BRB No. 97-1164

VICTORIA N. HARRIS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Additional Compensation Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

Traci M. Castille (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Additional Compensation Benefits (95-LHC-2931) of Administrative Law Judge Richard D. Mills 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 U.S. 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 shown by the challenging party 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).

Claimant was employed as a painter by employer from 1968 to 1969, and again from 1973 to 1977, during which time he was exposed to loud noise from chippers and sanders. Claimant had two hearing tests. The first, performed by Dr. Wold on December 22, 1993, showed a 71.2 percent impairment of the right ear and a 45 percent impairment of the left ear, or a binaural hearing impairment of 49.3 percent, which he related to noise exposure. CX-2. A subsequent audiogram performed by Dr. McDill on March 25, 1994, revealed a 71.2 percent impairment in claimant's right ear and a 24.4 percent impairment in his left ear, or a binaural hearing impairment of 32.2 percent. CX-8. After reviewing these test results and examining claimant, Dr. Muller opined that while the hearing loss in claimant's left ear was compatible with noise exposure in the past, the flat neurosensory hearing loss in the right ear with no speech discrimination whatsoever was not characteristic of a noise-induced hearing loss. CX-7. In a subsequent report, Dr. McDill stated that based only on the noise-related loss in the left ear, claimant had a 4.1 percent binaural impairment.[1] CX-9. On September 29, 1994, employer voluntarily paid claimant compensation for a 24.4 percent monaural impairment. CX-10; EX-8. Thereafter, on August 12, 1996, after the case had been referred to the Office of Administrative Law Judges, employer filed an amended Form LS-208, reflecting that claimant had been paid compensation for a 24.4 percent binaural loss. EX-9.

At the hearing before the administrative law judge, the parties agreed that the extent of claimant's hearing loss would be determined based on Dr. McDill's March 1994 audiogram. Tr. 7. Claimant contended, however, that under the aggravation theory, he was entitled to be compensated for the full 32.2 percent binaural hearing loss reflected on this audiogram, rather than the 24.4 percent binaural loss employer had paid voluntarily. Employer argued that, as noise-induced hearing loss is generally symmetrical, claimant had already been fully compensated, since the noise-induced portion of claimant's right ear hearing loss would approximate the 24.4 percent noise-induced hearing loss shown in his left ear.

The administrative law judge denied the claim, concluding that employer had fully compensated claimant and that claimant had not satisfied the burden of proving that the aggravation theory applies in this case. Although acknowledging that an employer may be held liable for a claimant's entire hearing loss where claimant's exposure to injurious noise levels during his employment combined with a pre-

[1]Dr. Dill used only the 24.4 percent loss in the left ear, which resulted in a 4.1 loss binaurally.

existing hearing loss to result in a greater degree of disability, the administrative law judge determined claimant had not put forward evidence sufficient to prove that such was the case here. The administrative law judge further stated that, in fact, employer had compensated claimant for more than his 24.4 percent monaural noise-induced hearing loss. Moreover, he found claimant's attempt to distinguish the present case from *Hicks v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-3451/A (Oct. 22, 1992)(unpublished), based on his testimony that he did not believe his hearing loss had worsened after leaving Ingalls, was not persuasive, stating that it was not probative and of little value in determining whether the aggravation theory applies in this case. Finally, the administrative law judge found that as there was no successful prosecution of this claim, claimant's counsel was not entitled to an attorney's fee payable by employer.

Claimant appeals, maintaining that in determining the extent of his disability the administrative law judge erred in failing to apply the aggravation doctrine, and reiterating the argument that he is entitled to be compensated for the full 32.2 percent binaural hearing loss evidenced on the March 1994 audiogram. Claimant relies on *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986), to support his argument. Claimant further contends that the administrative law judge erred in denying him a fee as employer did not make its final payment of compensation until nearly a year after referral of the claim to the Office of Administrative Law Judges. Employer, incorporating its post-trial brief below, responds, urging affirmance.

In determining whether an injury is caused or aggravated by conditions of employment, such as noise exposure, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, once he establishes a *prima facie* case by demonstrating the existence of a harm and that working conditions existed which could have caused it. Under Section 20(a) it is presumed, in the absence of substantial evidence to the contrary, that claimant's harm, *i.e.,* his entire hearing loss, is related to his employment. The Section 20(a) presumption applies to causation issues involving the aggravation rule. *See, e.g., Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Under the aggravation doctrine, if a work-related injury aggravates, accelerates, or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), *aff'g in pert. part Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*). Thus, once Section 20(a) is invoked, the burden shifts to employer to rebut it by producing facts proving that

claimant's employment did not cause, aggravate or contribute to his injury. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). In this case, as it is undisputed that claimant demonstrated a harm, *i.e*, a loss of hearing, and that he was exposed to injurious noise which could have caused this harm, claimant is entitled to invocation of the Section 20(a) presumption as a matter of law. As claimant established a *prima facie* case, the burden shifted to employer to put forth evidence that claimant's noise exposure at work did not aggravate or combine with claimant's hearing loss due to other causes; contrary to the analysis employed by the administrative law judge, claimant was not required to assume the additional "burden of proving that the aggravation theory applies to this case." Decision and Order at 4.

In *Worthington*, 18 BRBS at 200, the claimant had a 65.62 percent hearing loss in his right ear caused by a birth defect as well as a 15 percent work-related noise-induced hearing loss in his left ear. Citing *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980), the Board noted that, because of the pre-existing loss, Worthington's right ear was not able to compensate for the loss caused by exposure to noise. Therefore, as Worthington's work-related hearing loss combined with his pre-existing hearing loss to produce a greater loss than that which would have been caused by the work injury alone, the Board held that the administrative law judge properly awarded benefits for the entire impairment under the aggravation rule. *Worthington*, 18 BRBS at 201-202; *see also Morgan v. General Dynamics Corp.*, 15 BRBS 107 (1982).

The United States Courts of Appeals have similarly applied the aggravation doctrine. In *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT), the Ninth Circuit affirmed the Board's holding that claimant Ronne, whose audiometric evaluation revealed an 8.75 percent impairment, was entitled to benefits for his entire hearing loss despite the fact that the parties did not agree on the portion of it attributable to presbycusis. The court reasoned that in order to warrant compensation for the full disability, the aggravation rule does not require that the work injury interact with the pre-existing condition to cause a worsening of the pre-existing condition or that it combine in more than an additive way. *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 140-141 (CRT). It then concluded that an impaired employee:

> suffers a level of disability more severe than would an unimpaired worker sustaining the same injury on the job. [Therefore, it] would undercompensate the impaired worker to limit his or her award to that available to the unimpaired.

Id., 932 F.2d at 839, 24 BRBS at 141 (CRT). Further, the Ninth Circuit quoted *Nash*, a decision rendered by the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, and noted that the aggravation rule applies "even though the worker did not incur the greater part of his injury with that particular employer." *Port of Portland*, 932 F.2d at 839-840, 24 BRBS at 141 (CRT), *quoting Nash*, 782 F.2d at 519 n.10, 18 BRBS at 51 n.10 (CRT). The aggravation rule does not permit apportionment between work-related and non work-related causes merely because the percentage of impairment attributable to each cause may be ascertained from the record. *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982).

In light of controlling precedent, we hold that the administrative law judge erred in failing to apply the aggravation rule, and in not giving claimant the benefit of the Section 20(a) presumption. In this case, as Section 20(a) was invoked and employer offered no evidence that claimant's full hearing loss is not due to the combination of his noise exposure and prior causes, it failed to rebut the Section 20(a) presumption.[2] Thus, claimant's full binaural hearing loss is work-related. *See Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84, 90 (1995). Accordingly, we reverse the administrative law judge's denial of additional compensation, and as the parties have agreed that the March 1994 audiogram is controlling, modify his Decision and Order to reflect that claimant is entitled to compensation for a binaural impairment of 32.2 percent. *See Obert,* 23 BRBS at

[2]Citing *Coody v. Ingalls Shipbuilding, Inc.,* BRB Nos. 93-1530/A (Sept. 12, 1996) (unpublished) and *Hicks v. Ingalls Shipbuilding, Inc.,* BRB Nos. 89-3451/A (Oct. 22, 1992)(unpublished), employer contends that the Board has agreed that it is proper to compensate claimant for a binaural loss based solely on the percent of loss in the one ear which was noise-induced (excluding the other ear). Although unpublished cases lack any precedential value, *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990), we note that *Coody* is distinguishable from the present case because it dealt with the situation where claimant's non noise related hearing loss occurred subsequent to his noise induced loss; thus, the aggravation rule was not applicable. In *Hicks* the facts indicate that claimant was compensated for a binaural hearing loss based on his loss of hearing in both ears, and that the credited doctor described a non-noise-induced increase in his right ear loss occurring in 1986, years after his 1975 retirement, which was excluded. The aggravation rule was not raised or discussed in the decision in *Hicks,* as claimant sought only the full extent of the work-related loss assessed by the credited doctor, without contribution due to causes subsequent to employment. As both cases describe evidence attributing a portion of claimant's hearing loss to subsequent causes, they do not support apportionment contrary to the aggravation rule.

160; *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1, 2 (1986).

We also agree with claimant that the administrative law judge erred in denying him an award of attorney's fees. Section 28(b), 33 U.S.C. §928(b), applies when a controversy develops over additional compensation where employer has tendered compensation or is voluntarily paying compensation. *See Tait v. Ingalls Shipbuilding*, 24 BRBS 59 (1990). In the instant case, after controverting the claim initially, employer voluntarily paid claimant $1,692.58 in compensation for a 24.4 percent monaural loss on September 29, 1994. EX-8. Claimant, however, continued to assert his right to compensation on a binaural basis, and on August 12, 1996, after referral of the case to the Office of Administrative Law Judges, employer paid claimant $6,024.16 in additional compensation for a 24.4 percent binaural hearing loss. EX-9. Moreover, by virtue of this decision, claimant has established entitlement to compensation for a 32.2 percent binaural hearing loss. Inasmuch as a controversy remained even after employer voluntarily paid claimant compensation, and claimant was ultimately successful in obtaining additional compensation greater than that which employer agreed to pay, employer is liable for claimant's attorney's fees pursuant to Section 28(b). *See generally Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150 (CRT) (5th Cir. 1997*); Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision on remand). Accordingly, we reverse the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee, and remand the case for consideration of counsel's fee petition.

Accordingly, the administrative law judge's Decision and Order denying claimant additional disability compensation and an attorney's fee is reversed, the Decision and Order is modified to reflect that claimant is entitled to compensation for a 32.2 percent binaural hearing loss, and the case is remanded for the administrative law judge to consider claimant's counsel's fee petition.[3]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3]In its post-trial brief which employer has incorporated in its response brief, employer argues that if claimant is entitled to a fee it should be provided with 30 days in which to file its objections. On remand, the administrative law judge should provide employer with the opportunity to file its objections.