

DONNA OWENS DEAKLE)	
(Executrix of the estate of)	
HENRY M. OWENS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WATERMAN STEAMSHIP)	DATE ISSUED:
CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.) Pascagoula, Mississippi, for claimant.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Awarding Benefits (90-LHC-2039) of Administrative Law Judge A. A. Simpson, 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 administrative law judge's 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹Claimant, decedent's adult daughter, is the sole beneficiary and executrix of decedent's estate.

Decedent, who was exposed to injurious noise during his employment with employer, underwent an audiometric evaluation on April 4, 1987, the results of which revealed an 8.4 percent binaural impairment. Based on these results, decedent filed a claim for compensation under the Act on September 25, 1987; however, he died on December 31, 1989, due to non work-related causes.

At a formal hearing held on June 25, 1992, the parties informed the administrative law judge of their agreement to settle the claim. That agreement, which the administrative law judge construed as stipulations of fact, provided, *inter alia*, that if this claim is awarded to decedent's estate, the estate is to receive payment in the amount of \$942.62, representing a settlement compromise of decedent's compensation award and medical benefits, and claimant's counsel is to receive \$1,000 payable by employer. Alternatively, the agreement provided that if the award is made to the Special Fund pursuant to Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3), the parties agreed that the Fund would be entitled to \$798.60. Thus, the sole issue presented for disposition before the administrative law judge concerned the recipient of the compensation due decedent. In a decision dated October 8, 1992, the administrative law judge, incorporating by reference his prior decision dated October 1, 1991, ordered employer to pay the Special Fund the amount agreed to by the parties, \$798.60.²

On appeal, claimant challenges the administrative law judge's decision to award benefits to the Special Fund and asserts that her counsel is entitled to an attorney's fee inasmuch as this case resulted in a successful prosecution of this claim under the Act. The Director, Office of Workers Compensation Programs (the Director), responds, urging affirmance of the award of benefits to the Special Fund. Employer has not filed a response brief in this appeal.

Claimant initially argues that the administrative law judge erred in awarding decedent's benefits to the Special Fund rather than to decedent's estate. In response, the Director argues that, as decedent died without statutory survivors, the plain language of Section 8(d)(3) of the Act mandates payment of the decedent's unpaid benefits to the Special Fund. Section 8(d) provides for the disbursement of a deceased employee's scheduled disability benefits in the event he dies for reasons not associated with his work-related injury, prior to the payment of benefits. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid scheduled benefits are distributed accordingly; however, if he dies without statutory survivors, his benefits are paid to the Special Fund pursuant to Section 8(d)(3). The Board has held that an employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is entered. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72, 73 (1994) (McGranery, J., dissenting on other grounds); *Clemon v. ADDSCO Industries*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS

²In a decision dated October 1, 1991, the administrative law judge, after finding that Section 8(d)(3), 33 U.S.C. §908(d)(3) (1988), applies to this case, ordered employer to pay to the Special Fund the compensation owed pursuant to a settlement agreement between the parties. The administrative law judge subsequently vacated this decision, noting that the settlement agreement was entered into only by claimant and employer, and not the Special Fund.

27 (1994), *modified in part on recon.*, 28 BRBS 156 (1994); *see generally Alabama Dry Dock & Shipbuilding Corp.*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986); *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948). The Board has additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors. *Krohn*, 29 BRBS at 73; *Clemon*, 28 BRBS at 112-113; *Wood*, 28 BRBS at 36-38.

In the instant case, all permanent partial disability benefits due decedent as a result of his work-related hearing loss accrued prior to his death. *See Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). For the reasons set forth in *Krohn*, *Clemon*, and *Wood*, we reverse the administrative law judge's decision to award to the Special Fund the amount of benefits agreed to by the parties, and we modify the administrative law judge's decision to reflect decedent's estate's entitlement to the amounts set forth in that agreement. *See Krohn*, 29 BRBS at 74; *Clemon*, 28 BRBS at 112; *Wood*, 28 BRBS at 36.

Lastly, claimant contends that her counsel is entitled to an attorney's fee payable by employer. We agree. The Act does not prohibit the parties from agreeing on an appropriate attorney's fee. *See generally Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168 (CRT)(7th Cir. 1993); *Eaddy v. R.C. Herd & Co.*, 13 BRBS 455 (1981). In the instant case, the agreement entered into by the parties and accepted by the administrative law judge specifically provides that, should benefits be awarded to decedent's estate, claimant's counsel is to be entitled to a fee of \$1,000 payable by employer. Accordingly, pursuant to our holding that decedent's benefits are due his estate, claimant's counsel is entitled to a fee payable by employer. *Krohn*, 29 BRBS at 75.

Accordingly, the administrative law judge's award of benefits to the Special Fund and his denial of an attorney's fee are reversed. The award of benefits is modified to reflect that benefits are payable to decedent's estate. Claimant's counsel is entitled to a fee payable by employer pursuant to the parties' agreement.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge