

ALAN G. MITCHELL)	
)	
Claimant)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Joel F. Gardiner, Administrative Law Judge, United States Department of Labor.

Michelle Jodoin LaFond and Polly Haight Frawley (Norman, Hanson & DeTroy), Portland Maine, for employer.

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (95-LHC-1743) of Administrative Law Judge Joel F. Gardiner awarding benefits 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a grinder for employer for five years. Claimant testified that he

was exposed to loud noises, such as chipping and grinding, caused by power tools. Claimant contends that his exposure to noise continued after his transfer to the burning department in 1981.

In his Decision and Order, the administrative law judge found that claimant is entitled to compensation for a .9375 percent work-related binaural hearing loss pursuant to 33 U.S.C. §908(c)(13), based on an average weekly wage of \$550.70, and that self-insured employer is responsible for the payments of these benefits. The administrative law judge awarded employer Section 8(f), 33 U.S.C. §908(f), relief and found the Special Fund liable for the whole amount due claimant.

On appeal, the Director contends that the administrative law judge erred in granting employer Section 8(f) relief. Employer responds, urging affirmance of the administrative law judge's decision.

In a case involving an award of benefits pursuant to Section 8(c)(13), Section 8(f) limits employer's liability to pay compensation 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) (1988). Thus, employer is liable for its contribution to the hearing loss and the Special Fund is liable for the pre-existing loss. See *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) (*en banc*) (Brown, J., concurring); *Reggiannini v. General Dynamics Corp.*, 17 BRBS 254 (1985). Section 8(f) relief is applicable in a case where claimant is permanently partially disabled, if three requirements are met: (1) claimant has a pre-existing permanent partial disability which (2) combines with the subsequent work-related injury to result in a materially and substantially greater degree of permanent disability than that which would have resulted from the work injury alone, and (3) the pre-existing disability was manifest to employer. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

The Director contends that employer is not entitled to Section 8(f) relief in this case as employer failed to establish that claimant had a pre-existing hearing loss which contributed to claimant's compensable impairment. In the instant case, the administrative law judge properly stated that a pre-employment hearing loss need not be shown, as employer may receive Section 8(f) relief if a documented hearing loss occurring during the course of employment is aggravated thereafter by the claimant's continued employment. *Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989). The administrative law judge noted that claimant's hearing loss in 1994, a 3.8 percent binaural loss, was higher than

that diagnosed in 1995, when a .9375 percent binaural loss was recorded.¹ The administrative law judge stated nonetheless that “the record fails to establish that the Claimant met the literal Section 8(f) standard of having had a pre-existing permanent partial hearing loss which made the current disability materially and substantially greater than that which would have resulted from [the] subsequent injury alone.” Decision and Order at 14. The administrative law judge concluded, however, that Section 8(f) was satisfied on policy grounds as claimant had no measurable hearing loss when he was hired, suffered a hearing loss due to noise exposure on the job, and was retained by employer.

We reverse the administrative law judge’s award of Section 8(f) relief because, as the administrative law judge noted, the prerequisites for such relief are not satisfied and equitable grounds are an insufficient basis for awarding Section 8(f) relief. See generally *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982) (employer bears the burden of proof on each element of Section 8(f)). Inasmuch as the hearing loss for which claimant is being compensated is lower than the previously recorded hearing loss, it cannot be said that claimant’s continued employment “materially and substantially” contributed to his hearing loss. In the absence of evidence that claimant’s hearing loss increased or was aggravated by continued exposure to noise, Section 8(f) is inapplicable. See *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993); see generally *Jacksonville Shipyards Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988); *Mississippi Coast Marine, Inc. v. Bosarge*, 657 F.2d 885, 13 BRBS 851, *modifying* 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981). Employer therefore is liable to claimant for the entirety of his work-related hearing loss of .9375 percent.

¹Dr. Maxwell testified that a 1977 pre-employment audiogram demonstrated a high frequency hearing loss. Emp. Ex. 21. Dr. Parrotte found a similar bilateral high frequency loss on an audiogram administered in 1993, and also a low frequency hearing loss. Cl. Ex. 11. Neither the 1977 nor the 1993 audiogram is interpreted under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. See *McShane v. General Dynamics Corp.*, 22 BRBS 427 (1989). The April 1994 audiogram revealed a zero percent impairment in claimant’s left ear and a 22.5 percent impairment in claimant’s right ear, for a binaural loss of 3.8 percent. Lib. Mut. Ex. 25. The audiogram of July 31, 1995, revealed a binaural loss of .9375 percent. Emp. Exs. 21, 22.

Accordingly, the administrative law judge's award of Section 8(f) relief is reversed. His decision is affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge