RAYMOND BYRD	)	BRB No. 92-930
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
	)	
VINCENT T. NOLFE	)	BRB No. 92-952
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	DATE ISSUED: _____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decisions and Orders Awarding Benefits and Approving Settlements of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant Nolfe.

Walter R. Meigs, Mobile, Alabama, for employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., 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: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

SMITH, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decisions and Orders Awarding Benefits and Approving Settlements (91-LHC-185, 91-LHC-262) of Administrative Law Judge Quentin P. McColgin rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant Byrd worked intermittently as a chipper for employer from 1981 to 1987. During this time, he was exposed to noise, and on October 3, 1986, he underwent an audiological evaluation. The results of the evaluation revealed a 21.6 percent binaural impairment. In 1987 and until another injury disabled him in November 1988, Byrd worked in other employment; he has not worked since. On January 31, 1990, Byrd underwent a second audiometric evaluation, the results of which revealed a 19.4 percent binaural impairment. Jt. Stip. at 2-3 and exhibits.

Byrd and employer filed a joint stipulation with the administrative law judge. Based on the lower, more recent evaluation, they stipulated to a 19.4 percent binaural impairment, as well as to an average weekly wage of $206.94 and a compensation rate of $137.96 per week. Additionally, the parties stipulated that, based on an audiogram dated March 19, 1982 which revealed a pre-existing 7.2 percent binaural impairment, employer filed an application for Section 8(f), 33 U.S.C. §908(f), relief with the district director. Jt. Stip. at 1-4. The district director neither granted nor denied the requested relief. Instead, she deferred consideration of the issue because "the fact of the injury is the

[1]The Director's appeals in *Byrd*, BRB No. 92-930, and *Nolfe*, BRB No. 92-952, were formally consolidated for the purposes of decision by a Board Order dated January 22, 1993.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

primary issue." Letter dated October 5, 1990. In the joint stipulation, Byrd and employer agreed employer is liable for a 12.2 percent impairment, or 24.4 weeks of benefits, and the Special Fund is liable for a 7.2 percent impairment, or 14.4 weeks of benefits. Jt. Stip. at 4. The parties also settled future medical benefits for $1,000, and they agreed to an attorney's fee of $2,250. *Id.* at 4-5.

The administrative law judge treated the joint stipulation as an application for a Section 8(i), 33 U.S.C. §908(i) (1988), settlement, and found that it had been served on the Regional Solicitor and the district director, and that no formal objections had been filed. Consequently, the administrative law judge accepted the stipulation and incorporated it into his decision. He stated, *inter alia*, that the date of injury is October 3, 1986, that Byrd had a pre-existing hearing loss of 7.2 percent based on a March 1982 audiogram, supporting Section 8(f) relief, and that Byrd is entitled to benefits for a 19.4 percent binaural impairment under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13) (1988).[2] Decision and Order at 1-2. The Director appeals the decision, and employer responds, urging affirmance. Claimant has not responded to the appeal.

Claimant Nolfe worked as an outside machinist for employer from 1937 until his retirement in 1978. During this time, he was exposed to noise, and on October 9, 1986, he underwent an audiological evaluation. The results of the evaluation revealed an 18.1 percent binaural impairment. On December 13, 1986, he underwent a second evaluation, the results of which revealed a 27.2 percent binaural impairment. Jt. Stip. at 2-3 and exhibits.

Nolfe and employer filed a joint stipulation, in which they agreed Nolfe has an 18.1 percent binaural impairment, and they agreed he is entitled to benefits based on an average weekly wage of $302.66. *Id.* at 1-2. According to the stipulations, employer filed an application for Section 8(f) relief for a 10.3 percent pre-existing binaural impairment. *Id.* at 4-5. The district director approved employer's request; however, she did not indicate the extent of the Special Fund's liability. Letter dated October 3, 1990. Employer later realized its relief is limited to a 7.8 percent impairment, based on an audiogram dated February 25, 1977, and notified the district director.[3] Therefore, Nolfe and employer stipulated that employer is liable for a 10.3 percent binaural impairment, or 20.6 weeks of benefits, and the
Special Fund is liable for a 7.8 percent pre-existing hearing loss, or 15.6 weeks of benefits. Additionally, Nolfe and employer settled future medical expenses for $1,000, and they agreed to an attorney's fee of $1,975. *Id.* at 5-6.

The administrative law judge treated the joint stipulation as an application for a Section 8(i)

[2]The administrative law judge also accepted that part of the parties' stipulation concerning future medical expenses and an attorney's fee. Although he "awarded" a fee of $2,500 in the original decision, he corrected his mistake in an Order on Reconsideration dated February 14, 1992.

[3]The parties stipulated that when employer informed the district director of a change from a request for relief from compensation for a 10.3 to a 7.8 percent binaural impairment, the district director stated she "no longer assigns a percentage to her Special Fund grants. . . ." Jt. Stip. at 4.

settlement, and found that it had been served on the Solicitor of Labor, the Associate Regional Solicitor and the district director, and that no formal objections had been filed. Consequently, the administrative law judge accepted the stipulation and incorporated it into his decision, finding the agreement to be reasonable. He stated, *inter alia*, that the date of injury is October 9, 1986, that Nolfe had a pre-existing hearing loss of 7.8 percent, supporting Section 8(f) relief, and that Nolfe is entitled to benefits for an 18.1 percent binaural impairment under Section 8(c)(13) at a compensation rate of $201.77 per week. Decision and Order at 1-2. The Director appeals the decision, and Nolfe and employer respond.

In both appeals, the Director contends the administrative law judge erred in treating the parties' joint stipulations as applications for Section 8(i) settlements, and in approving settlements which affect the Special Fund, without the Director's participation.[4] In *Byrd*, the Director specifically argues that employer's request for Section 8(f) relief was not approved and that the administrative law judge did not adjudicate the issue of the Special Fund's liability but merely accepted the parties' stipulation. Employer responds, arguing that because the district director deferred consideration of Section 8(f) to the administrative law judge, the Director waived his right to object to the settlement. Further, it argues that substantial evidence supports the administrative law judge's settlement approval.

In *Nolfe*, the Director specifically argues that, although Section 8(f) relief was approved, a limit was not set on the Special Fund's liability. Moreover, he argues he explicitly opposed any settlement which affected the Special Fund, and he contends average weekly wage must be determined in accordance with *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), especially as the stipulated average weekly wage may expose the Special Fund to excessive liability. Employer responds, again arguing waiver; however, it agrees to a remand on the question of average weekly wage. Claimant Nolfe responds and, citing *Dickinson v. Alabama Dry Dock & Shipbuilding Corp.*, ___ BRBS ___, BRB No. 91-789 (May 24, 1993), urges affirmance. He contends the Director constructively participated in the process, and he argues that the average weekly wage issue cannot be raised for the first time on appeal. The Director replies, reiterating his prior written objection to a settlement involving the Special Fund, and contending the Special Fund cannot be held liable for benefits calculated by a legally erroneous method.

First, the Director contends the administrative law judge erred in approving settlements involving the Special Fund without his participation.[5] Particularly, the Director cites 20 C.F.R.

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[4]Although the parties did not specifically request settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i) (1988), they have not objected to this characterization. Moreover, the Director's sole objection on claimants' behalf is that the settlements foreclose Section 22, 33 U.S.C. §922, modification. Claimant Byrd no longer works for employer, and was injured in other employment, and claimant Nolfe is retired. As the percentage of hearing loss for which employer is liable is fixed, modification is of no benefit to these claimants.

[5]Contrary to the Director's contention in *Nolfe*, he did not "explicitly oppose" a settlement between the parties. Instead, he stated:

§702.242(a), which requires a settlement agreement to be a stipulation signed by all the parties. The Board has long held that an agreement between an employer and a claimant which affects the liability of the Special Fund is not binding on the Fund absent the Director's participation. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985); *Younger v. Washington Metropolitan Area Transit Authority*, 16 BRBS 360 (1984). Moreover, in 1984, Congress added Section 8(i)(4) to the Act to prevent employers from seeking Section 8(f) relief after reaching settlements with claimants in cases that would otherwise be assigned to the Special Fund.[6] *See Dickinson*, slip op. at 3; 33 U.S.C. §908(i)(4) (1988).

The Director did not explicitly participate in either settlement process, as he was not a party to the joint stipulations. However, the Board has recently held that constructive participation by the Director may prevent a later challenge to a settlement between the parties, even though the agreement affects the liability of the Special Fund. *Dickinson*, slip op. at 5. In *Dickinson*, the district director approved an employer's request for Section 8(f) relief, specifically denoting the extent of the pre-existing hearing loss for which the Special Fund was liable, and the Director notified the administrative law judge he would not appear at the hearing because of said approval. The Board held that the Director constructively participated in the settlement and gave approval of disbursement from the Special Fund consistent with the settlement agreement. *Dickinson*, slip op. at 4. Further, based on the Director's constructive participation, and because the extent of employer's entitlement to Section 8(f) relief was established prior to settlement, the Board held the Special Fund bound by the agreement, which attempted only to hold the Special Fund liable for the previously approved amount. Therefore, the Board determined the absence of the Director's signature on the agreement was irrelevant, and it affirmed the administrative law judge's approval of settlement. *Id.* at 5.

In *Byrd*, the district director deferred consideration of employer's request for Section 8(f) relief to the administrative law judge.[7] In *Nolfe*, the district director approved employer's request for

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> [T]he Solicitor does *reserve the right to object* to any settlement in the case in (sic) which affects the trust and in which the claimant (sic) has not first renounced his entitlement to 8(f) relief.

Letter dated June 6, 1991 (emphasis added). Nolfe and employer filed their joint stipulation with the administrative law judge on September 25, 1991, serving the Solicitor, the Associate Regional Solicitor and the district director. Jt. Stip. at 8-9. According to the administrative law judge, as of December 18, 1991, he had not received any objections to the agreement. Decision and Order at 1-2.

[6]Section 8(i)(4) provides:

> The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

33 U.S.C. §908(i)(4) (1988).

[7]The district director has the authority to approve requests for Section 8(f) relief in hearing loss

Section 8(f) relief on October 3, 1990; however, she did not indicate the specific extent of the Special Fund's liability. The actions by the district director in each of these cases distinguish them from the situation in *Dickinson*. In each case, the Director did not approve a specific amount for which the Special Fund would be liable for claimants' pre-existing disabilities; therefore, it cannot be said that he approved disbursement of funds consistent with the agreements or constructively participated in either settlement process. *See Dickinson*, slip op. at 4-5. Because the Director did not participate, explicitly or constructively, in either of the settlements, we hold that the administrative law judge erred in approving these agreements which affect the liability of the Special Fund. *See Brady*, 17 BRBS at 46; *Younger*, 16 BRBS at 360; 33 U.S.C. §908(i)(4) (1988). As the agreements violate the provisions of Section 8(i)(4) of the Act by holding the Fund liable for sums payable pursuant to the settlements, we must vacate them. Therefore, we remand the cases to the administrative law judge for decisions on the merits of each. Specifically, he must adjudicate the Section 8(f) claims.

The Director also contends that in *Nolfe*, in light of the Supreme Court's decision in *Bath Iron Works*, the stipulated average weekly wage potentially exposes the Fund to excessive liability because the parties utilized the national average weekly wage in effect in 1986 instead of claimant's average weekly wage at the time of his injury.[8] The Supreme Court of the United States recently held that occupational hearing loss injuries are complete when exposure to noise ends and that average weekly wage must be set at that time. *Bath Iron Works*, ___ U.S. at ___, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Accordingly, the Board has held that the proper date for the commencement of benefits in cases involving retirees with hearing losses, *i.e.* the date their injuries are complete, is the date of last exposure to workplace noise, which is often at retirement. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). Because Nolfe retired in 1978, the Director argues it was improper for the parties to utilize the national average weekly wage in effect at the time of Nolfe's 1986 audiometric evaluation to determine his benefits. In light of *Bath Iron Works* and *Moore*, the Director's argument has merit. As there is no evidence of record on this issue, on remand in *Nolfe*, the administrative law judge must re-open the record for the submission of evidence concerning Nolfe's average weekly wage as of the date of his last exposure to injurious noise.

In summary, because the Director did not participate in either settlement, and because the parties in *Nolfe* stipulated to an average weekly wage which potentially exposes the Special Fund to excessive liability, the settlements cannot bind the Special Fund; thus, we vacate the Decisions and Orders Approving Settlements in both *Byrd* and *Nolfe*. The cases are remanded for consideration on the merits in accordance with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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cases. *Dickinson*, slip op. at 4; OWCP Release No. 64 dated June 15, 1987, *reprinted in* Volume A BRBS 4-114.

[8]Contrary to claimant's response, the Director may raise new issues on appeal if the liability of the Special Fund is at issue, and the Director's contentions allege erroneous legal determinations and effectively challenge only the administrative law judge's analysis of existing evidence. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

I concur:

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ROBERT J. SHEA
Administrative Law Judge

BROWN, Administrative Appeals Judge, concurring:

I concur in the result reached by my colleagues in this case.

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JAMES F. BROWN
Administrative Appeals Judge