

R. B.)
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 Claimant)
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 v.)
)
 ELECTRIC BOAT CORPORATION) DATE ISSUED: 07/24/2008
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 Self-Insured)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Granting Motions for Reconsideration and Modifying Award of Special Fund Relief of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Peter D. Quay, Taftville, Connecticut, for self-insured employer.

Matthew W. Boyle (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Motions for Reconsideration and Modifying Award of Special Fund Relief (2006-LHC-01526) of Administrative Law Judge Daniel F. Sutton 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’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer administered an audiogram to claimant in 1985 that showed no hearing loss in claimant’s left ear and a significant non work-related loss in the right ear. On September 19, 1990, claimant underwent unsuccessful surgery on his right ear, secondary to otosclerosis. An audiogram administered in 2001 demonstrated a 100 percent right ear hearing loss and a zero percent loss in the left ear, pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides). On April 5, 2004, audiometric testing revealed a 28.125 percent left ear hearing loss and the 100 percent right ear hearing loss, which corresponds to a 40 percent bilateral impairment under the AMA Guides. EX 8. Employer accepted liability for claimant’s hearing loss and voluntarily paid him permanent partial disability compensation for 80 weeks for a 40 percent binaural hearing loss under Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). The district director denied employer’s application for Section 8(f) relief, 33 U.S.C. 908(f), and the claim was referred to the Office of Administrative Law Judges on that issue.

In his initial decision, the administrative law judge awarded employer Section 8(f) relief. The administrative law judge found that claimant has a 40 percent binaural impairment, consisting of a 28 percent work-related left ear hearing loss and a 100 percent non work-related right ear hearing loss. The administrative law judge found that claimant’s right ear hearing loss constituted a manifest, pre-existing permanent partial disability, and that this hearing loss contributed to claimant’s current binaural impairment. The administrative law judge found employer liable for 14.56 weeks of the awarded 80 weeks, representing claimant’s 28 percent left ear impairment.¹ The administrative law judge found the Special Fund liable for the remaining 65.44 weeks of the 80 weeks of permanent partial disability benefits awarded for claimant’s impairment, representing the portion attributable to the pre-existing right ear impairment.

Both employer and the Director, Office of Workers’ Compensation Programs (the Director), filed motions for reconsideration. On reconsideration, the administrative law judge found that employer’s payment of compensation to claimant was correctly calculated as a 40 percent binaural impairment, as claimant has a loss of hearing in both ears. Decision and Order on Recon. at 4, *citing Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980). However, the administrative law judge found he had not correctly apportioned the respective liabilities of employer and the Special Fund pursuant to

¹ This represents 28 percent of 52 weeks, pursuant to Section 8(c)(13)(A), which provides compensation for monaural impairments.

Section 8(f). The administrative law judge found that employer is liable for the work-related increase in claimant's binaural hearing loss under Section 8(c)(13)(B), and not, as he previously found, only for the extent of claimant's work-related monaural left ear hearing loss under Section 8(c)(13)(A). The administrative law judge found that claimant's pre-existing binaural loss under the *AMA Guides* for a 100 percent right ear hearing loss and a zero percent left ear loss was 16.67 percent. Accordingly, the administrative law judge found employer liable for the extent of claimant's current hearing loss attributable to the second injury, 23.33 percentage points of claimant's 40 percent binaural hearing loss, or 46.66 weeks of compensation under Section 8(c)(13)(B). The Special Fund was ordered to reimburse employer for 33.34 weeks of compensation representing claimant's 16.67 percent pre-existing hearing loss for which it is liable under Section 8(f).

On appeal, employer challenges the administrative law judge's decision on reconsideration finding it liable for 46.66 weeks of compensation. The Director responds, urging affirmance.

Pursuant to Section 8(f), employer is entitled to relief from liability for awarded permanent partial disability benefits if it establishes that claimant had a manifest, pre-existing permanent partial disability, and that the current disability is not due solely to the subsequent injury and is materially and substantially greater than that which resulted from the subsequent injury alone. *See Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2^d Cir. 1992); *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993). If these requirements are met in a hearing loss case, employer's liability is limited to the lesser of 104 weeks or the extent of the hearing loss attributable to the subsequent injury. 33 U.S.C. §908(f)(1); *see, e.g., Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989).

Employer contends that the administrative law judge properly calculated its liability for claimant's work-related hearing loss in his first decision. Employer avers that because none of claimant's pre-existing right ear hearing loss is related to his employment, it is liable only for the work-related monaural impairment in claimant's left ear. We reject this contention and affirm the administrative law judge's decision on reconsideration as it is in accordance with law.

Employer does not challenge the administrative law judge's finding that claimant is entitled to compensation for his combined left and right ear hearing losses and that the extent of claimant's loss must be calculated on a binaural basis under Section 8(c)(13)(B). *See Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986); *Morgan v. General Dynamics Corp.*, 15 BRBS 107 (1982); *Primc*, 12 BRBS 190. Thus, claimant was properly compensated for 80 weeks for his 40 percent binaural impairment. 33 U.S.C. §908(c)(13)(B). In *McShane v. General Dynamics Corp.*, 22

BRBS 427 (1989), the Board addressed the proper apportionment of liability pursuant to Section 8(f) in a case where the claimant sustained a work-related aggravation of a pre-existing monaural hearing loss, which resulted in a compensable binaural hearing loss. On appeal, the employer challenged, *inter alia*, the administrative law judge's conversion of claimant's pre-existing monaural hearing loss into a percentage of binaural impairment for purposes of apportioning Section 8(f) liability, as the administrative law judge also did in this case. The Board held that the claimant's compensable hearing loss was a binaural loss and that, in apportioning Section 8(f) liability, the relevant audiometric results must be calculated under the same standards to yield a valid result. The Board thus held that the administrative law judge properly converted the claimant's pre-existing monaural hearing loss into a percentage of binaural loss under the *AMA Guides* and found the Special Fund liable for the claimant's pre-existing binaural hearing loss. *McShane*, 22 BRBS at 429; *see also Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17(CRT) (2^d Cir. 1993) (compensation calculated under Section 8(c)(13)(A) when hearing loss is in a single ear with no measurable loss in the other ear). Pursuant to *McShane*, therefore, the administrative law judge in this case properly converted claimant's pre-existing monaural impairment into a binaural impairment under the *AMA Guides*, and then apportioned the respective liabilities of employer and the Special Fund pursuant to Section 8(f) on a binaural basis.

The administrative law judge converted claimant's pre-existing monaural impairment to a 16.67 percent binaural impairment. *See* Decision on Recon. at 5. Thus, the Special Fund was held liable for this hearing loss (33.34 weeks), and employer was held liable for the binaural loss attributable to the subsequent injury, which is 23.33 percent (46.66 weeks), as this figure is less than 104 weeks. 33 U.S.C. §908(f)(1). The Special Fund was ordered to reimburse employer for the compensation employer paid in excess of its liability. These calculations, correctly made pursuant to *McShane*, are not challenged on appeal. Thus, we affirm the administrative law judge's apportionment of the parties' liabilities pursuant to Section 8(f).

Accordingly, the administrative law judge's Decision and Order Granting Motions for Reconsideration and Modifying Award of Special Fund Relief is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge