing hearing loss, the administrative law judge properly resolved this claim consistent with the aggravation rule. The administrative law judge's conclusion that employer is liable for the entire stipulated hearing loss is therefore affirmed. *See generally Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT); *Epps*, 19 BRBS at 1.

Employer next argues that the administrative law judge erred in holding it liable for a Section 14(e) penalty based on its failure to pay claimant benefits or controvert claimant's right to benefits after her 1988 audiometric evaluation

revealed a hearing loss.[4] Section 14(b) of the Act provides that the first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. §912(d), or after the employer has knowledge of the injury. 33 U.S.C. §914(b). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 U.S.C. §914(d); *see also Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). Section 14(e) mandates that if an employer fails to pay benefits in accordance with Section 14(b) or timely controvert the claim in accordance with Section 14(d), then it shall be liable for a 10 percent penalty added to unpaid installments of compensation. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *Frisco v. Perini Corp.*, 14 BRBS 798 (1981). The determination of whether an employer has knowledge of the injury is a question of fact and is assessed in the same manner as determining knowledge under Section 12(d). *Scott*, 22 BRBS at 164; *Davenport v. Apex Decorating Co., Inc.*, 13 BRBS 1029 (1981). The Board has held that, additionally, an employer need not file a notice of controversion until it is aware of an actual controversy, *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); however, it has rejected the argument that there is no controversy until a claim has been filed. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

We hold that, on the facts of this case, employer is not liable for a Section 14(e) penalty. Although the plain language of Section 14(b), (d), clearly states that an employer need only have notice or knowledge of an "injury" before it must pay benefits or controvert the claim, it is illogical to find that employer had knowledge of an injury in 1988, when the full extent of claimant's injury was not yet known to employer or to claimant. After the 1988 audiogram, claimant continued to be exposed to work-place noise and, as we discussed, *supra,* her injury was on-going, as each exposure constituted a new injury. *Abbott*, 14 BRBS at 453. Employer does not have "knowledge" of an injury for purposes of Section 14(e) until it knows of the full extent of the injury on which the claim is based; in other words, employer must have knowledge of the same injury or aggravation for which compensation is to be paid. Thus, where claimant's claim is based upon aggravation of a prior condition, employer must receive notice or have knowledge of the aggravation before Section 14(e) applies.

[4]Specifically, employer asserts that the audiogram did not indicate a work-related hearing loss so as to put it on notice of a controversy. The administrative law judge rationally rejected employer's argument that, while the 1988 audiogram was sufficient for purposes of Section 8(c)(13)(D), it was insufficient to provide employer with knowledge of an injury for purposes of Section 14(e).

As employer argues, *Paul v. General Dynamics Corp.*, 13 BRBS 1073 (1981), is analogous precedent. In *Paul*, the claimant developed asbestosis due to asbestos exposure at work, but he continued to work until the time of the hearing. The Board held that, under the facts of the case, the employer had no reason to know of a controversy until a claim was filed; therefore, it was not liable for a Section 14(e) penalty for the period before it had notice of the claim for benefits. *Paul*, 13 BRBS at 1077. Here, as in *Paul*, claimant continued to work, and continued exposure aggravated her condition. Employer, therefore, did not know of a controversy warranting the filing of a notice of controversion or the payment of benefits until the full extent of claimant's injury was known. As the Board stated in *Paul*, "[i]t is not rational to require employer to initiate a [defense] to an unknown claim." *Id.*

Under the aggravation rule, claimant is permitted to file a claim for her entire impairment. In the instant case, the 1994 claim includes the pre-existing 31.88 percent hearing loss. Consequently, the full extent of claimant's compensable injury was not known to employer until claimant put it on notice of her intent to seek compensation for the cumulative injury. *Paul*, 13 BRBS at 1077. On these facts, "knowledge of the injury" in Section 14(b) means knowledge of the cumulative compensable hearing loss. As employer had no knowledge of the loss ultimately claimed in 1988, no controversy arose at that time, and it cannot be held liable for failing to pay benefits or file a notice of controversion on the 31.88 percent impairment reported in the audiogram. Further, because employer timely filed a notice of controversion once it gained knowledge of the compensable injury in 1994, it is not liable for a Section 14(e) penalty. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). Therefore, we reverse the administrative law judge's finding that employer is liable for a Section 14(e) penalty based on its failure to pay benefits or controvert the claim in 1988.

Next, employer contends the administrative law judge erred in not addressing its request for Section 8(f) relief. In this case, employer filed a timely application for Section 8(f) relief with the district director. The district director denied the relief, stating that the 1988 and 1991 audiograms attached to the application were not the earliest audiograms of record, but permitting employer to amend its application and reapply. Employer elected not to do so. Additionally, employer did not raise Section 8(f) as an issue before the administrative law judge at the hearing. Instead, it relied fully on its statute of limitations argument, believing it would not be held liable for benefits for the pre-existing hearing loss. *See* Emp. Motion for Recon. at 8. Only after the administrative law judge noted that employer would have been eligible for Special Fund relief did employer file a motion for reconsideration raising the issue.

We affirm the administrative law judge's denial of Section 8(f) relief. Although employer timely raised the applicability of Section 8(f) before the district director, it did not raise the issue before the administrative law judge until after the decision was issued. In denying employer's motion to address the issue on reconsideration, the administrative law judge stated that employer failed to raise the issue in a timely manner. An administrative law judge may refuse to entertain a post-hearing request to address a new issue when that issue should have been anticipated prior to the hearing. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Thus, contrary to employer's assertions, the administrative law judge did not abuse his discretion by refusing to address the Section 8(f) issue post-hearing. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Finally, employer challenges the administrative law judge's attorney's fee award. Employer argues that there has been no final successful prosecution as yet and that the fee awarded is "exorbitant." Incorporating its objections below, employer also challenges the hourly rate, the degree of claimant's success, the complexity of the case, and the validity of a few of the petition entries. The administrative law judge considered employer's objections and agreed that an hourly rate of $150 is too high; therefore, he reduced the rate to $135 per hour. He rejected employer's remaining objections.

A review of the petition and award reveals that claimant's counsel sought 18.875 hours of services for this case in which claimant was fully successfully in obtaining benefits for her entire 40.16 percent hearing loss, resulting in $26,000 in benefits in addition to those previously paid by employer, excluding the Section 14(e) assessment which we have reversed on appeal. The total fee awarded, reflecting the reduced hourly rate, is $2,548.12, plus $18 in expenses. A simple comparison of this amount with the additional benefits received demonstrates that employer's assertion that the fee awarded is "exorbitant" is frivolous. The administrative law judge found the fee awarded was reasonable for the work performed, and his award is affirmed. *See generally Maddon*, 23 BRBS at 62. Additionally, an administrative law judge need not wait until the underlying award is final before entering a fee award. He can award an attorney's fee during the pendency of an appeal, but the award is not enforceable until the compensation order becomes final. *See Wells v. International Great Lakes Shipping Co.,* 693 F.2d 663, 15 BRBS 47 (7th Cir. 1982); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). Therefore, the administrative law judge acted within his discretion in awarding a fee prior to the completion of the appellate process.

Accordingly, the administrative law judge's determination that employer is liable for a Section 14(e) penalty is reversed. In all other respects, his decisions are

affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge