BRB No. 97-447

ELBERT JACOBS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TAMPA SHIPYARDS	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA C & S	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Timothy D. Wolf (Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.), Tampa, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-416) of Administrative Law Judge Vivian Schreter-Murray 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 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 worked for employer as a ship-fitter from the first quarter of 1966 to the first quarter of 1969, when he commenced working for Seaboard Coastline Railway (CFX). CXS 2, 7. Thereafter, claimant worked part-time for employer from October 1971 to the second quarter of 1973. Claimant retired from CFX on February 21, 1991. CX 7. On May 30, 1995, claimant underwent an audiometric evaluation which revealed a binaural hearing

loss, and he filed a claim under the Act on June 22, 1995. *See* 33 U.S.C. §908(c)(13). Claimant and employer stipulated that claimant sustained a work-related 37.8 percent binaural hearing impairment. The sole issue before the administrative law judge was the calculation of claimant's average weekly wage pursuant to Section 10 of the Act, 33 U.S.C. §910.

In her Decision and Order, the administrative law judge initially found Section 10(c), 33 U.S.C. §910(c), to be the appropriate subsection to determine claimant's average weekly wage, as his work with employer was part-time and there was no record evidence of wages paid by employer to a similarly employed worker. *See* 33 U.S.C. §910(a), (b). Next, the administrative law judge, relying on *Harper v. Office Movers/E.I. Kane, Inc.*, 19 BRBS 128 (1986)(*en banc*), found that only claimant's wages with employer are relevant for determining his average weekly wage. Thus, pursuant to Section 10(c), the administrative law judge divided claimant's earnings during the year prior to his leaving longshore employment, $2,048.57, by 52 to derive an average weekly wage of $39.40. Accordingly, claimant was found entitled to compensation based on the statutory minimum weekly wage of $65.90. *See* 33 U.S.C. §906(b)(2). Claimant was therefore awarded compensation of $4,982.04 (200 x $65.90 x 37.8 %).

On appeal, claimant challenges the administrative law judge's decision to exclude his earnings with CFX when calculating his average weekly wage. Additionally, claimant argues the administrative law judge erred by failing to award interest on the award of compensation. Employer responds, urging affirmance.

In the instant case, the administrative law judge found that claimant's full-time non-covered work for CFX, initially as a truck operator and later as a bridge tender, was unaffected by his partial hearing loss. Thereafter, applying the Board's holding in *Harper*, 19 BRBS at 128, the administrative law judge excluded claimant's earnings while working for CFX from her average weekly wage calculation.

In *Harper,* claimant was employed full-time as an insurance claims adjuster and part-time as a furniture mover; only the employment in the part-time job was covered under the District of Columbia Workmen's Compensation Act extension of the Act. He injured his foot working for the covered employer. The administrative law judge awarded benefits for a 15 percent permanent foot impairment. In calculating claimant's average weekly wage, the full-time wages earned by claimant as an insurance adjuster were excluded from the average weekly wage determination based on claimant's testimony that he did not lose any time or pay from his full-time job due to the injury. The Board, sitting *en banc*, affirmed, based on the facts of the case, reasoning, "Holding employer responsible for this level of compensation [full-time and part-time wages combined] when claimant is fully able to earn unaffected wages at his full-time job is manifestly unfair and contrary to the remedial purposes of the Act. Neither employer nor carrier could have anticipated liability based on unaffected wages in other employment." *Harper*, 19 BRBS at 130. The Board determined that prior cases, in which all of claimant's wages in all jobs at the time of injury were included to determine average weekly wage, were distinguishable, as these cases involved

injuries where claimant's ability to earn wages in all jobs was affected. *Id*.

The instant case is factually indistinguishable from *Harper*. During the year prior to claimant's leaving longshore employment in June 1973, claimant worked part-time for employer and full-time for CFX in non-longshore employment. Like *Harper,* this case involves a permanent impairment falling under the schedule. Moreover, the administrative law judge found, and claimant does not challenge on appeal, that claimant's employment with CFX was unaffected by his hearing impairment. Accordingly, for the reasons stated in *Harper*, we affirm the administrative law judge's decision to exclude claimant's unaffected earnings in non-covered employment from her average weekly wage determination.[1]

Claimant next argues that the administrative law judge erred in failing to award interest on his award of compensation. We agree. The award of interest on benefits due under the Act is not statutorily mandated but has been upheld as consistent with the Congressional purpose of fully compensating claimants for their injuries. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *Quave v. Progess Marine,* 912 F.2d 798, 24 BRBS 43 (CRT), *on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991); *Strachan Shipping Co. v. Wedemeyer,* 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972). Interest in hearing loss cases is due from fourteen days after employer is notified of the injury or has knowledge of the injury. *See Wilkerson v. Ingalls Shipbuilding, Inc.*, ___ F.3d ___, No. 96-60676 (5th Cir. Oct. 23, 1997); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996)(*en banc).* In this case, claimant initially raised the issue of interest in his second pre-hearing statement. *See Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). In her Decision and Order, the administrative law judge while not addressing the interest issue, stated that the present claim was filed on June 22, 1995, and the earliest audiogram of record is dated May 30, 1995. The record in this case, however, does not establish the date employer received notice or had knowledge of claimant's hearing loss, which is the date from which claimant is entitled to interest. *See Renfroe*, 30 BRBS at 101. Accordingly, the case is remanded for the administrative law judge to determine the date from which claimant is entitled to interest on his compensation award and to enter an award of interest at the appropriate rate.

[1]We therefore need not address claimant's contention that the administrative law judge erred by excluding testimony whose purpose was to establish claimant's earnings with CFX at the time of injury. Any error in this regard, *see Ramirez v. Southern Stevedores,* 25 BRBS 260 (1992), is harmless, as these wages are irrelevant for determining claimant's average weekly wage pursuant to *Harper*.

Lastly, claimant's counsel has filed a fee petition seeking an attorney's fee of $2,590, representing 14 hours of services at $185 per hour, for work performed before the Board. Where an attorney achieves only limited success in a claim filed under the Act, he may not be entitled to a fee for all hours expended on the case. *See Hensley v. Eckerhart,* 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). We note that claimant was unsuccessful on his primary contention that the administrative law judge erred in determining his average weekly wage, prevailing only on his contention that he is entitled to interest on his compensation award. Thus, in light of claimant's limited success, an attorney's fee based on the number of hours expended on the litigation as a whole is excessive. *See Hensley,* 461 U.S. at 436; *see also Brooks,* 963 F.2d at 1532, 25 BRBS at 161 (CRT); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27 BRBS 24 (1993). Having considered the degree of success obtained by claimant, we find a fee of $1,295, representing 7 hours of legal services at an hourly rate of $185, reasonable for counsel's services on appeal. 33 U.S.C. §928; 20 C.F.R. §§802.203, 802.409.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and the case is remanded for the administrative law judge to determine the amount of interest due on claimant's compensation award. Employer is liable to claimant's counsel for an attorney's fee for work performed before the Board in the amount of $1,295, payable directly to claimant's counsel.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge