BRB No. 92-0451

JOSEPH F. DUNN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
	)	
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 Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for the self-insured employer.

Karen B. Kracov (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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (90-LHC-2758) of Administrative Law Judge Martin J. Dolan, Jr. 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 if they 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, who is currently retired, worked for employer as a rigger and foreman for thirty-five years, during which time he was exposed to loud industrial noise. An audiogram performed at the time claimant was hired on February 7, 1956, revealed a zero percent hearing loss. Claimant filed a claim under the Act for occupational hearing loss benefits in 1985. On September 24, 1987, employer voluntarily paid claimant $9,984 in compensation for an 11.1 percent binaural hearing loss.[1] Claimant retired on January 6, 1989. On November 15, 1989, claimant filed a second occupational hearing loss claim. An audiogram taken on April 12, 1990, revealed a binaural hearing impairment of 23 percent; a second audiogram performed on October 24, 1990, demonstrated a 29.4 percent binaural hearing loss. Claimant sought compensation under the Act for a 26.2 percent binaural work-related hearing loss based on the average of the April 12, 1990, and October 24, 1990, audiograms.

The administrative law judge found that claimant's binaural hearing loss was work-related and awarded him compensation for a 26.2 percent binaural hearing loss pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), commencing January 1, 1989. The administrative law judge, in addition, awarded claimant medical benefits pursuant to Section 7, 33 U.S.C. §907, and interest. The administrative law judge also granted employer relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f), finding that claimant had a pre-existing permanent partial disability, the 11.1 percent binaural hearing loss for which he previously was compensated. The administrative law judge accordingly determined that employer was liable for a 15.1 percent binaural hearing impairment (*i.e.*, 26.2 percent minus 11.1 percent) and that the Special Fund was liable for the remaining 11.1 percent hearing loss.[2] The administrative law judge further determined that claimant's total compensation should be reduced by the $9,984 previously paid on the first claim, and that employer, rather than the Special Fund, was entitled to the $9,984 credit. In so concluding, the administrative law judge agreed with employer that the decision of the United States Court of Appeals for the Second Circuit in *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), was controlling. The administrative law judge also awarded claimant's counsel an attorney's fee payable by employer.

On appeal, the Director contends that the administrative law judge erred by finding that employer, rather than the Special Fund, was entitled to the credit for the compensation previously paid to the claimant on the first hearing loss claim. The Director argues that whenever a credit for previous compensation paid entirely for an occupational injury is available to reduce the amount due

[1]There is no evidence of record indicating that this was a settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i).

[2] Under Section 8(f) as amended in 1984, an employer's liability in a hearing loss case is limited to the lesser of 104 weeks or the extent of hearing loss attributable to the most recent injury. *See* 33 U.S.C. §908(f)(1)(1988); *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).

to an employee, the credit should first be applied to reduce the liability of the Special Fund. The Director asserts that by awarding a credit to employer for its $9,984 payment on the first claim, the administrative law judge's ruling effectively allows employer to escape liability for the second injury, thereby contravening the clear intent of Section 8(f). The Director points out that the United States Court of Appeals for the Fifth Circuit adopted a "Fund-first" rule under similar circumstances in *Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989). Finally, the Director asserts that although the administrative law judge relied on *Krotsis* in awarding employer the credit in the present case, *Krotsis* is clearly distinguishable from the present case where the claimant's entire loss of hearing arose out of the course of his employment for employer and claimant sustained multiple injuries rather than a single injury.

By Order dated September 11, 1992, the Board granted employer's request to hold this case in abeyance pending the decision of the United States Court of Appeals for the Second Circuit in *General Dynamics Corp. v. Director, OWCP (Blanchette)*, 998 F.2d 109, 27 BRBS 58 (CRT)(2d Cir. 1993). Subsequent to the court's decision on July 2, 1993, the Board issued an Order dated August 10, 1993, indicating that the case was no longer being held in abeyance. On April 25, 1994, employer filed a Motion to Remand, in which it conceded that *Blanchette*, which supports the Director's position regarding the credit, is controlling and requested that the case be remanded for the employer to pay and/or reimburse the Special Fund in accordance with that decision.

We agree with the Director and the employer that the administrative law judge erred in determining that employer, rather than the Special Fund, is entitled to the credit for the compensation previously paid. Subsequent to the administrative law judge's Decision and Order in this case, the United States Court of Appeals for the Second Circuit, within whose jurisdiction the present case arises, issued its decision in *Blanchette*, which addresses the issue currently before us on appeal. In *Blanchette*, the court, adopting the reasoning of the United States Court of Appeals for the Fifth Circuit in *Brown*, held that where, as here, an employee has previously received compensation for a hearing loss which was entirely work-related brings a second injury claim alleging that his hearing loss has worsened, the Special Fund, and not the employer, is to receive the benefit of the credit. In so concluding, the court distinguished *Krotsis*, wherein the claimant had a pre-existing non-work related hearing loss and employer was determined to be entitled to the credit, noting that as claimants Blanchette and Wilcox did not exhibit any pre-employment hearing loss, awarding the credit to the Special Fund rather than to the employer would not unfairly result in the employer's being held liable for a disability which was not work-related. *Blanchette*, 998 F.2d at 115, 27 BRBS at 69 (CRT). The court further determined that allowing the Special Fund a credit under such circumstances was consistent with the express language of Section 8(f)(1) of the Act which indicates that the employer is to compensate the disabled employee for the *entire* second injury and with Congressional intent to control the unrestrained growth of the Special Fund's obligations by ensuring that employer pays the full stake specified in Section 8(f). *Blanchette*, 998 F.2d at 115-116, 27 BRBS at 70 (CRT); *see* H. R. Rep. No. 570, 98th Cong., 2d Sess., pt. 1, at 20, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2753. As it is undisputed that *Blanchette* is controlling, we reverse the administrative law judge's determination that employer, rather than the Special Fund, is entitled to the credit for the compensation previously paid to the claimant and modify the award to

reflect that the Special Fund is entitled to offset of the $9,984 credit against its liability under the Act.[3]

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 the $9,984 credit for compensation previously paid in connection with claimant's first injury claim. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]In light of our decision to modify the administrative law judge's Decision and Order, employer's request that the case be remanded is denied, as it is unnecessary.