ANDREW McGAREY	)	BRB No. 12-0672
Claimant-Petitioner	)	
v.	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 08/23/2013
Self-Insured Employer-Respondent	)	
THOMAS B. RUSSELL	)	BRB No. 13-0020
Claimant-Petitioner	)	
ELECTRIC BOAT CORPORATION	)	
Self-Insured Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Granting Employer's Cross-Motion for Summary Decision, Denying Claimant's Motion for Summary Decision, and Denying Claim for Section 14(e) Assessment of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor, and the Decision and Order Granting Employer's Counter Motion for Summary Decision, Denying Claimant's Motion for Summary Decision, and Denying Claim for Section 14(e) Assessment of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut, for claimants.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, and Conrad M. Cutcliffe (Cutcliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

Dominique Sinesi (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant McGarey appeals the Decision and Order Granting Employer's Cross-Motion for Summary Decision, Denying Claimant's Motion for Summary Decision, and Denying Claim for Section 14(e) Assessment (2012-LHC-01296) of Administrative Law Judge Daniel F. Sutton and Claimant Russell appeals the Decision and Order Granting Employer's Counter Motion for Summary Decision, Denying Claimant's Motion for Summary Decision, and Denying Claim for Section 14(e) Assessment (2012-LHC-01688) of Administrative Law Judge Timothy J. McGrath, 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). We must affirm the administrative law judges' 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). We consolidate these cases for decision. 20 C.F.R. §802.104(a). The facts of each case are set forth below.

McGarey, BRB No. 12-0672

Claimant McGarey has been employed by employer since 1975 as an outside machinist/grinder, and continues to work in that capacity. Throughout his employment with employer, he has undergone audiological evaluations conducted at employer's facility. *McGarey* Decision and Order at 2; CX 1. On May 18, 2011, claimant filed a Notice of Injury (LS-201) and a claim for compensation (LS-203) seeking compensation for a work-related hearing loss and listing the date of injury as May 17, 2011. CX 2. In a June 1, 2011 letter to claimant's attorney, employer's workers' compensation specialist, Mr. McGreevy, acknowledged receipt of the claim and noted that he had not received medical reports from claimant's attorney to support the claim for benefits. CX 3. Mr. McGreevy further stated that as a March 10, 2010 audiogram conducted at employer's facility showed an 11.5625 percent binaural hearing loss, employer was issuing payment of compensation for this 11.5625 percent binaural loss, less a credit for compensation it

had previously paid claimant on a prior claim for a 7.5 percent binaural hearing loss.[1] *Id.*; CX 4. In response to claimant's subsequent request for a Section 14(e), 33 U.S.C. §914(e), assessment, Mr. McGreevy stated that the increased hearing loss measured in the March 10, 2010 audiogram, as compared to claimant's previous hearing test, did not substantiate that this additional hearing loss was work-related. CX 5. Mr. McGreevy therefore took the position that the March 10, 2010 audiogram did not give employer knowledge of the injury so as to trigger employer's responsibility to either pay compensation or file a notice of controversion pursuant to Section 14 of the Act, 33 U.S.C. §914(b), (d), (e).[2] *Id.*

Claimant moved for summary decision, contending that employer had knowledge of his injury, specifically a loss of hearing, as of the date of its in-house audiological evaluation on March 10, 2010, and that employer did not controvert the claim. Claimant asserted that employer's failure to pay compensation within 28 days of the March 10, 2010 audiogram triggered its liability for a Section 14(e) assessment. Employer opposed claimant's motion and filed its own cross-motion for summary decision, contending that, pursuant to the Board's decision in *Mowl v. Ingalls Shipbuilding, Inc.,* 32 BRBS 51 (1998), it is not liable for a Section 14(e) assessment. In the alternative, employer argued that, pursuant to Section 14(e), it should be excused from paying compensation due to conditions beyond its control that prevented it from paying compensation at the time of the March 10, 2010 audiogram.

In his decision in *McGarey,* Judge Sutton found the Board's decision in *Mowl* to be dispositive of the Section 14(e) issue. *McGarey* Decision and Order at 4. Specifically, based on his reading of *Mowl,* Judge Sutton found that employer did not have full knowledge of claimant's injury for which compensation was to be paid for the purpose of Section 14(e) until the *claim* for compensation for cumulative work-related

[1]Although the March 10, 2010 audiogram referenced in Mr. McGreevy's letter is not included in employer's Individual Hearing Summary which lists claimant's hearing test results, CX 1, the administrative law judge found, and the parties agree, that an in-house audiological evaluation was conducted on that date and that this audiogram served as the basis for employer's voluntary payment of compensation to claimant. *McGarey* Decision and Order at 2. Moreover, the parties agree that employer properly deducted a credit for the compensation previously paid to claimant for a 7.5 percent binaural hearing loss. *See* Cl. Motion for Summary Decision at 3.

[2]Mr. McGreevy additionally stated that the March 10, 2010 audiogram was conducted as part of employer's Hearing Conservation Program, and that audiograms are performed to identify and report any threshold shift as required by OSHA. CX 5.

hearing loss was filed by claimant on May 18, 2011.[3] *Id.* at 5. Judge Sutton thus concluded that as employer voluntarily paid claimant all the compensation he was due based on the March 10, 2010 audiogram, less the credit for compensation previously paid, within 14 days after the claim was filed on May 18, 2011, employer is not liable for a Section 14(e) assessment. *Id.* at 5-6. Because the administrative law judge decided the Section 14(e) issue on the basis of his interpretation of the Board's decision in *Mowl*, he did not address employer's alternative argument that it should be excused from making payment at the time of the March 10, 2010 audiogram.

Russell, BRB No. 13-0020

Claimant Russell, who remains employed as a welder for employer, has worked for employer for 29 years. CX 3. Beginning on or about July 28, 1988, he has undergone multiple audiological evaluations at employer's facility, including an evaluation conducted on March 7, 2011. *Russell* Decision and Order at 2; CXs 1, 2. On May 9, 2011, claimant filed a Notice of Injury (LS-201) and a claim for compensation (LS-203), seeking compensation for work-related hearing loss and listing the date of injury as March 7, 2011. CX 3. In a May 23, 2011 letter to claimant's counsel, Mr. McGreevy stated that employer would pay claimant compensation for a 7.5 percent left monaural hearing loss based on the March 7, 2011 audiogram; he attached an LS-208, Notice of Final Payment, indicating that such compensation was paid on May 23, 2011. CX 4.

Claimant moved for summary decision, asserting that employer had knowledge of his injury as of the date of its March 7, 2011 in-house audiogram and that as employer's payment of compensation was not timely, it is liable for a Section 14(e) assessment. Employer filed an objection to claimant's motion and a counter-motion for summary decision, contending that a Section 14(e) assessment should be denied based on Judge Sutton's decision in *McGarey.*

In his decision in *Russell,* Judge McGrath agreed with employer that the decision issued by Judge Sutton in *McGarey* was directly on point, and he therefore adopted the holding in that case. *Russell* Decision and Order at 4. Consequently, Judge McGrath concluded that as employer voluntarily paid claimant all compensation due based on the March 7, 2011 audiogram within 14 days of the claim on May 9, 2011, employer is not liable for a Section 14(e) assessment. *Id.* at 5.

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[3]Judge Sutton's reference to the filing of the claim on May 11, 2011, *McGarey* Decision and Order at 5, is a typographical error; the claim was filed on May 18, 2011. CX 2.

On appeal, claimants assign error to the administrative law judges' conclusions of law, contending the administrative law judges incorrectly applied the Board's decision in *Mowl* to find that claimants are not entitled to Section 14(e) assessments.[4] Employer has filed response briefs in both cases, contending the administrative law judges properly denied Section 14(e) assessments. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in *Russell,* contending that the administrative law judges' and employer's reading of *Mowl* is overbroad. With respect to claimant Russell, the Director avers that employer had full knowledge of claimant's hearing loss on March 7, 2011, when it conducted the audiogram showing the degree of hearing loss later claimed, and that employer is therefore liable for a Section 14(e) assessment. Employer has filed a supplemental brief in *Russell,* contending the Director's position ignores the fact that claimant continued to work for employer after his March 7, 2011 audiogram.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40(c), 18.41(a). For the reasons that follow, we conclude that the administrative law judges erred in granting employer's motions for summary decision in each case as the law was not correctly applied.

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 of the injury 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(e) provides that the employer is liable for a ten percent assessment for failure to pay compensation when due unless the employer timely files a notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or unless the nonpayment is excused upon employer's showing that, because of conditions beyond its

[4]In *McGarey,* claimant additionally contends that Judge Sutton erred by characterizing employer's payment of compensation as "voluntary." As the term "voluntary" simply means that payments were not made under the terms of a compensation award, claimant's argument in this regard is rejected. *See generally* 33 U.S.C. §914(f); *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 611, 9 BRBS 326, 329 (3d Cir. 1978).

control, it could not make timely payments. 33 U.S.C. §914(e);[5] *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

It is well established that, pursuant to the plain language of the Act, the employer's duty to pay benefits or to file a notice of controversion pursuant to Section 14(b), (d) arises upon its receipt of notice or knowledge of the claimant's injury, as opposed to knowledge of a specific claim for benefits. *Prolerized New England Co. v. Benefits Review Board,* 637 F.2d 30, 39-40, 12 BRBS 808, 819-20 (1st Cir. 1980), *cert. denied,* 452 U.S. 938 (1981); *Bailey v. Newport News Shipbuilding & Dry Dock Co.,* 39 BRBS 11, 16 (2005); *Miller v. Prolerized New England Co.*, 14 BRBS 811, 821 (1981), *aff'd,* 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Pilkington v. Sun Shipbuilding & Dry Dock Co.,* 14 BRBS 119, 126 (1981). Employer's knowledge for purposes of Section 14 is governed by the same standard as employer's knowledge of injury under Section 12(d)(1).[6] *Mowl,* 32 BRBS at 54; *Pilkington,* 14 BRBS at 126.

In finding that employer is not liable for a Section 14(e) assessment in the *McGarey* case, Judge Sutton relied on *Mowl* for the proposition that in a hearing loss case in which the claimant continues to work and to be exposed to injurious noise after undergoing an audiogram demonstrating a loss of hearing, the employer does not have knowledge for Section 14(e) purposes of the injury for which compensation is to be paid until a claim is filed for cumulative work-related hearing loss. *McGarey* Decision and Order at 5. Judge Sutton's reasoning was adopted by Judge McGrath in the *Russell* case. *Russell* Decision and Order at 4-5. We agree with claimants and the Director, however,

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[5]Section 14(e) states:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e).

[6]An employer has knowledge for purposes of Sections 12(d)(1) and 14(e) if it knows of the injury and of such facts that a reasonable person would consider that compensation liability was possible and that further investigation should be made. *Pardee v. Army & Air Force Exch.,* 13 BRBS 1130 (1981); *see also Meardry v. Int'l Paper Co.,* 30 BRBS 160 (1996).

that *Mowl* is distinguishable from the cases before us and that the administrative law judges' reading of *Mowl* is overbroad.

In *Mowl,* the claimant received a 1988 audiogram which revealed a hearing loss. She continued to work and to be exposed to injurious noise and did not file a notice of injury or claim for compensation until after a subsequent audiogram performed in 1994 revealed an increased hearing loss. The issue addressed in *Mowl* involved the employer's liability for a Section 14(e) assessment based on its knowledge of the earlier 1988 audiogram which did not reflect the full extent of the injury on which the subsequent 1994 claim was based. The Board reversed the administrative law judge's award of a Section 14(e) assessment on that portion of the hearing impairment revealed by the 1988 audiogram, holding that, on the facts of the case, the employer could not be held liable for a Section 14(e) assessment based on the 1988 audiogram because the earlier audiogram did not give the employer knowledge of the subsequent cumulative hearing loss. *Mowl,* 32 BRBS at 53-54. The Board reasoned that in 1988, the full extent of the injury *on which the claim was based* was not known, emphasizing that for Section 14(e) purposes, "employer must have knowledge of the same injury or aggravation for which compensation is to be paid." *Id.* Thus, as the employer in *Mowl* timely filed a notice of controversion once it gained knowledge of the compensable injury in 1994, the Board reversed the administrative law judge's imposition of a Section 14(e) assessment. *Id.*

Contrary to the administrative law judges' broad reading, and to the argument made in employer's supplemental brief in *Russell, Mowl* does not stand for the proposition that in a hearing loss case in which claimant continues to work for employer and to be exposed to noise after undergoing an audiogram, employer cannot be found to have knowledge for purposes of Section 14(e) until the claim is filed.[7] Such a holding

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[7]In support of its position, employer relies on the Board's decision in *Paul v. General Dynamics Corp.,* 13 BRBS 1073 (1981), which was cited by Judge Sutton in *McGarey*. *See* Emp. Supplemental brief in *Russell* at 2; *McGarey* Decision and Order at 4-5. That case, however, does not support the broad proposition for which it is cited. In *Paul*, the claimant developed work-related asbestosis but continued to work for the employer. The Board held that, on the facts of that case, a Section 14(e) assessment should not apply to the period before the employer had notice of the claim. 13 BRBS at 1076-1077. In so holding, the Board relied on *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 662-63 (1979), in which the Board held, consistent with the reasoning of the United States Court of Appeals for the Third Circuit in *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3[d] Cir. 1978), that when the parties in good faith decide to wait a reasonable time after the claimant returns to work following an injury in order to determine the permanency or extent of disability, the employer need not file a notice of controversion until a controversy arises. *Id.* at 1077. *See also Collington v. Ira S. Bushey & Sons,* 13 BRBS 768, 773 (1981). The limited records before the Board in *McGarey* and *Russell,* however, contain no indication that

would be contrary to the plain language of Section 14(b) and (d), that employer must pay or controvert upon knowledge or notice of an *injury*. *See Prolerized New England Co.,* 637 F.2d at 39-40, 12 BRBS at 819-20; *Bailey,* 39 BRBS at 16; *Miller*, 14 BRBS at 821; *Pilkington,* 14 BRBS at 126. Rather, *Mowl* holds only that in a case in which the compensable injury is a cumulative hearing loss injury, the employer does not have knowledge for Section 14(e) purposes until it has knowledge of the full extent of the hearing loss injury on which the claim is based. *Mowl,* 32 BRBS at 54. In these cases, claimants were seeking a Section 14(e) assessment based on the hearing loss injuries demonstrated on the audiograms that formed the basis for the claims, not on prior audiograms.

As *Mowl* did not address the issue presented in the appeals before us regarding employer's liability for Section 14(e) assessments based on its knowledge of the injuries demonstrated on the in-house audiograms which served as the bases for its payment of compensation in both cases, the administrative law judges erred in relying on the Board's decision in *Mowl* to deny Section 14(e) assessments. We therefore vacate the administrative law judges' findings that employer is not liable for a Section 14(e) assessment in both *McGarey* and *Russell,* and remand the cases for the administrative law judges to reconsider the issue of employer's knowledge of claimants' injuries for purposes of Section 14(e) in accordance with the correct legal principles. As previously discussed, *supra* at n.6, employer possesses the requisite knowledge for purposes of Section 14(e) if it knows of the injury and of such facts that a reasonable person would consider that compensation liability was possible and that further investigation should be made. *Pardee v. Army & Air Force Exch.,* 13 BRBS 1130, 1137 (1981). Thus, on remand, the administrative law judges should determine whether employer had knowledge of the claimants' respective injuries when it conducted the in-house audiograms that revealed the full extent of the hearing loss for which compensation was claimed and paid.[8]

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there were good faith agreements between the parties to defer a determination of the extent of claimants' respective hearing impairments.

[8]On remand, in the *McGarey* case, the administrative law judge should address employer's alternative argument, made in employer's cross-motion for summary decision, that it should be excused from paying compensation in March 2010 "owing to conditions over which [it] had no control." 33 U.S.C. §914(e).

Accordingly, Judge Sutton's Decision and Order in *McGarey* and Judge McGrath's Decision and Order in *Russell* are vacated, and the cases are remanded for further consideration consistent with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge