

BRB No. 91-1708A

LOUIS HOCHMAN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS	)	DATE ISSUED:
CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Mark 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits (90-LHC-2375) of Administrative Law Judge David W. Di Nardi 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).

Claimant worked for employer's Electric Boat division from 1952 until his retirement in 1989, where he was exposed to loud noises. Subsequent to the administration of an audiometric examination on July 9, 1980, claimant filed a claim for benefits under the Act; employer voluntarily paid \$716.12 in compensation to claimant for a 1.65 percent binaural impairment. Claimant filed a second claim for benefits in 1984 for an additional hearing loss. On June 8, 1987, employer voluntarily paid \$3,530 in compensation to claimant for a binaural impairment of 6.105 percent. Neither of these settlements was approved by a district director or an administrative law judge. Subsequent to claimant's retirement on July 7, 1989, claimant filed a third claim under the Act alleging an additional hearing loss. An audiogram administered on October 3, 1989, revealed a 22.2 percent binaural loss.

In his Decision and Order, the administrative law judge found that claimant's hearing loss arose out of his employment with employer, and awarded benefits for his 22.2 percent binaural loss under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13)(1988), as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, interest, and an attorney's fee. The administrative law judge also found that relief under Section 8(f) of the Act, 33 U.S.C. §908(f), is available to employer. After initially finding that claimant did not suffer from any pre-employment hearing loss, the administrative law judge found that employer was entitled to Section 8(f) relief, since claimant had a "pre-existing" 6.10 percent hearing loss, based on audiograms administered in 1985.<sup>1</sup> Thus, the administrative law judge found that employer is liable for 16.1 percent of claimant's binaural loss, while the Special Fund is liable for claimant's pre-existing 6.1 percent binaural impairment. Next, citing *Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990), *aff'g Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), and *Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon.*, 23 BRBS 241 (1990)(*en banc*)(Brown, J., dissenting on other grounds), the administrative law judge determined that employer, and not the Special Fund, is entitled to a credit of \$4,246.89, the amount of employer's voluntary payments in 1982 and 1987.

On appeal, the Director contends that the administrative law judge erred in allowing employer, rather than the Special Fund, to receive a credit against its liability. Employer has not filed a brief in response to the Director's appeal.<sup>2</sup>

Allocation of the \$4,246.89 credit between employer and the Special Fund is the sole issue raised in this appeal. The Director argues that the administrative law judge misapplied the holdings of the United States Court of Appeals for the Second Circuit and the Board in *Krotsis* and *Balzer* respectively, asserting that the instant case is governed by the holding of United States Court of

---

<sup>1</sup>The increase of 16.1 percent in claimant's hearing loss is his "second injury" for Section 8(f) purposes. *Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989). Under Section 8(f), as amended in 1984, an employer's liability in hearing loss cases is limited to the lesser of 104 weeks or the extent of hearing loss attributable to the most recent injury. 33 U.S.C. §908(f)(1) (1988).

<sup>2</sup>Employer's appeal in this case, BRB No. 91-1708, was dismissed by Order dated December 27, 1991.

Appeals for the Fifth Circuit in *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989). We agree. In *Brown*, the claimant suffered a permanent partial disability to his left leg in 1979 and received voluntary compensation from his employer. In 1982, while working for the same employer, claimant again injured his left leg at work, suffering further disability. The administrative law judge awarded compensation for the entire resulting permanent partial disability, granted employer relief under Section 8(f), but determined that no credit for the compensation previously paid should be given. On appeal, the Board held that a credit for the voluntary payment should be allowed and that the employer, rather than the Special Fund, was entitled to utilize the credit to offset its liability. The Fifth Circuit reversed the Board's decision with regard to allocation of the credit, however, holding that applying the credit first to the Special Fund's liability (the "Fund-first" rule) is consistent with the express language of Section 8(f), in that the employer will always pay at least the amount that is related to the employee's second injury. If the employer were allowed a credit first, the court reasoned, the employer could actually pay less than the compensation due for the second injury alone. *Brown*, 868 F.2d at 762, 22 BRBS at 50 (CRT).

In *Krotsis*, the claimant's pre-employment audiogram indicated that he suffered from a hearing loss. During his employment with employer, he was exposed to loud noises and, in 1979, he filed a claim against the employer. Pursuant to Section 8(i), 33 U.S.C. §908(i), the parties attempted to settle the claim by agreeing that the employer would pay the claimant \$16,179.47, based on a stipulated total hearing loss of 36.63 percent. The district director, however, determined that this agreement was not in the best interest of the claimant and refused to approve the proposed settlement. Nevertheless, the employer voluntarily paid the claimant the agreed amount and the claimant took no further action on the claim. The claimant continued to work for the employer and in October 1983 filed a second claim, alleging additional hearing loss. The administrative law judge found that the claimant suffered from a 63.33 percent hearing loss as of October 1983, that he had suffered a hearing loss of 56.9 percent prior to his employment, and that pursuant to Section 8(f), the employer was liable for the 6.4 percent increase. The administrative law judge then credited to the employer the \$16,179.47 paid to the claimant in 1980.

The Director appealed, asserting that the Special Fund was entitled to the credit under the Fund-first theory of *Brown*. Holding that the employer's payment in 1980 was a voluntary payment of compensation in advance of an award, pursuant to Section 14(j), 33 U.S.C. §914(j)(1988),<sup>3</sup> since the proposed settlement was not approved, the Board rejected

---

<sup>3</sup>Under Section 14(j) of the Act, 33 U.S.C. §914(j)(1988), an employer is entitled to receive a credit for its voluntary payments of compensation against any compensation subsequently found due.

the Director's argument. Under the facts in *Krotsis*, allocation of the credit to employer resulted in its being liable for the full extent of the post-employment loss and the Fund's being liable for the pre-employment loss. The Board therefore affirmed the administrative law judge's award of a credit to the employer. The United States Court of Appeals for the Second Circuit, wherein appellate jurisdiction of the present case lies, affirmed the Board's decision. The court found a "crucial distinction" between the facts in *Krotsis* and *Brown*, in that in *Brown*, there was no pre-employment disability; all payments made by the employer which were at issue in allocating the credit were for successive work-related injuries. *Krotsis*, 900 F.2d at 511, 23 BRBS at 49 (CRT). By contrast, the employer in *Krotsis* had overpaid the portion of the disability for which it was liable, in view of its entitlement to Section 8(f) relief. Thus, the court held the employer was entitled to a credit for its payments since otherwise the effects of Section 14(j) would be vitiated. Similarly, in *Balzer*, the claimant filed one claim for a 40.78 percent hearing loss, 25.9 percent of which he had suffered prior to his employment with employer. The employer's voluntary payment in that case was in excess of the amount for which it was subsequently found liable, and thus, the Board ruled that employer, not the Special Fund, was entitled to a credit. *Balzer*, 23 BRBS at 243.

In the time since the Director filed her brief, the Second Circuit, in *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58 (CRT)(2d Cir. 1993), specifically acknowledged that the distinction between *Krotsis* and *Brown* applies to a situation where the claimant does not have a pre-employment hearing loss. The court held that where claimant's total compensation for an aggravation of his hearing loss is reduced by the amounts paid by the employer on previous hearing loss claims, and thus, there is no possibility that the employer could be liable for a disability that is not work-related, the Special Fund, and not the employer, is entitled to a credit on the amounts paid on the previous claims. *Blanchette*, 998 F.2d at 115, 27 BRBS at 69 (CRT).

The facts in the instant case are akin to those in *Brown* and *Blanchette* rather than to those in *Krotsis* and *Balzer*. The "crucial distinction" which the Second Circuit found in *Krotsis* between that case and *Brown*, is absent in this case. As in *Brown* and *Blanchette*, claimant herein did not suffer from any pre-employment disability; his entire hearing loss is due to his employment with employer. Therefore, employer did not overpay the portion of claimant's disability for which it is liable when it voluntarily paid \$4,246.89 to claimant. If employer were to be entitled to a credit in addition to relief under Section 8(f) employer would be absolved from paying full compensation for claimant's subsequent 1989 injury. See *Blanchette*, 998 F.2d at 116, 27 BRBS at 71 (CRT); *Davis v. General Dynamics Corp.*, 25 BRBS 221 (1991). Thus, we vacate the administrative law judge's allocation of the \$4,246.89 credit to employer, and modify the decision to reflect the Special Fund's entitlement to a credit of \$4,246.89.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is modified to reflect that the Special Fund, rather than employer, is entitled to a credit of \$4,246.89. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge