BRB No. 13-0143

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<tr><td>MEDRICK LUCKETT

Claimant-Respondent

v.

AMERICAN SUGAR REFINING, INCORPORATED

and

ACE AMERICAN INSURANCE COMPANY

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

John J. Rabalais, Janice B. Unland and Heather W. Blackburn (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-LHC-01218) of Administrative Law Judge Larry W. Price 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).

Claimant worked for employer as a longshoreman for approximately 10 years prior to being apprised he had sustained a hearing loss following a May 27, 2009 audiogram; the audiogram demonstrated a binaural impairment of 13.4 percent. CX 22 at 143. Claimant filed a claim against employer. Employer controverted the claim, contending that claimant's hearing loss is not noise-induced and, alternatively, that it was not claimant's last covered employer prior to the May 27, 2009 audiogram. Employer also requested Section 8(f) relief. 33 U.S.C. §908(f).

The administrative law judge found that claimant established a prima facie case of work-related hearing loss. The administrative law judge found that employer's medical evidence rebuts the Section 20(a) presumption, 33 U.S.C. §920(a), but, based on the evidence as a whole, he found that claimant established he has a work-related hearing loss. The administrative law judge rejected employer's contention that it was not claimant's last maritime employer prior to the May 27, 2009 audiogram as the employment records maintained by the Waterfront Employers of New Orleans (WENO) showed that claimant last worked for employer.[1] The administrative law judge averaged the results of the audiograms of record to find that claimant is entitled to benefits for a 13.8 percent binaural loss. Claimant's average weekly wage was determined under Section 10(c) as $115.08.[2] 33 U.S.C. §910(c). The administrative law judge found that claimant is entitled to digital hearing aids and any other reasonable medical treatment necessary for his hearing loss. Employer's request for Section 8(f) relief was denied as the administrative law judge found it was untimely filed, pursuant to Section 8(f)(3). 33 U.S.C. §908(f)(3).

On appeal, employer challenges the administrative law judge's findings: that claimant is entitled to the benefit of the Section 20(a) presumption; that, on the record as a whole, claimant established a work-related hearing loss; that employer was claimant's last maritime employer; and, that the claim for Section 8(f) relief was untimely made.

[1]WENO maintains payroll records and processes payrolls for approximately eight member companies, including employer. CX 21 at 6-7.

[2]Claimant's compensation award was $3,176.20. *See* 33 U.S.C. §908(c)(13)(B).

Claimant responds, urging affirmance of the compensation award. The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the denial of Section 8(f) relief.

Employer first contends that claimant is not entitled to invocation of the Section 20(a) presumption, because the audiometric evidence does not constitute presumptive evidence of hearing loss, as the administrative law judge did not apply the Occupational Safety and Health Administration (OSHA) guidelines defining injurious noise as exposure to 90 decibels over an eight-hour time-weighted average (TWA), and as there is no evidence that claimant had such exposure at employer's facility. We reject employer's contentions of error in this regard.

In order to be entitled to the Section 20(a) presumption, claimant must establish a prima facie case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See generally Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Claimant is not required to affirmatively prove that his work in fact caused or aggravated the harm; rather, claimant need establish only that the work injury could have caused or aggravated the harm alleged. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). If claimant establishes the elements of his prima facie case, Section 20(a) applies to presume the work-relatedness of claimant's harm. *See Amerada Hess Corp. v. Director, OWCP,* 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008).

The administrative law judge found that claimant sustained an injury based on the hearing tests of record, which recorded binaural impairments of 11.6, 16.5 and 13.4 percent. The administrative law judge rejected employer's contention that claimant did not demonstrate working conditions that could have caused his hearing loss based on the absence of evidence that claimant was exposed to noise levels at or above a TWA of 90 decibels. The administrative law judge found that, while the experts' testimony regarding injurious noise levels is inconclusive, the record establishes that claimant was exposed to injurious noise.[3] The administrative law judge found that employer's Hearing Conservation Program encompasses employees exposed to a TWA of 85 decibels, and

[3]The administrative law judge found that, while all three experts agreed that the OSHA standard for showing injurious noise exposure is a time-weighted average (TWA) of 90 decibels, Mr. Bode believed that the National Institute for Occupational Safety and Health (NIOSH) defines injurious noise at a TWA of 85 decibels, and Dr. Marks testified that there is debate as to the accuracy of the OSHA standard and as to whether the NIOSH standard should be lowered from 85 to 80 decibels. CXs 19 at 70-72, 96-97, 103-105; 22 at 189-190.

includes longshoremen such as claimant. CX 9 at 11, 22. The administrative law judge credited employer's 2008 sound level survey, which showed that longshoremen were exposed to a TWA of 86.3 decibels, and claimant's testimony that he did not receive training from employer in hearing conservation and did not always wear hearing protection. Tr. at 29; EX 11 at 8. The administrative law judge found that employer's noise survey did not sufficiently measure claimant's noise exposure because it did not account for the noise produced by a tractor in a confined hold, which claimant testified was exceedingly loud. *See* Tr. at 20-21, 28; CX 9 at 56; EX 12 at 38-39. The administrative law judge rejected the testimony of Andre Robinson, claimant's foreman, that claimant always wore hearing protection, since he could not be expected to oversee claimant at all times. Tr. at 72-73, 110-112. The administrative law judge, therefore, found that working conditions existed at employer's facility that could have caused claimant's hearing loss, based on claimant's testimony regarding his loud working conditions, the experts' acknowledgement that OSHA guidelines may not be completely accurate or consistent with other guidelines, and claimant's participation in employer's Hearing Conservation Program. Decision and Order at 13. Accordingly, the administrative law judge concluded that claimant established a prima facie case of work-related hearing loss.

We affirm the administrative law judge's finding that the Section 20(a) presumption applies in this case. Contrary to employer's contention, claimant need not produce an audiogram which qualifies as "presumptive evidence" in order to demonstrate he has a hearing loss; rather, it is for the administrative law judge to weigh the audiograms submitted and determine the appropriate weight to be given that evidence. *See R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); 20 C.F.R. §702.441. Thus, the test results based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) and found credible by the administrative law judge are substantial evidence of the existence of hearing loss, and the administrative law judge rationally found, based on this testing, that claimant established an "injury" for purposes of invoking the Section 20(a) presumption. *See Harris*, 42 BRBS at 7-9.

Moreover, the administrative law judge rationally rejected employer's contention that claimant did not establish the existence of working conditions that could have caused his hearing loss since employer's noise surveys do not record a TWA of 90 decibels or more. *See generally Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998). The administrative law judge rationally credited claimant's testimony of excessive noise exposure, the experts' acknowledgement that OSHA guidelines may not be completely accurate or consistent with NIOSH guidelines, and claimant's participation in employer's Hearing Conservation Program, to find that claimant's working conditions could have caused his hearing loss. *See id.* at 262; *see also Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Accordingly, the

administrative law judge's invocation of the Section 20(a) presumption that claimant's hearing loss is related to his employment is affirmed. *See Quinones v. H.B. Zachery, Inc.,* 32 BRBS 6 (1998), *aff'd in pert. part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Once, as here, the Section 20(a) presumption is invoked and rebutted,[4] claimant bears the burden of establishing the work-relatedness of his hearing loss based on the record as a whole. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Employer contends the administrative law judge erred in finding, based on the record evidence as a whole, that claimant established his hearing loss is work-related.[5]

The aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. Addressing the evidence of record on causation as a whole, the administrative law judge correctly stated that, while claimant's symptoms and the tests are "somewhat" inconsistent with noise-induced hearing loss, claimant must show only that his working conditions aggravated or contributed to his hearing loss.[6] Decision and Order at 15; *see generally Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); *see also Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS

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[4]The administrative law judge found the Section 20(a) presumption rebutted by the opinions of Drs. Gianoli and Marks that claimant's hearing loss is consistent with that caused by diabetes. Decision and Order at 15.

[5]Specifically, employer contends the administrative law judge erred by: relying on evidence that the cause of hearing loss can be multi-factorial; disregarding Dr. Marks's opinions based on the correct facts; incorrectly construing parts of Dr. Gianoli's testimony; considering Mr. Bode's testimony because he is an audiologist and not a medical doctor; and by finding the medical evidence of causation inconclusive. Employer also asserts that claimant's subjective symptoms and the objective findings are inconsistent with noise-induced hearing loss, and that claimant's hearing loss is due to diabetes.

[6]The administrative law judge noted claimant reported fluctuating hearing loss from ear to ear, which is not normal for a noise-induced hearing loss. Additionally, the administrative law judge noted that the lack of a "notch" on claimant's audiograms and his reported symptom of fullness are not indicative of noise-induced hearing loss; however, the administrative law judge found that claimant did not report fullness to Mr. Bode, and Mr. Bode testified that a notch is present in only 60 to 65 percent of noise-induced hearing loss cases. Decision and Order at 15; *see* CX 22 at 95-96, 110-111, 138-140.

137(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982). The administrative law judge found that Dr. Marks, Dr. Gianoli and Mr. Bode[7] agree that many factors may contribute to hearing loss and it may be impossible to precisely determine the cause thereof. CXs 19 at 60-61; 20 at 35, 81. The administrative law judge summarized Mr. Bode's opinion as stating that claimant "more than likely" has a noise-induced loss, and Dr. Marks's opinion as stating that diabetes was a "prime cause" of claimant's hearing loss, but that occupational noise exposure contributed to some extent. Decision and Order at 16; *see* CXs 19 at 66-69; 22 at 134-135, 141. The administrative law judge found that, while Dr. Gianoli opined that workplace noise did not contribute to claimant's hearing loss, he admitted that hearing loss can have more than one cause and is due to a combination of everything a person is exposed to over a lifetime. Decision and Order at 16; *see* CX 20 at 30-32, 35, 51, 81-82, 95. The administrative law judge concluded, based on this evidence, that claimant's hearing loss was, in part, noise-induced. Decision and Order at 16.

The administrative law judge has the authority to weigh the evidence and to draw inferences therefrom. *See, e.g., Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). In this case, the administrative law judge acted within his discretion as the fact-finder to credit the deposition testimony of Mr. Bode and Dr. Marks linking claimant's hearing loss in part to his employment to find that claimant established he has a work-related hearing loss. Contrary to employer's contention, the administrative law judge did not rely on general statements in employer's Hearing Conservation Program manual or speculate on the relevance of the inclusion of longshoremen in this program in reaching this conclusion. *See* Decision and Order at 15-16. Regarding employer's objections to the administrative law judge's weighing of the medical evidence, the mere fact that claimant had pre-existing diabetes cannot defeat the claim where the administrative law judge credited evidence that claimant's employment contributed to or aggravated his hearing loss. *See generally Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (discussing aggravation rule). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection from among competing inferences must be affirmed where it is supported by substantial evidence, which in this case is the opinions of Dr. Marks and Mr. Bode. *See Mendoza v. Marine Pers. Co., Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Specifically, Dr. Marks stated that, "[I] personally believe that [occupational noise exposure] contributed to some extent;" Mr. Bode stated that claimant has bilateral sensorineural hearing loss due to age and work-related noise exposure. CXs 19 at 69; 22 at 134, 141. The Board is not empowered to reweigh this medical evidence to obtain the result urged by employer. *See Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT); *Mijangos v. Avondale Shipyards, Inc.*,

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[7]Mr. Bode is a board-certified audiologist, who testified that he would receive a doctorate in audiology in August 2012. CX 22 at 7-8, 54.

948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Accordingly, as it is supported by substantial evidence, the administrative law judge's finding that claimant's hearing loss is due at least in part to his employment is affirmed. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). Thus, we affirm the finding that claimant is entitled to benefits for a 13.8 percent binaural impairment.

Employer next challenges the administrative law judge's finding that it is the employer liable for claimant's hearing loss benefits. Employer contends the administrative law judge erred by crediting the WENO records and the testimony of Ronald Felger, a human resource clerk at WENO, and by not crediting claimant's testimony that he worked only for the Port of Orleans/Ports America in 2009, which, employer asserts, is supported by claimant's Social Security records.

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case, as in this hearing loss case, is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. Employer bears the burden of establishing that it is not the responsible employer. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Zeringue v. McDermott, Inc.,* 32 BRBS 275 (1998). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has stated that, in order to meet its burden of establishing that it is not the responsible employer in an occupational disease case, an employer must prove either: (1) that exposure to injurious stimuli did not cause the employee's occupational disease; or (2) that the employee was performing work covered by the Act for a subsequent employer where he was exposed to injurious stimuli. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *see also Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In his decision, the administrative law judge correctly stated that the responsible employer would be whomever claimant worked for directly prior to the May 27, 2009 audiogram, which is the first evidence of hearing loss of record. *See Lins v. Ingalls Shipbuilding, Inc.,* 26 BRBS 62 (1992); Decision and Order at 13. The administrative law judge noted employer's reliance on claimant's deposition testimony and the Social Security records to establish that it is not the responsible employer. *See* CX 6; EX 12 at 30. The administrative law judge found that claimant's testimony that he worked only for Port of Orleans/Ports America, and not for employer, in 2009 "was clearly a misstatement and a memory issue; all evidence is to the contrary." Decision and Order at 13. The administrative law judge found that the WENO records show that claimant last worked for employer prior to the May 27, 2009 audiogram and that he did not work for Port of Orleans/Ports America prior to this audiogram. *Id*; *see* CX 21 at 68-70; *see also*

CX 21 at 11-12. The administrative law judge found the Social Security records do not support employer's assertion as they show only that claimant worked for Port of Orleans/ Ports America sometime in 2009 and not necessarily directly prior to May 27, 2009.[8] CX 6 at 2-3. The administrative law judge rejected employer's objection to Mr. Felger's testimony that he did not have personal knowledge of the WENO records, and he found that, even if Mr. Felger's testimony is discounted, the WENO records speak for themselves. Decision and Order at 13-14 n.4.

The administrative law judge acted within his discretion to credit the WENO records, as supported by the testimony of Mr. Felger, over claimant's deposition testimony and the Social Security records, to find that claimant last worked for employer prior to undergoing the May 27, 2009 audiogram. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mendoza,* 46 F.3d 498, 29 BRBS 79(CRT); *Zeringue*, 32 BRBS 275. Based on these findings, the administrative law judge rationally found that employer failed to establish that claimant was exposed to subsequent injurious noise at Port of Orleans/Ports America prior to his audiogram on May 27, 2009. As substantial evidence supports the finding that claimant was last exposed to injurious noise while working for employer, the administrative law judge's conclusion that employer is liable for benefits for claimant's work-related hearing loss is affirmed. *See Cuevas,* 977 F.2d 186, 26 BRBS 111(CRT); *Lins,* 26 BRBS 62; *see also Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

Employer also challenges the administrative law judge's denial, pursuant to Section 8(f)(3), of its request for Section 8(f) relief. Section 8(f)(3) requires an employer to present a request for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars the payment of benefits by the Special Fund, unless the employer demonstrates it could not have reasonably anticipated while the case was pending before the district director that the Special Fund's liability would be at issue.[9] 33

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[8]The Social Security records state that in 2009 claimant earned $2,598.20 with employer, $446.25 with SSA Gulf, Inc., and $3,300 with Ports America Louisiana LLC, which is Ports of Orleans/Ports America. CX 6 at 2-3.

[9]Section 8(f)(3), 33 U.S.C. §908(f)(3), states:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore [sic], shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with

U.S.C. §908(f)(3). The regulation implementing this provision, 20 C.F.R. §702.321, provides that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known. If claimant's condition has not reached maximum medical improvement and no claim for permanency has been raised by the date of referral to the Office of Administrative Law Judges (the OALJ), an application need not be submitted to the district director; however, in all other cases failure to do so is an absolute defense to the liability of the Special Fund. This defense is an affirmative defense which must be raised and pleaded by the Director. *Abbey v. Navy Exchange,* 30 BRBS 139 (1996). Failure to timely submit a fully documented application may be excused only where employer could not have reasonably anticipated the liability of the Special Fund prior to the district director's consideration of the claim. 20 C.F.R. §702.321(b)(3); *see Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991).

The administrative law judge found that an informal conference was held on October 19, 2010, at which claimant alleged a permanent partial disability based on a 13.4 percent hearing loss, and that employer did not raise Section 8(f) relief prior to or at that time. A recommendation was deferred in order for employer to obtain a second opinion. CX 14. The March 30, 2011 recommendation stated that employer should pay claimant compensation for the claimed 13.4 percent hearing loss impairment, and it noted that employer chose not to have claimant examined by a specialist in the greater New Orleans area. CX 15 at 2. The matter was referred to the OALJ on March 30, 2011; the district director noted that Section 8(f) had not been raised. CX 18 at 1. Employer's first application for Section 8(f) relief was filed in May 2012.

The administrative law judge found that an employer must raise Section 8(f) relief when it has reason to believe that claimant has a permanent disability. He found that claimant's LS-203 claim form filed on August 19, 2009, alleged that his hearing loss was permanent, and claimant again alleged permanency at the informal conference in October 2010. Decision and Order at 23; *see* CXs 13-14. The administrative law judge noted that employer had listed Section 8(f) as a potential issue in its LS-207 Notice of Controversion filed on February 17, 2010. Decision and Order at 23 n. 7; *see* EX 2. Claimant was deposed on September 17, 2010, prior to the informal conference, and he testified about his diabetes, high blood pressure, and prior eye surgery. The administrative law judge found that this testimony "should have put a reasonable person on notice that [claimant] had some pre-existing conditions." Decision and Order at 23; *see* EX 12 at 36, 52, 57, 67-68. The administrative law judge found, therefore, that employer should have reasonably anticipated the liability of the Special Fund by the time of the informal conference on October 19, 2010. Accordingly, the administrative law

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> such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

judge found that the absolute defense of Section 8(f)(3) applies, and he therefore concluded that employer is not entitled to Section 8(f) relief. Decision and Order at 23.

In this case, the Director timely raised the absolute defense before the administrative law judge, and it is undisputed that employer did not raise a claim, or file an application, for Section 8(f) relief with the district director. Moreover, employer does not dispute the administrative law judge's finding that employer was aware of the permanency of claimant's hearing loss by the time of the informal conference. 20 C.F.R. §702.321(b)(1); *see also Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109(CRT) (5th Cir. 1992). Whether employer should have reasonably anticipated the liability of the Special Fund while the claim was before the district director is a factual determination to be addressed by the administrative law judge. *Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP [Bailey]*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991). Employer contends the administrative law judge erred in finding it could have reasonably anticipated the liability of the Special Fund, since no medical opinion had been rendered relating claimant's hearing loss to his pre-existing diabetes by the time of the informal conference. For the reasons discussed below, we agree that the administrative law judge did not fully address this issue and that the case must be remanded.

In *Vina*, the employer was unaware while the case was pending before the district director of any prior medical treatment for the claimant's neck and back conditions. It knew only that the claimant had underlying degenerative changes in his back. The Fifth Circuit held on the facts before it that the employer was not obligated to undertake discovery at the district director level to determine if claimant had any serious neck and back conditions that were manifest prior to the claimant's sustaining a work-related back injury.[10] The court reasoned that the mere fact of pre-existing degenerative neck and back conditions was not sufficient information for the employer to have reasonably anticipated the liability of the Special Fund, as many people suffer back pain without being treated. Thus, the employer had no reason to know the manifest element of Section 8(f) was potentially satisfied. *Vina*, 168 F.3d at 195-196, 33 BRBS at 69-70(CRT). Citing *Cajun Tubing Testors,* the Fifth Circuit reiterated that "An employer is clearly obligated to submit a claim *when it knows that it has such a claim*." *Vina*, 168 F.3d at 195-196, 33 BRBS at 69-70(CRT) (emphasis in original) (quoting *Cajun Tubing Testors*, 951 F.2d at 75).

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[10]In *Vina*, claimant was diagnosed with degenerative neck and back conditions that were exacerbated by the work injury. Claimant, however, did not disclose until two weeks before the hearing that he had injured his neck and back two years before the work injury and had been unable to work for a year.

In *Ortiz v. Todd Shipyards Corp*. 25 BRBS 228 (1991), the claimant suffered a stroke approximately two weeks after experiencing shoulder and neck pain and headaches at work. The administrative law judge credited medical evidence that claimant's work contributed to the intracranial bleeding that preceded the stroke. Employer was not aware of the contribution of claimant's work to the intracranial bleeding until after the case was before the administrative law judge. The Board reversed the administrative law judge's finding that employer possessed sufficient medical evidence at the time of the informal conference to have reasonably anticipated the liability of the Special Fund based on the theory of intracranial bleeding as there was no medical evidence relating this condition to claimant's work injury prior to the referral of the claim to the OALJ.[11] *Ortiz*, 25 BRBS at 237-238.

In contrast, in *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd sub nom. Bath Iron Works v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55(CRT) (1st Cir. 1991), it was determined that the employer had sufficient medical evidence in its possession at the time of the informal conference indicating that the decedent's pre-existing lung impairment contributed to his death due to cardiorespiratory arrest, thereby enabling employer to reasonably anticipate the liability of the Special Fund.[12] *Bailey*, 24 BRBS at 236-237. The court stated,

> These various medical record reports, which were available to Employer-Carrier, charged each with knowledge of their contents well before the deputy commissioner's informal conference. Unless the law tolerates a "see no evil, speak no evil, hear no evil" approach, the ALJ and the Benefits Review Board, in assessing the medical worth of this wealth of information, could factually conclude that Employer-Carrier could have reasonably anticipated the probable liability of the special fund.

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[11]Additionally, the Board stated that medical records in existence prior to the stroke did not note intracranial bleeding but had attributed claimant's symptoms to cervical musculoskeletal pain. *Ortiz*, 25 BRBS at 237.

[12]In *Bailey*, a death benefits case, the administrative law judge found that the employer's own hospital records reflected the decedent's high blood pressure and annual chest x-rays that had been taken since 1966. The administrative law judge concluded that this evidence was sufficient to put employer on notice as to the possible applicability of Section 8(f). In affirming the administrative law judge's findings, the Board agreed that this evidence, which included a death certificate that listed "suspected asbestosis" under "Conditions Contributing to Death," was sufficient to indicate that the decedent had pre-existing medical conditions which could have contributed to his death. *Bailey*, 24 BRBS at 236-237.

950 F.2d at 59, 25 BRBS at 62(CRT). In *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142, 145 (1997), the Board stated that in addressing the reasonable anticipation issue,

> the administrative law judge should address when employer reasonably knew the case might meet the legal requirements for obtaining Section 8(f) relief, when evidence relevant to these requirements was available, and any other facts having an impact on employer's filing a Section 8(f) application.

Thus, from this body of case law, the Section 8(f)(3) bar applies only when employer could have reasonably anticipated that that it had a claim for Section 8(f) relief, not merely when it was aware that the claimant's work injury was permanent or that claimant had a pre-existing condition.

In his decision, the administrative law judge did not discuss any case precedent in determining that employer should have reasonably anticipated the liability of the Special Fund while the claim was before the district director merely because it was aware that claimant had pre-existing diabetes. Therefore, we must vacate the administrative law judge's finding that the request for Section 8(f) relief is barred pursuant to Section 8(f)(3), and remand the case for the administrative law judge to more fully address this issue.[13]

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[13]In its response brief, the Director notes that claimant had a prior audiogram in 2006 demonstrating a hearing loss, and that, therefore, employer was aware at the time of the informal conference that Section 8(f) could apply. The Director did not raise before the administrative law judge this audiogram as a basis for application of the Section 8(f)(3) bar. On remand, the administrative law judge may consider the Director's contention. *See generally Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988).

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for further findings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge