BRB No. 92-1405

JOHN WESTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DULUTH, MISSABE AND IRON RANGE RAILWAY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

D. Edward Fitzgerald and J. Kent Richards (Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A.), Duluth, Minnesota, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees (91-LHC-1320) of Administrative Law Judge Charles W. Campbell 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 F.2d 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*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).

Claimant was exposed to loud noise while working for employer. In 1987, as part of a physical examination performed by employer, claimant learned that he had a hearing loss. Claimant subsequently informed his personal physician, Dr. Griesy, of this finding; Dr. Griesy then referred claimant to Dr. Merrick. At Dr. Merrick's request, an audiometric evaluation was performed on April 29, 1987, which revealed a binaural loss of 8.1 percent. While Dr. Merrick discussed the results of this audiometric evaluation with claimant, claimant did not physically receive either this audiogram or its accompanying report; instead, Dr. Merrick forwarded the audiogram to Dr. Griesy.

Thereafter, claimant filed a claim under the Act for a work-related hearing loss on June 29, 1990. Subsequently, Dr. Merrick performed another audiogram on December 7, 1990, which revealed a 13.8 percent binaural impairment. A third audiogram was conducted by Dr. Banovetz on January 21, 1991, which revealed a binaural loss of 7.8 percent.

In his Decision and Order, the administrative law judge first found that since claimant never actually received the 1987 audiogram, as required by Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D), the time period for notifying employer of an injury under Section 12 of the Act, 33 U.S.C. §912, and the filing of a claim under Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2), had not yet commenced. Thus, the administrative law judge found that claimant's claim, filed in 1990, was timely. Next, relying on Dr. Merrick's 1990 audiogram, the administrative law judge found that claimant suffers from a 13.8 percent binaural impairment, and awarded claimant permanent partial disability benefits pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), for a 13.8 percent binaural impairment. The administrative law judge also determined that since employer never paid compensation and never filed a notice of controversion, employer was liable for a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e), and assessed a 10 percent penalty on the total amount of compensation due claimant.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting a fee of $6,556.25, representing 52.45 hours of services performed at an hourly rate of $125, and $342.18 in expenses. Thereafter, employer filed objections to counsel's fee petition. In a Supplemental Decision and Order, the administrative law judge reduced the number of hours sought by counsel to 34.4, and awarded claimant's counsel a fee of $4,300, representing 34.4 hours of legal services at an hourly rate of $125, plus $342.18 in expenses.

On appeal, employer challenges the administrative law judge's determination that claimant's claim was timely filed, and that it is liable for a Section 14(e) penalty. In a supplemental appeal, employer contends that the attorney's fee awarded by the administrative law judge to claimant's counsel is excessive. Claimant responds, urging affirmance of the administrative law judge's award of benefits; additionally, claimant has filed a motion for summary affirmance of the administrative law judge's attorney's fee award.

A worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise; thus, as hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), claims for hearing

loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). *See Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). Section 8(c)(13)(D) of the Act provides that, in claims for a loss of hearing, the time period of Section 13, 33 U.S.C. §913, will not commence "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. §908(c)(13)(D)(1988). *See* 20 C.F.R. §702.221(b). The intent of Congress in enacting Section 8(c)(13)(D) is clearly expressed in the legislative history of the 1984 Amendments to the Act. The conference report accompanying the Act as amended in 1984 states that the amendment provides, with regard to hearing loss, that the "time period for filing a claim does not begin running until an employee is *given a copy* of the audiogram." H.R. Rep. No. 98-1027, 98th Cong., 2d Session 28 (1984)(emphasis added). *See Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); *see also Bath Iron Works*, 113 S.Ct. at 700, 26 BRBS at 154.

Employer initially contends that the administrative law judge erred in finding that the instant claim was timely filed; specifically, employer avers that the receipt of claimant's initial audiogram by claimant's personal physician in 1987 should have commenced the running of the limitations period set forth in Section 13 of the Act. We disagree. The unequivocal language of the statute provides that the time for filing a claim for a work-related hearing loss under Section 13 shall not commence until *the employee* has received a copy of the audiogram with accompanying report. Section 8(c)(13)(D) requires actual receipt of specific documents by a specific person, the employee; nothing in the statute or regulations states that receipt by a representative is equivalent to receipt by the employee. *See Vaughn*, 26 BRBS at 29 (wherein the Board held that receipt of an audiogram by employee's counsel is not constructive receipt by the employee).

Moreover, the Board has held that mere knowledge of the results of an audiometric examination is insufficient to start the running of the statute of limitations. *See Ranks*, 22 BRBS at 306. In this case, employer does not contend that claimant received a copy of his 1987 audiogram with report; rather, employer asserts that receipt of the 1987 audiogram by claimant's personal physician satisfies the statutory provision. Based upon the unequivocal language of the statute, we must reject employer's assertion. We hold that receipt by claimant's physician is not constructive receipt by claimant. Accordingly, we affirm the administrative law judge's determination that claimant's 1990 claim for a work-related hearing loss is timely under the Act, as claimant in the instant case did not receive a copy of an audiogram and report until December 1990 at the earliest. *See, e.g., Vaughn*, 26 BRBS at 27; *Ranks*, 22 BRBS at 301.

Employer next contends that since claimant first raised the issue of its liability for a Section 14(e) penalty in a post-hearing brief, the case should be remanded to give employer the opportunity to establish that failure to file a notice of controversion was beyond its control. It is well established that since Section 14(e) provides for a mandatory assessment of additional compensation, it may be

raised at any time.[1] *See Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981). Although employer had the opportunity to request that the administrative law judge keep the record open in order to receive additional evidence, it did not make such a request. We therefore reject employer's request that the case now be remanded for the administrative law judge to receive additional evidence.

Employer further argues that the administrative law judge erred in assessing a Section 14(e) penalty, since its first report of injury filed in December 1990, Form LS-202, together with the stipulations filed in this case, obviate the need for a notice of controversion. We disagree. Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a notice of controversion or the failure to pay is excused by the district director after a showing by the employer that owing to conditions over which it had no control, such installment could not be paid within the period prescribed for the payment. Section 14(b) of the Act, 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the 14th day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

In addition, Section 14(d) provides:

> If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

33 U.S.C. §914(d). The Board has held that a Form LS-202 is inadequate to meet these requirements if it does not state explicitly that the right to compensation is controverted and if it does not provide specific reasons for such an action. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 346 (1992)(*en banc*)(Brown, J., dissenting), *aff'g on recon.* 25 BRBS 245 (1991)(Brown, J., dissenting). In the instant case, the Form LS-202 filed by employer is inadequate to meet the requirements of Section 14(d), since that document fails to indicate whether compensation is to be paid or controverted. Inasmuch as it is uncontested that employer never filed a notice of controversion or made voluntary payments of benefits to claimant, and there is no evidence that an informal conference occurred, we affirm the administrative law judge's assessment of a Section 14(e) penalty on the entire award due claimant. *See Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993).

Lastly, employer has filed a supplemental appeal challenging the administrative law judge's

[1]In an Order dated July 15, 1993, the Board held that it cannot consider any new or additional evidence, 20 C.F.R. §802.301, and returned to employer a document attached to employer's Petition for Review and brief.

award of an attorney's fee to claimant's counsel. Employer first challenges the number of hours requested by counsel and approved by the administrative law judge. The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. *See, e.g., Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). In considering counsel's fee petition, the administrative law judge acknowledged employer's objection to hours spent by claimant's attorney for certain services, noted that he had authority only to award fees for services performed at the hearing level of proceedings, and reduced the number of hours requested by 18.05. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral*, 13 BRBS at 97.

We further reject employer's assertion that the awarded hourly rate is excessive. The administrative law judge found the hourly rate of $125 to be fair and reasonable for the issues involved in this case and in the region where the case originated. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the rate awarded by the administrative law judge to counsel.[2] *See Maddon*, 23 BRBS at 55; *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

[2]Inasmuch as we affirm the administrative law judge's award of an attorney's fee, claimant's motion for summary affirmance of the administrative law judge's attorney's fee award is moot.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge