BRB Nos. 05-0893
and 07-0643

G. K.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 04/18/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	DECISION and ORDER

Appeals of the Decision and Order Approving Stipulations for Compensation Order and Attorney Fees and Denying Section 8(f) Special Fund Relief and the Order Granting Director's Motion for Modification of Order Issued May 30, 2006 of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Normand R. Lezy (Leong Kunihiro Leong & Lezy), Honolulu, Hawaii, for employer/carrier.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Approving Stipulations for Compensation Order and Attorney Fees and Denying Section 908(f) Special Fund Relief and the Order Granting Director's Motion for Modification of Order Issued May 30, 2006 (2004-LHC-02255) of Administrative Law Judge Gerald M. Etchingham 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer from 1964 to 1995 repairing containers, and as a security guard from 1995 until he retired on November 1, 2002. His employment throughout exposed him to loud noise. Dr. Pang-Ching administered annual audiograms to claimant at employer's request from 1978 to 2002, with the exception of 1990 and 1994. Claimant was not provided a copy of the audiometric test results. On February 14, 2002, Dr. Pang-Ching diagnosed claimant as having a 48.4 percent binaural hearing loss. EX M at ex. 2. On January 20, 2003, Dr. Chun interpreted a post-retirement audiogram as showing a 53.1 percent binaural loss. EX K at 3. Both doctors related claimant's current hearing loss, at least in part, to his employment. EXs K at 2, M at 21-28. On March 1, 2004, employer submitted an application for Section 8(f) relief, 33 U.S.C. §908(f), based on the 4.7 percentage point increase in claimant's hearing loss from February 14, 2002, to January 20, 2003. Employer sought to hold the Special Fund liable for the pre-existing 48.4 percent loss. On January 21, 2005, the Director informed employer by telephone before the January 24, 2005, formal hearing that, based on Dr. Chun's opinion that the 4.7 percentage point increase between the two audiograms is minimal and within the range of test/retest variability,[1] he objected to the claim for Section 8(f) relief since claimant's ultimate disability is not the combined result of pre-existing and second injuries. Claimant and employer stipulated that claimant is entitled to compensation for a 53.1 percent binaural hearing loss. 33 U.S.C. §921(c)(13). Employer also agreed to pay $5,000 for past and future medical expenses. ALJX 1.

[1] The Director averred that "test/retest variability" refers to the medical standard for comparing audiogram results which allows for a variation between tests in any given frequency of plus or minus 5 dB. For example, a person's hearing at 3000 Hz of 75 dB in one test and 85 dB in a subsequent test does not demonstrate increased hearing loss inasmuch as, using the midpoint between the tests of 80 dB, the additional 5 dB loss recorded in the subsequent test is within the range of test-retest variability. *See* DX C; EX P.

In his initial decision, the administrative law judge accepted the private parties' stipulations and awarded claimant compensation accordingly. With regard to employer's claim for Section 8(f) relief, the administrative law judge found that employer established a manifest pre-existing permanent partial disability, and that the only issue was whether claimant's 4.7 percentage point increase in hearing loss contributed to a materially and substantially greater disability than that which resulted from the pre-existing 48.4 percent hearing loss alone. *See* n. 4, *infra.* The administrative law judge rejected employer's objection to the admission into evidence of Dr. Chun's opinion that the two audiograms do not show a substantial increase in claimant's hearing loss. DX A. The administrative law judge also found that employer failed to produce any evidence to support a finding that the 4.7 percentage point difference in the two audiograms is a materially and substantially greater disability. Accordingly, the administrative law judge denied the request for Section 8(f) relief.

Employer appealed the administrative law judge's decision, BRB No. 05-0893, but it subsequently requested remand for modification proceedings, *see* 33 U.S.C. §922, which the Board granted by Order issued on November 30, 2005. The administrative law judge granted employer's request for modification, finding a mistake in fact in his prior finding that the 4.7 percentage point additional hearing loss recorded in the January 2003 audiogram is within the range of test/retest variability. The administrative law judge found that the January 2003 audiogram recorded an additional 10 decibel hearing loss in the left ear at the 3000 Hz frequency, which he found is outside the normal 5 decibel test/retest margin of error. Order Granting Employer's Motion for Modification of Decision and Order Dated June 27, 2005 and Granting Section 908(f) Special Fund Relief at 7-8. Accordingly, the administrative law judge found that the January 2003 audiogram established a hearing loss materially and substantially greater than the loss recorded by the February 2002 audiogram, and he awarded employer Section 8(f) relief.

The Director appealed the administrative law judge's decision, BRB No. 06-0733, but he subsequently requested remand for modification proceedings, which the Board granted by Order issued on August 29, 2006. The administrative law judge admitted into evidence additional medical reports addressing the range of test/retest variability. The administrative law judge found that upon further reflection of the evidence in light of the newly-submitted medical reports of Drs. House and Schindler, the January 2003 audiogram does not establish a hearing loss materially and substantially greater than the loss recorded by the February 2002 audiogram. Specifically, the administrative law judge found that the plus-or-minus 5 decibel range for determining whether the results from a second audiogram are within the range of test/retest variability allows for the latter audiogram to record up to a 10 decibel difference in any particular frequency from the earlier audiogram since the midpoint between the two test results would be within a 5 decibel range in either direction. Order Granting Director's Motion for Modification of

Order Issued May 30, 2006 (Order) at 8-9, 11. In this case, claimant's hearing on February 2002 at 3000 Hz was recorded at 75 decibels, and the test in January 2003 recorded claimant's hearing at 3000 Hz at 85 decibels. EXs J at 1, K at 5. Dr. House opined that "[T]his probably represents a normal variation, in that the center point may be 80dB instead of 75dB; thus, the 5dB variation." EX P at 1. Thus, the administrative law judge rejected the 2002 audiogram as a basis for Section 8(f) relief.

The administrative law judge also rejected employer's alternate contention that its entitlement to Section 8(f) relief may be established based on the pre-2002 audiograms of record. The Director responded that none of the pre-2002 audiograms is presumptive evidence of the extent of claimant's hearing loss on the testing date because claimant was not provided with a copy of the audiogram and an accompanying report within 30 days of the test, as required under Sections 702.321 and 702.441(b)(2) of the regulations, 20 C.F.R §§702.321, 702.441(b)(2). The administrative law judge found that the Director established that claimant was not provided with any of the pre-2002 audiograms within 30 days of being tested, DX E at 5-10, and that employer did not maintain proper records as required by 29 C.F.R. §§19100.95(g)-(m), 1910.1020(a)-(e), (g)-(i).[2] The administrative law judge determined that for purposes of obtaining Section 8(f) relief, pre-existing hearing loss must be documented by an audiogram that meets all the criteria of Section 702.441. Since employer in this case did not timely provide claimant with a copy of any of the audiograms conducted from 1978 to 2000 as required under Section 702.441(b)(2), the administrative law judge found that employer is not entitled to Section 8(f) relief because there are no presumptive audiograms to verify claimant's pre-existing hearing loss. The administrative law judge further found that a strict construction of Sections 702.321 and 702.441 is required in order for workers to learn of their hearing loss as soon as possible since this injury is not as obvious as most industrial injuries. Accordingly, the Director was granted modification, and employer's application for Section 8(f) was denied.

Employer sought reinstatement of its initial appeal, BRB No. 05-0893, and it also appealed the administrative law judge's Order granting the Director's motion for modification, BRB No. 07-0643. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of Section 8(f) relief. Employer has filed a reply brief.

[2] The Occupational Safety and Health regulations cited by the administrative law judge refer to the requirement that employer provide the employee with a copy of hearing tests and access to employer's exposure and medical records.

Employer first contends that the administrative law judge erred by considering in his initial decision the Director's objection to employer's request for Section 8(f) relief based on Dr. Chun's opinion that the January 2003 audiogram test results are within the range of test/retest variability from the February 2002 test results. Employer argues that the Director failed to comply with the administrative law judge's pre-hearing order requiring that the parties file a pre-hearing statement and all exhibits 30 days prior to the January 24, 2005, hearing. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious, or an abuse of discretion. *See, e.g., Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

In his first decision, the administrative law judge found that the Director informed employer of his objection to its claim for Section 8(f) relief on January 21, 2005, one business day before the hearing, and he faxed employer a copy of Dr. Chun's report the same day. Decision and Order Approving Stipulations for Compensation Order and Attorney Fees and Denying Section 908(f) Special Fund Relief (Decision and Order) at 4; *see* ALJX 3 at 3; DX B. On March 7, 2005, the Director submitted a closing brief to which he attached Dr. Chun's report as an exhibit. ALJX 4; DX A. On March 10, 2005, the administrative law judge granted employer's request to submit a reply brief to the Director's Section 8(f) objection. ALJX 6. In his decision, the administrative law judge rejected employer's objection to the Director's post-hearing submission of Dr. Chun's report since the Director provided verbal notice of his objection prior to the hearing, and employer was afforded an opportunity to file a reply brief after the hearing. Decision and Order at 6-7. Moreover, the administrative law judge found that employer had actual or constructive notice of Dr. Chun's test/retest variability opinion since June 2003, as employer's claims adjuster requested clarification of Dr. Chun's January 2003 audiogram, which the doctor provided in a report dated June 20, 2003. In that report, Dr. Chun stated there is no significant change in claimant's 2003 audiogram from the loss shown on the 2002 audiogram. DX A at 1. Under these facts, we hold that employer did not establish that the administrative law judge abused his discretion in admitting evidence which was not offered in compliance with the pre-hearing order. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table); *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in pert. part and rev'd in part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992); *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

Employer next argues that the administrative law judge improperly credited medical evidence addressing the test/retest variability because the 2002 and 2003 audiograms complied with the technical requirements of Section 702.441 of the regulations for establishing presumptive evidence of the extent of claimant's hearing

loss.[3] Employer therefore contends that Sections 702.321 does not permit consideration of any other factors regarding the extent of the hearing loss demonstrated on a given audiogram.

In his initial decision, the administrative law judge found persuasive the discussion in three decisions by other administrative law judges adopting the Director's contention that audiogram test results at any particular frequency that fall within a 5 decibel range of each other are within the range of test/retest variability and thus are a measure of the same hearing loss. The administrative law judge credited Dr. Chun's opinion in this case and concluded that the 4.7 percentage point difference between the two audiograms at issue is within the test/retest variability range of 5 to 10 decibels when comparing audiogram results by different audiologists. Decision and Order at 7-8. In his June 2003 report, Dr. Chun opined that there is "no significant change between the [2002 and 2003] audiograms," as the results are within the range of test/retest variability. DX A at 2. The administrative law judge thus found that employer did not establish that claimant's

[3] Section 702.321 of the regulations, entitled "Procedures for Determining Applicability of Section 8(f) of the Act," states, in relation to hearing loss cases, that "[i]f the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram which complies with the requirements of Section 702.441." 20 C.F.R. §702.321(a)(1). Section 702.441, entitled "Claims for Loss of Hearing," in turn, mandates that all "[c]laims for hearing loss pending on or filed after September 28, 1984, shall be adjudicated with respect to the determination of the degree of hearing impairment in accordance with these regulations." 20 C.F.R. §702.441(a). Subsection (b) states "an audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if" the requirements, detailed at Section 702.441(b)(1)-(3), are met. Under the criteria, this subsection applies where the audiogram is administered by a licensed or certified audiologist, a copy is provided to the claimant, and no contrary audiogram of equal probative value is produced. 20 C.F.R. §702.441(b); *see also* 33 U.S.C. §908(c)(13)(C). Subsection (c) provides requirements for pre-employment audiograms and states that audiograms performed after December 27, 1984, must comply with the standards described in subsection (d). Section 702.441(d) states that "[i]n determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment*, using the most currently revised edition of this publication," *see* 33 U.S.C. §908(c)(13)(E), and provides the standards for calibrating audiometers used in testing and for testing procedures.

current disability is materially and substantially greater than that which resulted from the subsequent injury alone.[4]

In addition to Dr. Chun's opinion, the record developed on the Director's motion for modification includes the reports of Drs. House and Schindler. *See* discussion, *infra*. These doctors concur with Dr. Chun that the 2002 and 2003 audiogram results in this case are within the range of test/retest variability such that the 2003 audiogram does not represent an increase in claimant's hearing loss since the 2002 audiogram. DX C at 3; EX P at 1. There is no contrary evidence of record. Section 8(c)(13)(C) of the Act and Section 702.441(b) of the regulations set forth standards for determining hearing loss and for establishing presumptive evidence of hearing loss. These provisions do not preclude experts from interpreting the audiometric data or from giving opinions relevant to the issue in this case, namely whether the contribution element for Section 8(f) relief has been satisfied. Moreover, the administrative law judge acted within his discretion in crediting the uncontradicted medical opinions of record to find that employer did not establish that claimant sustained a second injury by virtue of the January 2003 audiogram as, due to the test/retest variability, the hearing loss demonstrated on the 2002 and 2003 audiograms represent the same hearing loss. *See generally Electric Boat Co. v. DeMartino*, 495 F.2d 14, 41 BRBS 45(CRT) (2d Cir. 2007).

We next address employer's appeal of the administrative law judge's second Order on modification. Employer argues the administrative law judge erred by allowing the Director to submit additional evidence that should have been submitted at the initial hearing. By Order issued October 3, 2006, the administrative law judge granted the Director's request allowing the parties to submit new evidence and a supplemental brief. The administrative law judge found that the Director did not need to develop Dr. Chun's

[4] The administrative law judge erroneously addressed the issue as whether claimant's 2003 audiogram demonstrated a materially and substantially greater disability than that demonstrated on the 2002 audiogram. The statute, however, requires that the ultimate disability be greater as a result of the *pre-existing* disability than that which would result solely from the second injury. 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000). As the Director correctly notes, the issue actually presented is whether the 2003 audiogram represents a "second injury." *See Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in part and rev'd in part on other grounds sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). If claimant's ultimate disability is due to the pre-existing disability, then employer is not entitled to Section 8(f) relief. *See Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988). We shall refer to this analysis in the rest of this decision.

credited opinion more fully at the time of the initial hearing. The administrative law judge also found that the Director could not have anticipated his granting employer's prior motion for modification. Accordingly, the administrative law judge found that the Director's motion to further develop the record, pursuant to his motion for modification, was reasonable.

Decisions addressing Section 22 have emphasized the broad scope of modification. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003); *see also Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The modification process is flexible, easily invoked, and intended to secure accuracy and justice under the Act. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002), *citing Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). A party need not establish that the evidence on which it bases its modification request was unavailable at the initial hearing. *Jensen*, 346 F.3d at 277, 37 BRBS at 101(CRT). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see Banks*, 390 U.S. 459. In light of this law and the circumstances of this case cited by the administrative law judge, we hold that the administrative law judge properly granted the Director's request to present additional evidence on modification. *See Jensen*, 346 F.3d 273, 37 BRBS 99(CRT).

Employer argues that the Director's "new evidence" on modification is only cumulative of evidence already before the administrative law judge, and that the Director instead impermissibly requested modification to raise a new legal theory. Specifically, employer challenges the Director's submission of both a medical report by Dr. Schindler and employer's admission that claimant was not provided with timely copies of the 1978 to 2002 audiograms.

We reject employer's contention concerning Dr. Schindler's report. The Supreme Court in *O'Keeffe* expressly recognized that "cumulative evidence" may be considered in a Section 22 proceeding. Moreover, there is no basis for employer's contention that the Director used this evidence to raise a new legal theory. Dr. Schindler's report is additional evidence supporting the Director's request for modification on the basis that the January 2003 audiogram does not establish that claimant sustained a second injury, which is the identical issue addressed by the administrative law judge in his prior decisions. The Director's submission on modification of employer's admission that claimant was not provided with copies of the 1978 to 2002 audiograms is evidence in

support of the Director's response to employer's argument in its prior petition for modification that employer is entitled to Section 8(f) relief based on pre-2002 audiograms. This admission, as well as Dr. Schindler's report, is relevant to employer's entitlement to Section 8(f) relief, which is the ultimate fact at issue and which is subject to modification. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). Therefore, we reject employer's contention that the Director impermissibly raised a new legal theory on modification. *See Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). As the administrative law judge did not err in admitting into evidence on modification the opinions of Drs. House and Schindler, and as this evidence along with Dr. Chun's opinion constitutes substantial evidence supporting the finding that claimant did not sustain a second injury between 2002 and 2003, we affirm the denial of Section 8(f) relief on this basis. *DeMartino,* 495 F.3d 14, 41 BRBS 45(CRT).

Finally, employer argues the administrative law judge erred by rejecting its claim for Section 8(f) relief based on the audiograms pre-dating 2002. Employer specifically contends the administrative law judge erred by finding that Sections 702.321 and 702.441 of the regulations 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 Section 8(f). *See also* n. 2, *supra.* In his Order, the administrative law judge relied on prior decisions by other administrative law judges addressing this issue, and he denied Section 8(f) relief because the pre-2002 audiograms did not comply with all of the criteria of Section 702.441. *See* n. 3, *supra.* The administrative law judge also found distinguishable the Board's decision in *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993). In *Skelton*, the Board rejected the Director's contention that Section 8(f) did not apply in that case because the employer allegedly did not inform claimant of the results or file an injury report with the district director. The Board held that the audiogram was valid evidence of a pre-existing permanent partial disability despite an allegation that the claimant did not receive a copy because there was no affirmative evidence that the audiogram results were concealed from claimant and employer has no duty under Section 30(a), 33 U.S.C. §930(a), to report the hearing loss to the district director as was it a no-time-loss injury. In this case, the administrative law judge found that the Director produced evidence that employer withheld the prior audiogram results. DX E at 5-10. The administrative law judge found that Section 702.321 could have cited to Section 702.441(d) had there been intent to omit the requirement of Section 702.441(b)(2) that employer timely provide claimant a copy of the audiogram, and that the Director's interpretation of the regulations is entitled to deference. Moreover, the administrative law judge found that policy reasons favor a strict interpretation of these regulations to aid workers in learning of their hearing loss as soon as possible since this injury is not as obvious as other industrial injuries. The administrative law judge concluded that since employer concealed the reports, there are no presumptive audiograms of record to verify claimant's pre-existing hearing loss;

therefore, employer is not entitled to Section 8(f) relief based on the 1978 to 2000 audiograms.

We agree with employer 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. Section 8(c)(13)(D) provides that the filing times under Sections 12 and 13, 33 U.S.C. §§912, 913, do not begin to run in hearing loss cases until claimant receives an audiogram with an accompanying report that indicates a loss of hearing. However, the Board has rejected the contention that claimant must be informed of the prior test results for employer to be entitled to Section 8(f) relief. *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting). The Board held that a claimant's knowledge of whether he sustained an injury is irrelevant to the purpose of Section 8(f) which is to encourage employers to hire and retain handicapped workers. *Id*. at 165. In this case, the Director, in effect, argues that hearing loss cases are unique from cases involving other disabilities in that claimant must be made aware of the pre-existing condition prior to sustaining the second injury. The Board has 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. *See Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989) (pre-existing hearing loss may be established by post-employment audiogram); *see also Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991) (no indication that Congress intended to make the receipt of an audiogram and accompanying written report crucial outside the procedural requirements of Section 12 and 13).

Moreover, the Board, in *R. H. v. Bath Iron Works Corp.*, __ BRBS __, BRB No. 07-0739 (Mar. 28, 2008), recently rejected 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).[5] The Board stated 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 is otherwise reliable and probative. *R. H.*, slip op. at 6-8 (citing several cases). The Board held that an audiogram complying with the criteria set forth in Section 702.441(d) is sufficient to establish pre-existing hearing loss under Section 8(f) if it is reliable and probative. *R.H.*, slip op. at 4-8; *see* n.3, *supra*. Thus, for the reasons stated in *R. H.*, the administrative law judge in this case erred by finding that claimant's pre-existing hearing loss must be documented by an audiogram that meets all the criteria under Section

[5] By motions filed April 16, 2008, the Director moved for reconsideration in *R.H.*, and to hold the instant case in abeyance pending a decision on its motion for reconsideration. We deny the Director's motion to hold this case in abeyance.

702.441(b). That claimant was not provided copies of the audiograms and reports is not determinative of employer's entitlement to Section 8(f) relief. Therefore, we vacate the denial of Section 8(f) relief.

The administrative law judge found in his initial decision that there is no dispute about the validity of the 1978 to 2002 audiograms conducted by Dr. Pang-Ching for employer. Decision and Order at 3. Thus, on remand, the administrative law judge must evaluate these audiograms to determine the extent of claimant's manifest pre-existing hearing loss, and determine if claimant's ultimate hearing loss is materially and substantially greater as a result of the pre-existing loss than it would be from the second injury alone. *See generally Marine Power & Equip.*, 203 F.3d 664, 33 BRBS 204(CRT); *Fucci*, 23 BRBS 161; *Risch*, 22 BRBS 251. Employer is liable for the lesser of 104 weeks or the portion of claimant's hearing loss attributable to the second injury. 33 U.S.C. §908(f)(1). The Special Fund is liable for the remaining portion of the compensable hearing loss. *Reggiannini v. General Dynamics Corp.*, 17 BRBS 254 (1985).

Accordingly, the administrative law judge's denial of Section 8(f) relief based on a comparison of the 2002 and 2003 audiograms is affirmed. The administrative law judge's denial of Section 8(f) relief based on the 1978 to 2000 audiograms of record is vacated, and the case is remanded for further proceedings in accordance with this opinion. The award of benefits to claimant is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge