

BRB No. 90-2090

DOYLE O. SMITH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (88-LHC-2402) of Administrative Law Judge A.A. Simpson, Jr., 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).¹ 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

¹Claimant's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Decision and Order Denying Motion for Reconsideration, BRB No. 90-2090A, was dismissed at claimant's request by Order dated December 20, 1994.

Claimant filed a claim under the Act on January 22, 1987, seeking benefits for a noise-induced hearing loss. Cl. Ex. 3. By letters dated May 11 and 14, 1987, Assistant District Director² Robert Bergeron excused employer from filing notices of controversion or making payments in hearing loss claims pursuant to Section 14 of the Act, 33 U.S.C. §914. Employer controverted the claim on July 22, 1987. Emp. Ex. 3.

The administrative law judge awarded claimant benefits for a 79.65 percent binaural impairment pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), at the stipulated average weekly wage of \$674.81. The administrative law judge also found employer liable for a Section 14(e) penalty, finding the excuse granted by the district director to be invalid pursuant to the holding of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990).

On appeal, employer contends that the administrative law judge erred in finding that the excuse granted by the district director is invalid, and that the concept behind a Section 14(e) penalty, that of replacement income, is not applicable in a hearing loss case. Claimant responds, urging affirmance of the imposition of a Section 14(e) penalty.³

The precise arguments raised by employer regarding the excuse granted by the district director and the concept of "replacement income" have been rejected by both the Board and the Fifth Circuit, in whose jurisdiction the present case arises. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *aff'g in part, part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*) (Brown, J., concurring). Moreover, we note that inasmuch as employer had notice of claimant's injury on January 22, 1987, its duty to pay benefits or controvert the claim arose prior to the time the district director granted employer the excuse from filing notices of controversion. *See* 33 U.S.C. §914(b), (d), (e). We, therefore, affirm the administrative law judge's finding that employer is liable for a Section 14(e) assessment.

²The term "district director" has replaced the term "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

³Claimant's Motion to Strike a portion of employer's Petition for Review and brief is denied. The contentions therein shall be considered as part of claimant's response to employer's appeal.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge