

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 21 May 2012

CASE NO.: 2012-LHC-00207
OWCP NO.: 01-172562

In the Matter of:

PAUL ODDO
Claimant,

v.

ELECTRIC BOAT CORPORATION,
Employer/Self-Insured.

Before: Timothy J. McGrath, Administrative Law Judge

Appearances:

Scott N. Roberts, Esq. (Scott N. Roberts, LLC), Groton, Connecticut, for the Claimant

Edward W. Murphy, Esq. (Morrison Mahoney, LLP), Boston, Massachusetts, for Electric Boat Corporation

DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF

I. STATEMENT OF THE CASE

This proceeding arises from a claim for workers' compensation and medical benefits filed by Paul Oddo (the "Claimant") against Electric Boat Corp. ("EBC" or the "Employer") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). A hearing was requested, and the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing that was scheduled for April 24, 2012 in New London, Connecticut.

At the hearing, appearances were made by attorneys representing the Claimant and the Employer. The Director of the Office of Workers' Compensation Programs did not appear at the hearing. The parties advised that they were able to resolve all issues by stipulation with the exception of whether the Employer was entitled to Section (8)(f) relief from the Special Fund. 33 U.S.C. § 908(f). The parties offered their Joint Stipulations as Joint Exhibit ("JX") 1 and Form LS-208, "Notice of Final Payment or Suspension of Payments," as JX-2. Both exhibits were admitted. The Employer's Exhibit ("EX") 1, "Application for Section 8(f) Relief, dated

June 24, 2011, was admitted. Subsequent to the hearing, the Director has indicated that he is withdrawing his opposition to Section 8(f) relief.¹

Upon review of the parties' stipulations and the evidence of record, I conclude that the Claimant is entitled to an award of partial and permanent disability compensation beginning on November 3, 2010, for a period of 141.50 weeks, and to medical benefits. I further conclude that the Employer is entitled to relief from liability pursuant to Section 8(f) of the Act. My findings of fact and conclusions of law are set forth below.

II. PARTIES STIPULATIONS AND ISSUE PRESENTED

The parties have entered into the following stipulations:

1. Claimant has been employed by Employer as a carpenter from March 3, 1975 to date. In the course of his employment, Claimant sustained an occupational hearing loss as a result of injurious noise exposure;
2. Such injury comes within the coverage of the Act;
3. Employer was permissibly self-insured for benefits under the Act;
4. Claimant gave Employer timely notice of the claim;
5. Claimant's average weekly wage as of the above-noted date of injury was \$999.65, yielding a weekly compensation rate of \$666.43;
6. Claimant's filing audiogram was performed on November 3, 2010, by Jean P. Tuneski, a certified audiologist. The audiogram reflected a 70.75% binaural hearing impairment;
7. Employer did not have Claimant evaluated;
8. Claimant has a compensable 70.75 % binaural hearing loss based on the audiogram of November 3, 2010;
9. Claimant did not have any hearing impairment when he was hired at Electric Boat;
10. Claimant has previously been paid benefits for binaural hearing loss;
11. Claimant filed his first claim for a hearing loss in 1986. The claim was assigned OWCP No. 01-84398. On October 29, 1986 Claimant was paid \$9,972.58 for the hearing loss he suffered at that time;
12. Claimant filed a second claim for benefits on account of a binaural hearing loss;

¹ On May 2, 2012, the Court received a letter from the Employer enclosing e-mail correspondence from the Director stating that he would not be contesting the issue of the Employer's entitlement to Section 8(f) relief.

13. The date of injury was June 5, 2000. The OWCP No. is 01-150178;
14. Claimant was seen by Peter J. Rosenberg, M.D. and an audiogram was performed by Elyse Kirschblum on June 30, 2000. The audiogram reflected a 51% binaural impairment;
15. Employer did not have Claimant evaluated;
16. Claimant was initially paid a net of \$40,739.78 representing the benefits due for a 51% impairment less a credit of \$9,972.58 previously paid. The average weekly wage was \$745.78 and the compensation rate \$497.18. The initial payment on [OWCP No.] 01-150178 was made on August 30, 2000;
17. Claimant was seen by Jean Tuneski on November 30, 2005. The audiogram was reflective of a 62.8% binaural impairment;
18. Claimant did not file a new claim. His benefits for 62.8% were paid on [OWCP No.] 01-150178. Benefits were commenced on November 30, 2005 and completed on May 12, 2006. These benefits were paid at \$497.19, as it was determined that the original compensation rate of \$497.18 was incorrect. The average weekly wage was \$745.78. Claimant was compensated for 62.8%, 125.6 weeks at \$497.19 less a credit of \$9,972.58 paid on 01-84398;
19. Claimant received total net benefits of \$52,474.48² on [OWCP No.] 01-150178;
20. Claimant had received a total of \$62,448.06 for his two prior hearing loss claims;
21. Claimant is entitled to an award under Section 8(c)(13)(B) for 70.75% permanent loss of hearing in both ears, for 141.50 weeks based on an average weekly wage of \$999.65 and a compensation rate of \$666.43 per week. Claimant has received prior benefits of \$62,447.06 for his prior claims. Claimant is due benefits for 141.50 weeks at \$666.43 per week, a total of \$94,299.85, less prior payments of \$62,447.06 resulting in net benefits to Claimant of \$31,852.79;
22. Claimant was paid for a 62.8% permanent binaural hearing loss as a consequence of his prior claims. Prior to this claim Claimant had received 62.8% loss of hearing in both ears, 125.6 weeks of compensation at \$497.19;
23. On January 27, 2010, Employer timely filed a fully documented Petition for Second Injury Relief for the pre-existing 47.98% hearing loss under Section 8(f) of the Act in the Office of the District Director;
24. On June 6, 2011, Employer commenced payments for the current loss and filed the appropriate from LS-206;

² \$62,447.06 - \$9,972.58 = \$52,474.48.

25. Prior to his most recent claim the Claimant had received benefits for 125.6 weeks at \$497.19. The average weekly wage for the new claim is \$999.65 resulting in a compensation rate of \$666.43. Electric Boat seeks a recovery for the increased compensation rate now paid on the 125.6 weeks previously paid. Electric Boat will be paying 125.6 weeks at an increased rate \$169.24³ per week or \$21,256.54 over and above the amount the Claimant has already received for the same 125.6 weeks;
26. Electric Boat asserts that it has made the necessary submission for an award of benefits under Section 8(f) relief. Electric Boat requests that relief be granted for 62.8% pre-existing binaural hearing loss, for 125.6 weeks of compensation for the difference in the compensation rates of \$169.24 for a total reimbursement of \$21,256.54;
27. Claimant received prior payment for hearing impairment under Section 8(c)(13) of the Act in the amount of \$62,447.06 for a 62.8% binaural loss of hearing. The Special Fund is entitled to credit this amount against its liability for this injury. The Special Fund has a liability for 125.56 weeks at \$666.43 per week, \$88,703.61 which is reduced by the credit for amounts paid to date of \$62,447.06 resulting in a net liability of \$21,256.54; and
28. Employer shall continue to be responsible for Claimant's reasonable and necessary medical care (including but not limited to audiological examinations, hearing aids, and supplies), when medical treatment is requested and authorized in accordance with Section 7 of the Act.

The only issues to be adjudicated are whether the Employer is entitled to Section 8(f) relief and subject to a 10% penalty under Section 14(e).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Background:

The Claimant was born on May 28, 1953, making him fifty-nine at the time of the hearing. EX-1, Exhibit A. He has worked at EBC since March 3, 1975, as a carpenter. *Id.* The Claimant had no hearing loss when he was hired at EBC. EX-1, Exhibit B.

The Claimant has had two claims for hearing loss prior to the present claim. The first claim was filed in 1986. EX-1, Exhibit C. The Claimant's second claim was filed based on an injury which occurred on June 5, 2000. EX-1, Exhibit D. On June 30, 2000, Claimant was examined by Dr. Peter J. Rosenberg and an audiogram revealed Claimant had a 46.9% loss in his left ear and a 73.1% loss in his right ear, for a 51 % binaural hearing loss. EX-1, Exhibit I. Dr. Rosenberg's report noted Claimant's work history and frequent exposure to noise and concluded that this hearing loss was "consistent with exposure to noise trauma over the years." *Id.* On November 30, 2005 the Claimant saw Jean P. Tuneski, a certified audiologist, for an audiogram, which reflected a 62.8% binaural impairment. EX-1, Exhibit J. Similarly to Dr. Rosenberg, Jean Tuneski found that "based upon Mr. Oddo's work history, occupational noise is a prime etiology for his high frequency hearing loss." *Id.*

³ \$666.43 - \$497.19 = \$169.24.

The Employer paid permanent partial disability benefits in the amount of \$9,972.58 on October 29, 1986 for the Claimant's first claim. EX-1, Exhibit C. For the Claimant's second claim, the Employer paid Claimant \$40,739.78, receiving a credit for the \$9,972.58 the Employer had previously paid. EX-1, Exhibit E. While the Claimant did not file an additional claim following his November 30, 2005 audiogram, the Employer voluntarily commenced payment for this binaural impairment on November 30, 2005, at a rate of \$497.19 for 125.6 weeks, less a credit of \$9,972.58, for a total of \$52,474.48. EX-1, Exhibit F, G, H. The Claimant has received a total amount of \$62,447.06 for prior hearing loss claims.

On November 3, 2010, the Claimant was seen again by audiologist Jean Tuneski for an audiogram. EX-1, Exhibit K. The results revealed that the Claimant had a binaural hearing impairment of 70.75%. *Id.* Jean Tuneski's report noted Claimant's daily exposure to noise during his 36 year long career with EB and concluded Claimant's hearing loss is "consistent with years of noise exposure". *Id.*

b. Compensation Benefits

Based upon the above stipulations and findings of fact, the Claimant is entitled to compensation benefits for permanent partial disability for a 70.75% permanent binaural hearing loss, pursuant to 33 U.S.C. §908(c)(13)(B), at a compensation rate of \$666.43, for a period of 141.5 weeks, plus annual adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f).

c. Medical Care

An employer found liable for the payment of compensation is additionally responsible pursuant to Section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Section 8(f) does not relieve an employer of its liability for a claimant's medical benefits pursuant to Section 7(a). *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Dir.*, *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978). EBC has not disputed its liability for any of the Claimant's medical care. Accordingly, I will order EBC to pay for medical treatment which is reasonable and necessary for the Claimant's work-related injury.

d. Entitlement to Special Fund Relief

Special Fund Relief under section 8(f) of the Act is available where an employee with an existing permanent partial disability suffers a subsequent injury which combines with the earlier partial disability to result in permanent total disability. 33 U.S.C. § 908. An employer's liability for payment of benefits under the Act is limited to no greater than a period of 104 weeks with the remaining compensation paid by a Special Fund established pursuant to 33 U.S.C. § 944. 33 U.S.C. § 908(f)(2)(A); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file an

application with the Director (formerly the Deputy Commissioner) of the Department of Labor's Office of Worker's Compensation Programs (OWCP) pursuant to section 8(f)(3). 33 U.S.C. § 908(f)(3). The record shows that the Employer submitted a petition for Special Fund relief on June 24, 2011, when the claim was pending before the District Director. The District Director reviewed and denied the application by letter dated October 20, 2011, on the grounds that the application made no reference nor provided copies of forms LS-202 and LS-208 for the pre-existing hearing loss claim of June 4, 1985. As there is no question that the Section 8(f) application was timely, I will proceed to the merits of the Employer's application.

In addition to the timely filing of a sufficiently documented application, an employer in a permanent partial disability case must meet three requirements to obtain Section 8(f) relief: (1) the employee must have had a pre-existing permanent partial disability; (2) the pre-existing disability must have been manifest to the Employer; and (3) the current disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. *Dir., OWCP v. Bath Iron Works Corp.*, 129 F.3d 45 (1st Cir. 1997); *Perry v. Bath Iron Works Corp.*, 29 BRBS 57, 58 (1995) (*Perry*). In the context of Section 8(f), a pre-existing permanent partial disability is one that would motivate a cautious employer to terminate an employee due to an enhanced risk of consequent compensation liability. *C&P Tel. Co. v. Director, OWCP (Glover)*, 564 F.2d 503, 512 (D.C. Cir. 1977). Medical records in existence at the time of the subsequent injury from which the condition was objectively determinable satisfy the manifest requirement. *Dir., OWCP v. Universal Terminal & Stevedoring (De Nichilo)*, 575 F.2d 452, 454-57 (3d. Cir. 1978); *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40, 43-44 (1983).

In the instant case, I find that the Employer has successfully established all of the above-mentioned elements in establishing its entitlement to Section 8(f) relief. The audiograms of the Claimant in 2000 and 2005, sufficiently establish that the Claimant suffered from a pre-existing permanent partial disability of hearing loss. Moreover, the Employer has stipulated and established by evidence that this disability was manifest to the Employer, as it covered medical expenses and paid compensation benefits. With regard to the third requirement, the Claimant's audiograms demonstrate that he had a significant hearing loss prior to his last exposure to injurious noise. As such, I find that the Claimant's pre-existing hearing loss worsened the effects of his current hearing loss materially and substantially.

e. Penalty

Pursuant to Section 14(b), 33 U.S.C. § 914(b), compensation is due on the fourteenth day after the employer has received notice of the injury. Section 14(e) of the LHWCA provides "[i]f any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment...." 33 U.S.C. § 914 (e). To escape a penalty under Section 14(e), an employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981). The employer must file a notice of controversion within 14 days of becoming aware of a dispute. *Bonner*, 600 F.2d at 1295; *DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981).

In its “*Motion to Dismiss Claim for Section 14(e) Penalty*” the Employer admits it did not file a timely notice of controversion and began paying compensation on June 6, 2011, well after the 14 day period. After careful consideration of the cross motions filed on the penalty issue, along with all the evidence of record, I conclude the Claimant is entitled to a Section 14(e) penalty, in the amount of 10 percent of the unpaid compensation. Employer’s “*Motion to Dismiss Claim for Section 14(e) Penalty*” is denied.

f. Credit

Section 14(j) of the Act provides that “[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installment of compensation due.” 33 U.S.C § 914(j). This provision allows the employer a credit for its prior payments of compensation against any compensation subsequently found to be due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *on recon., aff’d*, 23 BRBS 241 (1990); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 415 (1989). Further, the employer is entitled to a reimbursement for overpayment where the Special Fund has assumed the payments to the Claimant. *See Dir., OWCP v. General Dynamics Corp.* [Krotsis], 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990), *aff’g Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989) *overruled on other grounds by Dir., OWCP v. Gen. Dynamics Corp.* [Bergeron], 982 F.2d 790 (2nd Cir. 1992).

Based on the above stipulations and findings of fact, I find that the Employer is entitled to a credit for any and all compensation payments to the Claimant prior to and since November 3, 2010.

g. Attorney’s Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys’ fees under Section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Dir., OWCP*, 920 F.2d 163, 166 (5th Cir. 1993).

IV. ORDER

Based upon the Findings of Fact and Conclusions of Law and upon the entire record, I issue the following order:

1. The Employer shall pay the Claimant compensation benefits for a 70.75% permanent loss of hearing in both ears pursuant to 33 U.S.C §908(c)(13)(B), at a rate of 66 2/3 percent of his average weekly wage of \$999.65 for a period of 141.50 weeks, plus annual adjustment pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f);
2. The Employer shall pay the Claimant a penalty under Section 14(e) of 10 percent of the unpaid compensation;

3. The Employer is entitled to a credit for any and all compensation payments made to the Claimant prior to and since November 3, 2010;
4. The Special Fund shall reimburse the Employer the amount of \$21,256.54, which represents the net amount of the Special Fund's liability after the application of credits for amounts paid;
5. The Employer shall provide all reasonable and necessary medical care required by the Claimant for his work-related hearing loss;
6. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director; and
7. If the Claimant seeks an award of attorney's fees and costs pursuant to 33 U.S.C. § 928, an application conforming to the requirements of 20 C.F.R. § 702.132(a) (2008) shall be filed within **30 days** of the date on which this order is filed in the office of the District Director. Should the Employer object to any fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Employer's objections shall be filed not later than **30 days** following service of the fee application. **The objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Claimant's attorney prior to the filing of the objections.**

SO ORDERED.

A

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts