

G.K.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: 07/21/2009
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	ORDER

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Special Fund Relief After 4/18/08 BRB Remand (2004-LHC-02255) of Administrative Law Judge Gerald M. Etchingham 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). The Director has filed a Motion for Summary Affirmance of the administrative law judge's decision on remand awarding employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), in this hearing loss case. 20 C.F.R. §802.219. Employer has responded to the Director's motion, stating that it "takes no position" on it.

To recapitulate, claimant and employer stipulated that claimant has a work-related 53.1 percent binaural hearing loss. 33 U.S.C. §908(c)(13). Employer sought Section 8(f) relief based on claimant's audiograms pre-existing claimant's 2003 audiogram. 33 U.S.C. §908(f). Relevant to the current proceeding, the administrative law judge agreed with the Director's position that, for purposes of obtaining Section 8(f) relief, any pre-existing hearing loss must be documented by an audiogram that meets all the criteria of Section 702.441, 20 C.F.R. §702.441, pursuant to 20 C.F.R. §702.321. As employer did not timely provide claimant with a copy of any of the audiograms conducted before 2002 as required under Section 702.441(b)(2), the administrative law judge found that employer is not entitled to Section 8(f) relief because there are no presumptive audiograms to verify claimant's pre-existing hearing loss.

In its decision, the Board, *inter alia*, rejected the Director's interpretation of Sections 702.321 and 702.441 and held that claimant's pre-existing hearing loss need not be documented by an audiogram that meets all the criteria of Section 702.441. Specifically, the Board stated that the fact that claimant was not provided copies of the prior audiograms and reports is not determinative of employer's entitlement to Section 8(f) relief. *G.K. v. Matson Terminals, Inc.*, 42 BRBS 15 (2008); *see also R.H. v. Bath Iron Works Corp.*, 42 BRBS 6 (2008). Thus, the Board vacated the denial of Section 8(f) relief and remanded the case for the administrative law judge to evaluate the audiograms to determine the extent of claimant's manifest pre-existing hearing loss and if claimant's ultimate hearing loss is materially and substantially greater as a result of the pre-existing loss than it would be from the second injury alone. *G.K.*, 42 BRBS at 20.

On remand, the administrative law judge found that the January 26, 2001, audiogram is the best measure of claimant's pre-existing hearing loss at 45.3 percent binaurally. The administrative law judge found that this loss was a manifest, pre-existing partial disability, and that claimant's current disability is not due solely to the subsequent injury, but is materially and substantially greater than that which results from the second injury alone. Thus, the administrative law judge found employer liable for a 7.8 percent binaural impairment and the Special Fund liable for a 45.3 percent binaural impairment. 33 U.S.C. §908(f)(1).

On appeal, the Director does not challenge the administrative law judge's findings of fact on remand, but contends that the Board's prior decision interpreting Section 702.321 and 702.441 is erroneous. As the Director correctly acknowledges, the Board's prior decision is the law of the case and no exceptions to this doctrine apply. *See, e.g., Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002). Therefore, we grant the Director's Motion for Summary Affirmance and affirm the administrative law judge's decision on remand awarding Special Fund relief to employer.

Accordingly, the Director's Motion for Summary Affirmance is granted. We affirm the administrative law judge's Decision and Order Awarding Special Fund Relief after 4/18/08 BRB Remand.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge