BRB Nos. 05-0893
and 07-0643

G. K.	)	
Claimant	)	
v.	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: 09/29/2008
and	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	ORDER on RECONSIDERATION

The Director, Office of Workers' Compensation Programs (the Director), has timely filed a motion for reconsideration *en banc* of the Board's Decision and Order in this case, *G.K. v. Matson Terminals, Inc.*, 42 BRBS 15 (2008). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has filed a response brief urging rejection of the Director's motion.

In its decision in this case, the Board addressed, *inter alia*, employer's contention that the administrative law judge erred by rejecting its claim for Section 8(f), 33 U.S.C. §908(f), relief based on audiograms pre-dating 2002. Employer specifically contended the administrative law judge erred by finding that Sections 702.321 and 702.441 of the regulations, 20 C.F.R. §§702.321, 702.441, require that employer provide claimant with a copy of the audiogram and interpreting report in order for the test to be valid for purposes of obtaining Section 8(f) relief. The Board vacated the administrative law judge's finding that employer is not entitled to Section 8(f) relief based on the 1978 to 2000 audiograms. The Board held that the administrative law judge erred by construing Sections 702.321

and 702.441 as requiring that employer provide claimant with a copy of the audiogram and interpreting report in order for the test to be valid for purposes of establishing employer's entitlement to Section 8(f) relief.

The Board relied on precedent rejecting the contention that claimant must be informed of the audiometric test results in order for employer to establish entitlement to Section 8(f) relief. *G.K.,* 42 BRBS at 20, *citing Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting). The Board stated that it had previously rejected the argument that an analysis of Section 8(f) entitlement in hearing loss cases should be different than those Section 8(f) cases involving other disabilities. *Id., citing Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989). The Board also relied on its recent decision in *R.H. v. Bath Iron Works Corp.*, 42 BRBS 6 (2008), *recon. denied*, BRB No. 07-0739 (Sept. 18, 2008), rejecting the Director's contention that an employer's entitlement to Section 8(f) relief must be predicated on an audiogram that meets all of the criteria of Section 702.441(b)-(d). The Board stated in *R.H.* that Section 702.441(b)(1-3) applies for an audiogram to be presumptive evidence of hearing loss, but an audiogram not meeting these criteria may establish a hearing loss if it complies with Section 702.441(d) and is otherwise reliable and probative. *Id.*, 42 BRBS at 8-10; *see* 33 U.S.C. §908(c)(13)(E). Thus, for the reasons stated in *R.H.*, the Board in this case held that the administrative law judge erred by finding that claimant's pre-existing hearing loss must be documented by an audiogram that meets all the criteria under Section 702.441(b). That employer did not provide claimant with copies of the audiograms it conducted and the accompanying reports is not determinative of employer's entitlement to Section 8(f) relief. Therefore, the Board vacated the denial of Section 8(f) relief based on the 1978 to 2000 audiograms and remanded for consideration of employer's entitlement to Section 8(f) relief. *G.K.*, 42 BRBS at 19-20.

In his motion for reconsideration, the Director contends that the Board erred in holding that employer need not produce evidence compliant with all of Section 702.441 in order to obtain Section 8(f) relief, pursuant to Section 702.321. The Director contends that his interpretation of the regulations is entitled to deference. We reject these contentions for the reasons stated by the Board in its denial of reconsideration in *R.H.*

The Director further argues that his construction of Sections 702.321 and 702.441 as predicating employer's entitlement to Section 8(f) relief on its providing claimant with a copy of the audiograms and report is consistent with Congressional intent, as reflected in the legislative history to the 1984 Amendments to the Act. Specifically, the Director cites:

> the Committee's bill further requires that a report on the audiogram must be provided to the employee at the time the audiogram was administered.

> Clearly, if that audiogram shows a hearing loss, the employee may want to file a claim for compensation against a previous employer. Further, he may want to undertake steps in his current employment to limit his exposure to noise, so as to prevent further detriment to his hearing.

H.R. Rep. 98-570 (I) at 9 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 2742.

We reject the Director's contention that this language is tied to employer's claim for Section 8(f) relief. This passage, in its entirety, does not reference Section 8(f), but addresses the employee's inability to file a claim or limit his exposure if he is unaware of audiogram results. Similarly, the statute does not reference claimant's receipt of an audiogram as necessary to employee's entitlement to Section 8(f), but provides claimant's receipt is necessary in order for an audiogram to be presumptive evidence of hearing loss and in order to commence the running of the timeliness provisions of Section 12 and 13, 33 U.S.C. §§912, 913. *See* 33 U.S.C. §908(c)(13)(C), (D).[1] These provisions are aimed at ensuring claimant is aware of his loss. In a similar situation involving the Board's attempt to engraft a receipt of audiogram requirement onto the responsible employer determination, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, rejected the notion that the employer responsible for compensation is that for whom claimant was working at the time of receipt of the audiogram on which benefits were based. *Port of Portland v. Director, OWCP,* 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). The court stated, "[T]here is no indication that

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[1] Sections 8(c)(13)(C) and (D) state:

> (C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.
>
> (D) The time for filing a notice of injury, under section 912 of this title, or a claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

33 U.S.C. §908(c)(13)(C), (D).

Congress intended to make the receipt of the audiogram and accompanying report, the events that begin the clock running for notice and filing purposes, crucial outside the procedural requirements of Sections 12 and 13." *Id.*, 932 F.2d at 841, 24 BRBS at 144(CRT). The court cited the explanatory statement in the House Conference Report that "[T]he House amendment affords audiograms presumptive weight if a three-part test is met and provides the time period for filing a claim does not begin running until an employee is given a copy of the audiogram." H.R. Conf. Rep. No. 1027 at 28, *reprinted in* 1984 U.S.C.C.A.N. at 2778. The conference report does not reference Section 8(f) with respect to claimant's receipt of the audiogram, addressing only claimant's entitlement to compensation for loss of hearing pursuant to Section 8(c)(13). Similarly, statements by Representative Miller in the Congressional Record and the Summary of the [House] Conference Substitute to S.38, September 18, 1984, are consistent with the court's statement in *Port of Portland* as they do not reference Section 8(f) with respect to claimant's receipt of an audiogram.[2] 130 Cong. Rec. 9734, 9736 (1984).

Congress could have further encouraged employers to provide employees with a copy of audiometric test results by conditioning Section 8(f) relief on such a provision, but, contrary to the Director's contention, there is no legislative history indicating such Congressional intent. In *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting), the Board held that employees need not be informed of the prior test results for employer to be entitled to Section 8(f) relief.[3] The Board stated that a

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[2] The remarks by Representative Miller state that the presumptive evidence standard for audiograms is intended to resolve difficulties in ascribing audiograms probative weight by having the results certified by an audiologist or otolaryngologist and that pre-enactment tests also are presumptively valid where the employer has complied with the procedures for administering audiograms. 130 Cong. Rec. 9734 (1984). The Summary of the Conference Substitute to S. 38, September 18, 1984, states that the amendments provide presumptive validity to audiograms certified by an audiologist or otolaryngologist in order to clarify their probative value and the amendments also clarify when the limitations statutes in hearing loss cases commence running. 130 Cong. Rec. 9736 (1984).

[3] We reject the Director's contention that the Board's reliance on *Fucci* in its original decision was misplaced due to the fact that the decision did not discuss Sections 702.321 and 702.441 of the regulations. The Director was the petitioner in *Fucci,* and he did not cite the regulations, or offer his current construction of them, as support for his appeal. Moreover, as we have discussed, there is no statutory support or expressed legislative intent to predicate employer's entitlement to Section 8(f) relief on a "presumptive" audiogram, and Section 702.321 does not specifically reference Section 702.441(b). Thus, as we explained in *R.H.*, an audiogram which meets the requirements of Section 702.441(d) may establish a pre-existing permanent partial disability under

claimant's knowledge of whether he sustained an injury is irrelevant to the expressed Congressional intent that Section 8(f) should encourage employers to hire and retain disabled workers. *Fucci*, 23 BRBS at 165 *citing* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 8, *reprinted in* 1972 U.S.C.C.A.N. 4705-4706; S. Rep. No. 1125, 92d Congress 2d Sess. 7 (1972). Therefore, we reject the Director's contention that the legislative history to the 1984 Amendments to the Act establishes that a claimant's receipt of an audiogram and accompanying report is necessary for an audiogram to establish the pre-existing disability requirement of Section 8(f).

Accordingly, the Director's motion for reconsideration is denied.[4] 20 C.F.R. §802.409. The Board's decision is affirmed, and the case is remanded to the administrative law judge as stated therein.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

Section 8(f), just as it may provide substantial evidence in establishing claimant's entitlement.

[4] As a majority of the permanent Board members has denied reconsideration, the request for reconsideration *en banc* is also denied. 20 C.F.R. §801.301(c).