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| WILLIAM G. ELAM | BRB Nos. 92-2538<br>and 92-2538A |
| Claimant-Respondent<br>Cross-Respondent | |
| v. | |
| INGALLS SHIPBUILDING,<br>INCORPORATED | |
| Self-Insured<br>Employer-Respondent<br>Cross-Petitioner | |
| DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS,<br>UNITED STATES DEPARTMENT OF<br>LABOR | |
| Petitioner | |
| WILLIAM G. ELAM | BRB No. 94-0878 |
| Claimant-Respondent | |
| v. | |
| INGALLS SHIPBUILDING,<br>INCORPORATED | |
| Self-Insured<br>Employer-Petitioner | DECISION and ORDER |

Appeals of the Decision and Order Awarding Benefits of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor, the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor, and the Compensation Order - Award of Attorney's Fees of N. Sandra Ramsey, District Director, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport Mississippi, for claimant.

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

Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits of Administrative Law Judge Kenneth A. Jennings, and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (90-LHC-2538) of Administrative Law Judge Richard D. Mills and the Compensation Order - Award of Attorney's Fees (6-101480) of District Director N. Sandra Ramsey 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked in employer's electronics department, where he was exposed to loud workplace noise from 1965 until July 1987.[1] After noticing problems with his hearing in 1967 or 1968 and experiencing vertigo, claimant consulted a doctor. Emp. Ex. 11. Claimant's hearing was subsequently tested several times. After evaluating claimant's hearing on November 18, 1982, Dr. Stanfield fitted him with hearing aids and recommended that he avoid exposure to high levels of noise. Dr. Stanfield reevaluated claimant on October 21, 1986, and found a 67.5 percent binaural hearing impairment. A July 16, 1987, audiogram performed by Dr. Lamppin revealed a 38 percent binaural hearing impairment. Emp. Ex. 9. An August 27, 1987, audiogram performed by Dr. Muller revealed a binaural impairment of 39.1 percent. Claimant filed a formal claim on February 24, 1988. Employer filed its Notice of Controversion on November 2, 1988.

[1] Claimant deposed that he worked until 1988, but other evidence shows that he last worked in July 1987. At the time of the hearing claimant was receiving permanent total disability compensation for a back injury.

Based on Dr. Stanfield's November 18, 1982, uninterpreted audiogram and his report indicating that claimant was to avoid exposure to high levels of noise, the administrative law judge determined that claimant had the requisite awareness of a work-related hearing loss necessary to commence the running of the statute of limitations as of that date. *See* 33 U.S.C. §§912, 913. The administrative law judge then determined that because claimant did not file his claim until February 24, 1988, the claim was untimely pursuant to Section 13 of the Act. The administrative law judge further determined that claimant failed to provide timely notice under Section 12(a), and that inasmuch as claimant had not proven that employer had actual knowledge of claimant's injury and as employer would be prejudiced by allowing the claim to proceed, the failure to provide timely notice could not be excused pursuant to Section 12(d)(1) and (2) of the Act. Accordingly, the administrative law judge also found the claim barred under Section 12 of the Act.

The administrative law judge further found that if the claim were not time-barred, claimant would be entitled to compensation for a 38.6 percent binaural hearing impairment based on the average of the July and September 1987 audiograms and an average weekly wage of $468.26. In addition, the administrative law judge determined that claimant would be entitled to an assessment under Section 14(e), 33 U.S.C. §914(e). Moreover, he concluded that although the Special Fund had accepted liability for claimant's pre-existing 20.6 percent binaural impairment, the Section 8(f), 33 U.S.C.§908(f),[2] issue was moot in view of the untimeliness of the claim. Finally, he awarded claimant past and future medical benefits pursuant to 33 U.S.C. §907.

The Director appeals the administrative law judge's finding that the claim is barred. The Director contends that the administrative law judge erred in finding that Dr. Stanfield's 1982 audiogram and report were sufficient to satisfy Section 8(c)(13)(D), 33 U.S.C. §908(c) (13)(D), and in finding that employer was prejudiced by claimant's delay in providing notice. Claimant responds, agreeing with the Director. BRB No. 92-2538. Employer appeals the fee awards made by the administrative law judge, BRB No. 92-2538A, and the district director, BRB No. 94-0878.

**TIMELINESS**

Initially, we agree with the Director that the administrative law judge's finding that claimant received an audiogram and report under Section 8(c)(13)(D) and was sufficiently "aware" of his injury and its relation to his employment in 1982 so as to trigger the limitations periods of Sections 12 and 13 is not supported by substantial evidence. Section 8(c)(13)(D) of the Act provides that in claims for a loss of hearing, the Section 12 and 13 time periods do not commence "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)(1988). *See Bridier v. Alabama Dry Dock and Shipbuilding Corp.*, 29 BRBS 84 (1995); *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27, 29 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994); 20 C.F.R. §702.221(b).

[2]The record reflects that the Special Fund accepted liability for a 20.6 percent binaural hearing impairment based on Dr. Muller's May 27, 1967 audiogram. *See* Emp. Ex. 11; Decision and Order at 8.

In determining that the periods under Sections 12 and 13 commenced in 1982, the administrative law judge noted that claimant admitted at the hearing that he was aware of his hearing loss in 1982 and that he had purchased his hearing aids himself at that time, because he did not know that employer would buy them. Tr. at 14. The administrative law judge further noted that Dr. Stanfield's November 1982 report clearly stated that claimant was to avoid high levels of noise exposure, and he reasoned that these circumstances together established that claimant was aware of his hearing loss and its relation to his employment in 1982.

The administrative law judge's finding that Dr. Stanfield's November 11, 1982, audiogram and report are sufficient to satisfy the requirements of Section 8(c)(13)(D) does not comport with applicable law. Although the statute does not specify the contents of an "accompanying report," stating only that claimant must receive an audiogram with an accompanying report which indicates a loss of hearing, the applicable regulation states that "the time for filing a claim does not begin to run until the employee receives an audiogram with the accompanying report which indicates the employee has sustained a hearing loss that is related to his or her employment." 20 C.F.R. §702.221(b). The Board has also recognized that Section 8(c)(13)(D) must be read in conjunction with the requirement of awareness under Sections 12 and 13, as an audiogram generally provides only a measure of the degree of impairment and may not indicate the relationship between its results and claimant's work. Therefore, the Board has held that claimant is aware of the relationship between his work and his hearing loss, for purposes of Sections 12 and 13, when he receives an audiogram with report and "has knowledge of the causal connection between his work and his loss of hearing." *Bridier*, 29 BRBS at 88, *quoting Larson v. Jones Oregon Stevedoring Co.,* 17 BRBS 205, 207-208 (1985); *see also Ranks v. Bath Iron Works Corp*., 22 BRBS 301 (1989).

Although the 1982 report indicates that claimant has a moderate-severe bilateral sensori-neural hearing loss, it is silent as to any employment connection, and indicates only that claimant "was counselled to avoid all high level exposure." The November 1982 audiogram was not interpreted, and Dr. Stanfield's report fails to state that claimant has a measurable hearing impairment or the degree of such impairment. We conclude that this report is insufficient to constitute an "accompanying report" or provide claimant with awareness of his work-related condition. *See Bridier*, 29 BRBS at 87-89. The Board has held that claimant's knowledge of the general hazards of employment does not provide a sufficient ground for awareness particularly where, as here, claimant has had pre-existing non-work-related hearing problems for many years.[3] *Bridier*, 29 BRBS at 88. Thus, the administrative law judge erred in finding that claimant was "aware" of his work-related hearing loss for purposes of Sections 12 and 13 in 1982 based on claimant's knowledge of his loss and Dr. Stanfield's advice that he avoid high levels of noise. *See Bridier*, 29 BRBS at 88 n.5.

In addition, the United States Courts of Appeals which have addressed the issue of awareness have uniformly held that the limitations period of Section 13(a) does not begin to run until the injured employee becomes aware of the full character, extent, and impact of the harm done

[3]Claimant herein had persistent tinnitus and intermittent dizziness dating back to 1967.

to him as a result of the employment-related injury. *See Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP,* 43 F.3d 1206 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991); *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). Along the same line, we note that in determining claimant's date of awareness in the present case, the administrative law judge failed to account for the potentially aggravating effect of claimant's continued work for employer subsequent to 1982. *See generally Spear v. General Dynamics Corp.*, 25 BRBS 253, 258 (1991). Accordingly, the administrative law judge's finding that the Sections 12 and 13 time periods commenced in 1982 is reversed. The case is remanded for reconsideration of claimant's date of awareness consistent with Section 8(c)(13)(D) and this decision.[4]

We also agree with the Director that the administrative law judge's finding of prejudice under Section 12(d)(2) is improper. The failure to provide timely or adequate notice of an injury as required under Section 12(a) bars a claim unless it is excused pursuant to Section 12(d) of the Act. Pursuant to Section 12(d), the failure to provide such notice will not act as a bar to the claim if employer either had knowledge of the injury or was not prejudiced by the lack of timely notice. 33 U.S.C. §912(d)(1),(2) (1988). In the absence of evidence to the contrary it is presumed pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that employer has been given sufficient notice under Section 12. *See Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203, 207 (1991). To establish prejudice for purposes of Section 12(d)(2), the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's

[4] We note that the Director asserts that the earliest date that claimant could have been aware of his occupational hearing loss was October 21, 1986, the date of the filing audiogram. Subsequent to the parties' filing of the briefs in this case, the United States Supreme Court held that occupational hearing loss is not an occupational disease which does not immediately result in disability. *Bath Iron Works Corp. v. Director, OWCP,* 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). Therefore, the two-year statute of limitations of Section 13(b)(2) is not applicable, and this claim is subject to the one year limitation period provided in Section 13(a). *See Vaughn v. Ingalls Shipbuilding, Inc.,* 28 BRBS 129 (1994) (*en banc)*, *aff'g on other grounds* 26 BRBS 27 (1992). Inasmuch as the February 24, 1988, claim was not filed within one year of the October 21, 1986, audiogram, the Section 13 time limitations would not be satisfied by the filing of the formal claim if claimant first became aware of his occupational hearing loss at the time of this audiogram. We thus must reject the Director's contention that the denial of benefits should be reversed as a matter of law. We note, however, that there is evidence in the record which suggests that claimant, acting without representation, previously filed an informal claim on October 26, 1986. Employer's counsel referred to a *pro se* claim at the hearing. Tr. at 21. Moreover, in its LS-202, Employer's First Report of Injury Form, filed on November 5, 1986, employer indicated that it first knew of claimant's October 21, 1986, injury on October 27, 1986. Emp. Ex. 2; *see also* Cl. Ex. 8. On remand, the administrative law judge must consider this evidence and determine whether claimant filed an earlier claim.

failure to provide timely notice. *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 216 (1991).

Because the administrative law judge's finding of prejudice in the present case was premised on his perception of unwarranted liability rather than on employer's inability to effectively investigate the claim, as is required under Section 12(d)(2), we also vacate this finding. *See generally Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). On remand, if the administrative law judge concludes that claimant did not provide timely notice under Section 12(a), he should reconsider the issue of Section 12(d)(2) prejudice under the appropriate legal standard.[5]

[5]On remand, if the administrative law judge ultimately finds that the Sections 12 and 13 statutory limitation requirements have been satisfied, he should award claimant compensation for a 38.6 percent binaural hearing loss under 33 U.S.C.§908(c)(13)(B) based upon an average weekly wage of $468.26, consistent with the factual findings he previously made which were not challenged on appeal. Although the Director also contends that the administrative law judge's finding with regard to the period of the Section 14(e), 33 U.S.C. §914(e), assessment is incorrect, we disagree. The administrative law judge found that, but for untimeliness of the claim, employer would have owed an additional 10 percent of the compensation that would have been due "up until it filed its notice of controversion, Form LS-207, on November 2, 1988." Because the entire 77 weeks (38.6 percent of 200) of compensation would have been due at the time employer filed its Notice of Controversion, under the wording of the administrative law judge's decision, the Section 14(e) assessment would attach to the entire award consistent with the Director's argument on appeal. *See generally Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(decision on recon.).

In summary, the administrative law judge's finding that the Sections 12 and 13 limitations periods commenced in this case in 1982 is reversed. The case is remanded for reconsideration of the issues relating to timely notice and filing for the reasons previously discussed.

THE FEE APPEALS

We now direct our attention to employer's appeals of the administrative law judge's and district director's fee awards. Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's attorney filed a fee petition for work done at the administrative law judge level, requesting $1,375, representing 11 hours of services at $125 per hour. Employer filed objections. In a Supplemental Decision and Order, the administrative law judge reduced the hourly rate requested to $110, disallowed four of the 11 hours requested, and awarded claimant's counsel a fee of $770, representing seven hours of services at $110 per hour.

Claimant's attorney also submitted a fee petition for services rendered at the district director level between February 15, 1988, and October 23, 1990, requesting $2,154.55 for 21 hours of legal services at $100 per hour plus $54.55 in expenses. Employer filed objections. The district director disallowed three of the hours requested. Accordingly, she awarded claimant's counsel a fee of $1,129.55, representing 12.5 hours of services at $100 per hour and $54.55 in expenses.[6]

We initially reject employer's contention that the administrative law judge and district director erred in holding it liable for claimant's attorney's fee because there was no successful prosecution of the claim. In this case, up until the time of the hearing employer controverted causation, and although the disability claim was found time-barred, claimant was ultimately successful in establishing his right to past and future medical benefits. As claimant's counsel successfully prosecuted his claim for medical benefits, the administrative law judge's finding that claimant's attorney is entitled to a fee to be assessed against employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), is affirmed. *See generally Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); *Morgan v. General Dynamics Corp.*, 16 BRBS 336, 339 (1984).[7]

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[6]The district director stated that upon totaling the hours requested in the fee petition, she only came up with 15.5 hours to be considered, rather than the 21 hours claimant alleges. In fact, the hours claimant requests add up to 16.5. As the district director disallowed three hours, claimant's counsel is entitled to 13.5 hours, at $100 per hour, for a total fee of $1,404.55, including expenses. The district director also determined that claimant was liable for fees incurred prior to March 30, 1988, the date of the district director's formal notice of claim to the employer, or $175.

[7]The facts in this case are distinguishable from those in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). In *Baker*, the court recognized that a claimant may be entitled to medical benefits even though he has no ratable impairment. Nonetheless, upon the employer's challenge to the award of medical benefits and the resultant attorney's fee, the court reversed the award of benefits and the award of an attorney's fee where the claimant failed to present evidence of the need for future medical treatment. In the instant case,

After considering employer's remaining objections to the number of hours awarded and to the hourly rate, we reject these contentions, as employer has not shown that the district director or administrative law judge abused their discretion in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer's contentions which were not raised below will not be addressed for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown an McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co*., 21 BRBS 261 (1988).

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claimant is significantly impaired and employer has not challenged its liability for claimant's medical care. Accordingly, we reject the employer's argument that holding employer liable for claimant's attorney's fees on the facts presented is inconsistent with *Baker*. *See also Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995).

Accordingly, the administrative law judge's finding regarding claimant's awareness is reversed. The conclusion that claimant's occupational hearing loss claim is barred under Sections 12 and 13 of the Act is therefore vacated, and the case is remanded for reconsideration of these issues consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits is affirmed. BRB No. 92-2538. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, BRB No. 92-2538A, and the district director's Compensation Order-Award of Attorney's Fees, BRB No. 94-0878, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge