BRB No. 89-1190

CLOYD JORDAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Decision and Order on Petition for Reconsideration of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Winn S. L. Faulk, Mobile, Alabama, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Decision and Order on Petition for Reconsideration (87-LHC-2163) of Administrative Law Judge Martin J. Dolan, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921 (b)(5)(1988).

Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act).[1] We must affirm

the findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant was exposed to loud noise while working for employer as a chipper from 1955 through his retirement on January 20, 1988. Claimant underwent audiometric testing on several occasions while working for employer, and testified that he was neither informed nor shown the results of any of the audiograms. Claimant also underwent audiometric testing by Dr. Sellers on October 3, 1986 which revealed a 47.8 binaural loss, by Dr. McDill on December 18, 1986 which revealed a 30.3 percent binaural loss, and by Dr. Sellers on January 30, 1987 which revealed a 51.9 percent binaural loss. Claimant testified that he first became aware he had a work-related hearing loss on October 3, 1986, when his attorney informed him of the results of the testing administered on that date. Claimant gave notice of his injury and filed a claim for hearing loss on October 16, 1986.

The administrative law judge noted that the record contained evidence of audiograms conducted prior to October 3, 1986, but credited claimant's testimony that he neither received copies of those audiograms nor was informed of any relationship between his hearing loss and his employment with employer based on the tests' results. The administrative law judge found that claimant's testimony that he first became aware he had a work-related hearing loss on October 3, 1986 when he reviewed Dr. Sellers' audiogram was credible. The administrative law judge therefore found that the date of injury was October 3, 1986, and that claimant's notice of injury and filing of his claim on October 16, 1986 were timely pursuant to Sections 12 and 13 of the Act. 33 U.S.C. §§912, 913.

In calculating the extent of claimant's hearing loss, the administrative law judge found that the October 1986 audiogram was not reliable, and averaged the results of the December 1986 and January 1987 audiograms to obtain a 40.1 percent binaural loss. The administrative law judge found that claimant's average weekly wage was $382.01 based on his earnings in the 52 weeks prior to October 3, 1986. The administrative law judge therefore awarded claimant compensation for permanent partial disability pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 40.1 percent binaural loss. The administrative law judge also found that claimant had a pre-existing binaural loss of 24.7 percent, and he awarded employer Section 8(f), 33 U.S.C. §908(f), relief. Employer thus was held liable for compensation for 30.8 weeks commencing on October 3, 1986, and the Special Fund was found liable for benefits thereafter for a period of 49.4 weeks. The administrative law judge also awarded claimant medical expenses and interest. Employer filed a motion for reconsideration which the administrative law judge denied.

On appeal, employer first contends that claimant's notice of injury and filing of his claim were untimely because claimant became aware he had a work-related hearing loss either in 1975 when his treating physician administered audiometric testing and found he had a 32.3 percent binaural loss or in 1983 when claimant allegedly received an in-house audiogram. Employer therefore contends that claimant's notice of injury and filing of his claim on March 20, 1987, when claimant filed Form LS-203 "Employee's Claim for Compensation," were untimely.[2] Further,

employer contends that the administrative law judge should have calculated claimant's average weekly wage based on his earnings in the year prior to the 1975 audiogram. Lastly, employer contends that the administrative law judge erred in awarding benefits for a 40.1 percent hearing loss, as the parties stipulated to a 30.3 percent loss, and that the administrative law judge erred in averaging the results of two audiograms with such divergent results. Claimant responds, urging affirmance.

Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D)(1988), provides that the time for filing notice of a hearing loss under Section 12, and a claim for compensation due to a hearing loss under Section 13, does not begin to run until claimant has received an audiogram with an accompanying report which indicates he has suffered a hearing loss. *See Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989). This requirement is consistent with Sections 12 and 13 in general which provide that the time limits for giving notice of an injury and filing a claim commence on the date claimant becomes aware of the relationship between his injury and his employment. *See Vaughn*, 28 BRBS at 131-132. In a hearing loss case, claimant must give notice of his injury within 30 days and file a claim within one year of the date of injury. *Id.; see also Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993).

We hold that the administrative law judge rationally credited claimant's testimony that he first became aware he had a work-related hearing loss in October 3, 1986, when he reviewed the results of the audiometric test administered on that date with his attorney, and that he had not been informed nor received the results of any of the earlier audiograms. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 44 U.S. 911 (1979). The administrative law judge therefore properly determined that the date of claimant's injury was October 3, 1986 as that is the date claimant became aware that his disability was work-related.[3] *See Ranks*, 22 BRBS at 306-307. Since the administrative law judge found that claimant gave employer notice of his injury and filed his claim for benefits on October 16, 1986, we affirm the administrative law judge's finding that claimant's notice and claim were timely filed. *Vaughn*, 28 BRBS at 131.

Further, claimant's average weekly wage generally is calculated based on the wages earned in the year preceding the date of injury. *See* 33 U.S.C. §910; *see generally Bath Iron Works Corp.*, U.S. , 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT) (Section 10(i) is inapplicable in hearing loss cases, but average weekly wage is to be calculated at the "time of injury"). Since the administrative law judge rationally found that claimant's date of injury is October 3, 1986, he properly based claimant's average weekly wage on his earnings in the year prior to this date.

Employer next contends that the parties stipulated that claimant has a 30.3 percent binaural loss based on the results of the audiogram administered by Dr. McDill and that the administrative law judge may not reject this stipulation without giving the parties notice. Employer additionally contends that the administrative law judge erred in averaging the results of the two valid audiograms as there is no evidentiary basis that averaging findings as divergent as 30.3 percent and 51.9 percent is scientifically supportable.

We agree with employer that the administrative law judge erred in rejecting the parties' stipulation that claimant has a 30.3 percent binaural loss. Employer's LS-18 pre-hearing statement states that the parties agreed that claimant has a 30.3 percent hearing loss. The stipulations submitted to the administrative law judge indicate that claimant was seeking benefits for a 30.3 percent hearing loss based on the results of the audiogram administered by Dr. McDill in December 1986. *See* Transcript at 6, 9; Stipulations of the parties. After the hearing, claimant submitted an affidavit of Dr. Sellers concerning the validity of the audiograms he administered, which the administrative law judge admitted into evidence. Decision and Order at 1. Following the issuance of the administrative law judge's decision in which he awarded benefits based on the average of the December 1986 and January 1987 audiograms, employer sought reconsideration on the ground that the administrative law judge should have accepted the results of the December 1986 test, or reopened the record for an independent examination of claimant.[4] The administrative law judge summarily denied employer's motion.

The Board has held that an administrative law judge may not reject the parties' stipulation without giving the parties prior notice and an opportunity to provide evidence to support the stipulation. *See Dodd v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985). As employer relied on the stipulation and was not given an opportunity prior to the issuance of the decision to challenge the basis for Dr. Sellers' opinion, we must vacate the administrative law judge's finding that claimant has a 40.1 percent hearing loss. The case is remanded for the administrative law judge to consider the parties' stipulation as to the extent of claimant's hearing loss. If the administrative law judge decides to reject it, he must provide the parties with notice and an opportunity to present additional evidence to support their positions. Moreover, if the stipulation is properly rejected, the administrative law judge has the discretion to calculate the extent of claimant's hearing loss based on the audiograms of record he deems are valid.[5] *See Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66, 68 (1992).

Accordingly, we vacate the administrative law judge's finding that claimant has a 40.1 percent hearing loss, and the case is remanded for reconsideration of the extent of claimant's disability. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge