BRB No. 90-0868

ALFRED SKELTON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Anthony J. Iacobo, Administrative Law Judge, United States Department of Labor.

Stephen Hessert and Michelle Jodoin LaFond (Norman, Hanson & DeTroy), Portland, Maine, for employer/carrier.

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

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

*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).

The Director, Office of Workers' Compensation Programs (the Director), appeals the

Decision and Order-Awarding Benefits (89-LHC-1484) of Administrative Law Judge Anthony J. Iacobo 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 which 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).

On March 16, 1988, claimant filed a claim under the Act, alleging that he sustained an employment-related, noise-induced, binaural hearing loss. At the time of the hearing, claimant had been employed with employer since December 1977. From December 1977 until 1984 claimant was employed as a rigger where he was exposed to loud noise from blowers, grinders, and chipping hammers. Tr. at 13-14. In October 1984, claimant injured his back and was out of work until September 1986 when he returned to light duty in the "cooking room" placing plastic coating on various equipment.

In his Decision and Order, the administrative law judge determined that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B)(1988), for a 28.1 percent binaural impairment based on the results of the latest audiogram of record. The administrative law judge found that Liberty Mutual Insurance Company is the responsible carrier. The administrative law judge found further that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f)(1988), based on claimant's pre-existing hearing loss of 7.8 percent as revealed on a November 1, 1984, audiogram. The administrative law judge therefore held the Special Fund liable for 7.8 percent of claimant's award and employer liable for the remaining 20.3 percent.

On appeal, the Director contends that the administrative law judge erred in awarding Section 8(f) relief to employer. Employer responds, urging affirmance of the administrative law judge's decision.

Section 8(f) limits an employer's liability for permanent disability benefits. Employer is entitled to this relief in a case of permanent partial disability if employer proves that claimant had a manifest pre-existing permanent partial disability which combines with the subsequent work injury to result in a materially and substantially greater degree of disability. If these prerequisites are met in a hearing loss case, employer's liability for compensation under Section 8(c)(13) is limited to the lesser of 104 weeks or the number of weeks attributable to the subsequent injury. *Reggiannini v. General Dynamics Corp.*, 17 BRBS 254 (1985); 33 U.S.C. §908(f)(1988).

The Director initially argues that claimant's pre-existing 7.8 percent hearing loss does not constitute an existing permanent partial disability because it became manifest after his exposure to injurious stimuli ended. The Director, citing the Board's decision in *Harris v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 114 (1989), *rev'd*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991), contends that in this situation there can be no employment discrimination against claimant, and that awarding Section 8(f) relief to employer amounts to a windfall.

We agree with the Director that the administrative law judge erroneously calculated the award of Section 8(f) relief in this case, although our rationale differs somewhat from that asserted by the Director.[1] The administrative law judge's award of Section 8(f) relief in this case based on a November 1984 audiogram is not consistent with his determination that claimant was not exposed to injurious stimuli after he injured his back in October 1984. Specifically, in determining that Liberty Mutual is the responsible carrier, the administrative law judge credited claimant's testimony that he was not exposed to any loud noise after his return to work in 1986. *See* Decision and Order at 4; Tr. at 18, 30-31. Thus, the administrative law judge's factual findings, which are supported by substantial evidence, establish the absence of exposure to noisy working conditions after the 1984 audiogram.

For purposes of the contribution element of Section 8(f), employer must establish that the pre-existing injury combined with the subsequent injury to result in a materially and substantially greater degree of permanent disability, or that the pre-existing disability was aggravated by claimant's subsequent employment. *See, e.g., Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989). The administrative law judge cited this law correctly in his discussion of Section 8(f), but he did not apply it correctly in view of his finding that claimant was not exposed to injurious stimuli after October 1984. In this case, based on the evidence credited by the administrative law judge in determining the responsible carrier, employer cannot satisfy the contribution element with regard to the increase in claimant's hearing loss between 1984 and 1986 as there is no evidence that the prior hearing loss was aggravated by noise exposure after November 1984.[2] In the absence of evidence that claimant's condition was aggravated by continued exposure to injurious noise after 1984, claimant has suffered only one injury and Section 8(f) is inapplicable.[3] *See generally Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT), *reh'g denied*, 859 F.2d 928 (5th Cir. 1988); *Mississippi Coast Marine, Inc. v. Bosarge*, 657 F.2d 885, 13 BRBS 851 (5th Cir. 1981), *modifying* 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981).

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[1] In *Harris v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 114 (1989), the Board held that Section 8(f) does not apply in the case of a retiree with an occupational disease whose pre-existing disability became manifest after retirement, because in such a case the purpose of Section 8(f) in preventing employment discrimination could not be served. This holding was reversed by the United States Court of Appeals for the Fourth Circuit. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991). The court held that in such a case the manifest requirement was eliminated, and that the pre-existing disability need only exist prior to the date of injury of the work-related occupational disease. *Id.*

[2] We note that the standard for determining the responsible employer or carrier requires only proof of exposure to injurious stimuli, and not an actual causal relationship between the injury and the exposure. *See Grace v. Bath Iron Works Corp.*, 21 BRBS 244 (1988).

[3] Although the audiogram results show an increase in hearing loss between 1984 and 1986, contrary to employer's suggestion in its response brief, this alone is insufficient to establish that claimant's hearing loss was aggravated by conditions of employment.

The record evidence reveals, however, that audiograms were administered on December 14, 1977 and November 26, 1978. The administrative law judge found that the December 1977 pre-employment audiogram reveals no hearing loss, and the November 1978 audiogram discloses a 2.8 percent binaural loss. Claimant testified that his employment prior to the back injury exposed him to loud noise, and Dr. Haughwout concluded that claimant's hearing loss is due, at least in part, to noise exposure at work. Employer thus has established the prerequisites for Section 8(f) relief with regard to the hearing loss demonstrated prior to claimant's leaving the noisy environment. *Risch*, 22 BRBS at 254. Claimant's pre-existing 2.8 percent hearing loss constitutes a manifest permanent partial disability that was aggravated by subsequent exposure to noise in the workplace. Accordingly, we modify the administrative law judge's award of Section 8(f) relief. The Special Fund is liable for the 2.8 percent of claimant's pre-existing hearing loss and employer is liable for the remaining 25.3 percent of claimant's binaural impairment.

We reject, however, the Director's contention that Section 8(f) should not apply in cases where the employer administers audiograms to claimant and allegedly does not inform him of the results or file an injury report with the district director. The Director argues that in such a case the claim should be considered to be amended to include a claim for the percentage of hearing loss revealed on such an audiogram and that the employer should be liable for benefits for this hearing loss. The Director further contends that if Section 8(f) applies to the later increase in hearing loss, the Special Fund and employer should get a credit for the "payments" for which employer is liable, under the holding in *Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989).

Initially, we note that there is no evidence that employer concealed the results of the audiograms administered in 1978 and 1984 from claimant. Moreover, employer had no duty under Section 30(a) of the Act, 33 U.S.C. §930(a)(1988), to report the 1984 hearing loss to the district director. Pursuant to Section 30(a), employer need only file a report of injury with the district director if an injury causes the loss of one or more shifts of work. *See Nelson v. Stevens Shipping and Terminal Co.*, 25 BRBS 277 (1992)(Dolder, J., dissenting on other grounds). There is no evidence in this case that claimant lost any time from work due to his hearing loss in 1978 and 1984.

Furthermore, claimant did not file a claim after the 1978 or 1984 audiograms were administered, and there is no basis under the Act for the claim to be "amended" by the Director to include claims for the prior hearing losses merely for the purpose of the Special Fund getting a credit against its liability. Claimant did not file a claim for any loss in 1978 or 1984 and therefore cannot be separately compensated for those losses at this time. Employer cannot be denied Section 8(f) relief merely because the Director alleges that employer concealed the results of prior audiograms for the purpose of later obtaining Section 8(f) relief.

Accordingly, we modify the administrative law judge's award of Section 8(f) relief. The Special Fund is liable for 2.8 percent of claimant's hearing impairment, and employer is liable for the

remaining 25.3 percent. In all other respects, the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge