BRB Nos. 91-517
and 91-517A

JOHN D. DOSWELL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits and Order Denying Motion for Reconsideration of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order-Awarding Benefits and Order Denying Motion for Reconsideration (88-LHC-1586) of Administrative Law Judge Quentin P. McColgin 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).

Claimant sought benefits under the Act for a work-related hearing loss. On October 16, 1986, claimant was tested by an independent audiologist, who concluded that claimant had sustained a 3.8 percent binaural hearing impairment. Cx. 1. On October 27, 1986, claimant filed a claim for noise-induced hearing loss under the Act, notifying employer of his injury on the same day. On

November 7, 1986, employer filed its Form LS-202, First Report of Injury. Claimant had previously undergone an audiogram at employer's facility on November 15, 1983, which revealed a 15.9 percent hearing impairment. Cx. 10. On May 11 and 14, 1987, Assistant District Director Robert H. Bergeron[1] advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, or controversions, and from making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of a claim by the district director's office. An audiogram subsequently performed at employer's facility on October 22, 1987, revealed a 21.25 percent binaural hearing impairment. Cx. 11. Claimant underwent a fourth audiogram on December 29, 1988, which revealed a 13 percent binaural hearing impairment. Cx. 6.

In his Decision and Order, the administrative law judge, after concluding that employer's November 15, 1983 and October 22, 1987, in-house audiograms were entitled to probative weight, determined that claimant sustained a 13.5 percent hearing impairment based on the average of the results of the four audiograms. The administrative law judge, however, declined to address claimant's contention that he was entitled to a Section 14(e) assessment, concluding that, pursuant to *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), the disposition of the Section 14(e) issue lies within the exclusive province of the Board to resolve. Employer's motion for reconsideration was denied by the administrative law judge on October 25, 1990.

On appeal, claimant contends that the administrative law judge erred in failing to hold employer liable for a Section 14(e) assessment. Employer responds that no Section 14(e) penalties are due in this case because its LS-202, First Report of Injury Form, filed on November 7, 1986, is the functional equivalent of a timely-filed notice of controversion. Employer cross-appeals, asserting that the administrative law judge erred in giving probative weight to its in-house audiograms which, it contends, do not conform with the requirements of Section 702.441 of the regulations promulgated under the Act, 20 C.F.R. §702.441. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

The first issue presented by these appeals is whether claimant is entitled to a Section 14(e) assessment. Section 14(e) of the Act provides that if an employer fails to pay an installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing that owing to conditions over which employer had no control, such installment could not be paid within the period prescribed. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12, 33 U.S.C. §912, or the employer has knowledge of the injury.

[1]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

We agree with claimant that the disposition of the Section 14(e) issue is controlled by the Board's decision in *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990).[2] In *Fairley*, 22 BRBS at 184, the Board determined, *inter alia*, that the excuse granted by the district director in the relevant group of cases was invalid. The United States Court of Appeals for the Fifth Circuit affirmed the Board's holding that the district director abused his discretion in excusing employer from filing notices of controversions. Moreover, we reject employer's contention that its Form LS-202, First Report of Injury, constitutes a notice of controversion for the reasons stated in *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting). Thus, because employer did not timely pay benefits or controvert the claim in this case, we hold, for the reasons set forth in *Ingalls Shipbuilding* and *Fairley*, that claimant is entitled to a Section 14(e) assessment as a matter of law. *See also 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).

While remand to the administrative law judge is appropriate where factual findings are necessary to determining employer's liability for a Section 14(e) assessment, in this case there are no factual disputes. As it is undisputed that employer received notice of claimant's hearing loss on October 27, 1986, that no informal conference was held, and that employer neither filed a notice of controversion nor made voluntary payments of compensation, we hold, as a matter of law, that claimant is entitled to a Section 14(e) penalty on the entire award of benefits in this case.[3] *See Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on reconsideration).

In its cross-appeal, employer contends that the administrative law judge erred in utilizing its in-house audiograms when determining the degree of claimant's hearing impairment. Specifically, employer asserts that the November 15, 1983, and October 22, 1987, audiograms did not meet the requirements of Section 702.441 of the regulations, 20 C.F.R. §702.441, as they were not accompanied by a narrative report and there was no indication that the calculations contained therein were made in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment* (the AMA *Guides*). *See* 33 U.S.C. §908(c)(13)(C). We disagree.

In addressing the weight to be accorded to employer's in-house audiograms, the administrative law judge rejected employer's argument that they should be accorded little or no weight because they were conducted for the purpose of implementing the hearing conservation program under the Occupational Safety and Health Act (OSHA) regulation and not for the purpose of accurately measuring the hearing of employees. The administrative law judge concluded that these audiograms were entitled to probative weight because the quality standards prescribed under the OSHA regulations provided sufficient indicia of reliability when offered into evidence by a party

[2]Contrary to the administrative law judge's determination, it was within his authority to decide issues raised under Section 14(e) of the Act, 33 U.S.C. §914(e), consistent with applicable law.

[3]The period of assessment runs for 27 (13.5 percent of 200) weeks from October 18, 1986, the stipulated date of injury.

opponent. The administrative law judge then noted that with regard to the qualifications of persons authorized to conduct audiograms, 20 C.F.R. §702.441(b)(1) expressly allows testing by persons authorized under the OSHA hearing conservation program to conduct audiograms.[4] The administrative law judge also reasoned that the audiograms were administered pursuant to Section 1910.95(g)(3) of the regulations promulgated under the Occupational Safety and Health Act, 29 C.F.R. §1910.95(g)(3).[5]

[4]Section 702.441 of the regulations, 20 C.F.R. §702.441, corresponds to Section 8(c)(13)(C) of the Act, which provides that an audiogram is presumptive evidence of the amount of the hearing loss on the date it was performed only if it was administered by a licensed professional, the audiogram and report were provided to the employee at the time it was administered, and no contrary audiogram made at that time is produced. 33 U.S.C. §908(c)(13)(C). The regulation states, *inter alia*, that an audiogram shall be presumptive evidence of the amount of hearing loss sustained by claimant if the following conditions are met: (1) the audiogram was administered by a licensed or certified audiologist; (2) the employee was provided with a copy of the audiogram and the accompanying report within thirty days from the time that the audiogram was administered; (3) no one has provided a contrary audiogram of equal probative value within thirty days of the subject audiogram where the claimant continues to be exposed to excessive noise levels, or within six months if such exposure ceases; (4) the audiometer used must be calibrated according to current American National Standard Specifications; and, (5) the extent of the claimant's hearing loss must be measured according to the most currently revised edition of the AMA *Guides. See* 20 C.F.R. §702.441(b)(1)-(3) and (d).

[5]Section 702.441(d), 20 C.F.R. §702.441(d), of the regulations promulgated under the Act states, in relevant part, that "[a]udiometer testing procedures required by hearing conservation programs pursuant to the Occupational Safety and Health Act of 1970 should be followed (as described at 29 C.F.R., Section 1910.95 and appendices)."

The administrative law judge thereafter determined claimant's binaural hearing impairment by averaging the result of employer's two in-house audiograms with the results of the audiometric testing performed on October 16, 1986 and December 29, 1988. Thus, contrary to employer's assertion, the administrative law judge did not regard employer's in-house audiograms as presumptive evidence of the extent of claimant's binaural hearing impairment; rather, the administrative law judge acted within his discretion in assigning probative weight to the November 15, 1983 and October 22, 1987, audiograms. *See generally Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). Moreover, the parties' stipulated to the impairment demonstrated on these audiograms as calculated under the AMA *Guides*. *See* Tr. at 18; Cx. 11. In the instant case, the degree of claimant's binaural hearing impairment was in dispute and the administrative law judge rationally weighed all probative evidence relating to this issue. Accordingly, we affirm the administrative law judge's decision to utilize the November 15, 1983 and October 22, 1987, audiometric test results, in addition to the test results obtained on October 16, 1986 and December 29, 1988, in determining the degree of claimant's binaural hearing impairment, as that decision is neither arbitrary, capricious, nor an abuse of his discretionary authority. *See, e.g., Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

Accordingly, the administrative law judges's Decision and Order is modified to reflect employer's liability for an assessment pursuant to Section 14(e) of the Act on the entire award of benefits owed. In all other respects, the administrative law judge's Decision and Order-Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge