BRB No. 93-2285

JAMES E. GAINER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (92-LHC-2729) of Administrative Law Judge A. A. Simpson, Jr., 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 sustained a noise-induced hearing loss during the course of his employment with employer between 1958 and 1989. As a result of an audiogram administered on October 16, 1986, claimant filed a claim dated October 26, 1986, for which employer accepted liability and voluntarily paid compensation for an 11.6 percent binaural loss at a rate of $295.17 for a period of 23.2 weeks. In light of a subsequent audiogram administered on November 8, 1990, indicating a 15.3 percent binaural hearing impairment, claimant filed a second claim on March 26, 1991, alleging that the increased hearing loss resulted from additional noise exposure at employer's facility.

At the hearing the parties stipulated that, among other things, claimant was exposed to workplace noise which could have caused a hearing loss, that on March 8, 1989, employer paid claimant compensation in the amount of $6,847.71, and that medical benefits were accepted by

employer on February 18, 1993.

In his Decision and Order, the administrative law judge initially determined that claimant sustained a 13.75 percent binaural hearing impairment as a result of noise exposure during the course of his employment with employer. The administrative law judge then found that claimant's average weekly wage, calculated pursuant to Section 10(c), (d), 33 U.S.C. §910(c), (d), is $363.31, resulting in a compensation rate of $242.20. The administrative law judge also determined that employer is entitled to a credit for the $6,847.71 previously paid to claimant. Accordingly, the administrative law judge concluded that claimant is entitled to compensation for a period of 27.5 weeks, commencing on November 8, 1990, plus interest pursuant to 28 U.S.C. §1961, less amounts previously paid.

On appeal, claimant challenges the administrative law judge's determinations regarding the extent of his hearing loss, the calculation of his average weekly wage, and the date for the commencement of benefits. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred by according greatest weight to the in-house audiogram administered on January 4, 1990, since that test does not meet the requirements set out in 20 C.F.R. §702.441. Moreover, claimant contends that while employer offered the testimony of audiologist Marianne Towell as evidence of her testing technique at the shipyard, her testimony is only general in nature and is not specific to the instant case. Claimant further asserts that the audiological studies performed by Dr. McDill are the most relevant indicia of the degree of claimant's permanent hearing loss, and therefore requests modification of the award to compensate him for a 15.3 percent binaural hearing loss, which would entitle him to 30.6 weeks of compensation.

In weighing the relevant evidence of record,[1] the administrative law judge accorded greatest weight to the audiogram administered by Marianne Towell on January 4, 1990 because it was taken closest to claimant's last exposure to noise with employer, *i.e.*, June 14, 1989, and thus is a more probative indicia of claimant's true hearing loss resulting from his employment. While this is a rational basis for crediting the January 4, 1990 audiogram, *see Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991), we hold that the administrative law judge's discussion of the audiogram evidence is flawed in that he failed to address claimant's contention, raised before the administrative law judge and in this appeal, that the January 4, 1990 audiogram is not in compliance with Section 702.441(d) of the regulations and therefore is not entitled to determinative weight.[2] *See generally*

[1]The record contains three audiograms. The first audiogram, administered on October 16, 1986 by Drs. Lingo and McDill, resulted in an 11.6 percent binaural hearing loss. A second audiogram, administered at employer's facility on January 4, 1990 by audiologist Marianne Towell, reflected a 13.75 percent binaural hearing loss. The third audiogram, administered by Dr. McDill on November 8, 1990, indicated a 15.3 percent binaural hearing loss.

[2]Under the Act and implementing regulations, an audiogram provides presumptive evidence of the extent of claimant's hearing loss if the following conditions are met: 1) the audiogram was

Bridier v. Alabama Dry Dock & Shipbuilding Corp., 29 BRBS 84 (1995). Although the administrative law judge may credit an audiogram that does not meet the criteria of the regulation, he must discuss claimant's contention that it is not as reliable as other evidence of record. We therefore vacate the administrative law judge's finding that claimant has a 13.75 percent binaural hearing loss and remand for reconsideration as to the extent of claimant's loss of hearing. On remand, the administrative law judge must discuss whether the failure of the in-house audiogram to meet the pertinent regulations has any effect on the probative value of that evidence.[3]

Claimant next contends that the administrative law judge erred in his calculation of claimant's average weekly wage. Claimant, in essence, is requesting that the administrative law judge use Section 10(a), 33 U.S.C. §910(a), to calculate his average weekly wage, by virtue of his contention that his average weekly wage should be figured by multiplying his 1989 hourly rate by forty hours per week.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied. The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

The administrative law judge, after noting that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c),[4] divided claimant's average annual earnings for

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administered by a licensed or certified audiologist or physician; 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 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 claimant's hearing loss must be measured according to the most currently revised edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment. See* 20 C.F.R. §702.441 (b)(1)-(3) and (d); *West v. Port of Portland*, 20 BRBS 162 (1988), *modified on recon.*, 21 BRBS 87 (1988).

[3]In considering the reliability of the January 4, 1990 audiogram, the administrative law judge may rely on the deposition testimony of Ms. Towell, but he should also consider the fact that Ms. Towell's testimony was given with regard to a different case.

[4]Inasmuch as claimant's wages in the year prior to his retirement were limited due to extensive

1987 and 1988, which amounts to $18,891.99, by 52 and thus, fixed claimant's average weekly wage at the time of his injury at $363.31. The formula used by the administrative law judge, pursuant to Section 10(c), in calculating claimant's average weekly wage is reasonable, supported by substantial evidence, and consistent with the goal of arriving at a sum which reasonably represents claimant's annual earnings at the time of his injury. *See Gatlin*, 936 F.2d at 819, 25 BRBS at 26 (CRT); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). Accordingly, the administrative law judge's calculations of claimant's average weekly wage and compensation rate are affirmed as they are supported by substantial evidence.[5]

Claimant lastly argues that the administrative law judge erred in finding that compensation should be paid from November 8, 1990, the date of claimant's third audiogram. Claimant maintains that he last worked for employer on June 14, 1989, which is the date of injury from which compensation should be paid.

The United States Supreme Court, in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), held that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. Additionally, the Supreme Court noted that as a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. *See Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). In light of the Supreme Court's decision in *Bath Iron Works*, we hold that claimant's benefits must commence on the date of his last exposure to injurious noise levels while working for employer. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). In the instant case, claimant's exposure to noise ended on June 14, 1989, claimant's last day of employment. Consequently, we modify the administrative law

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absences due to illness, the administrative law judge determined, and the parties agreed, that a Section 10(a) calculation of his average weekly wage would be inappropriate. Additionally, the administrative law judge correctly noted that there is no evidence in the record to require a Section 10(b) calculation. Moreover, claimant, in his Brief in Support of the Petition for Review, specifically notes that he requested the administrative law judge to use Section 10(c). Claimant's Brief at 5. In light of these circumstances, we hold that claimant's contention that Section 10(a) be used, at least in part, to calculate his average weekly wage is meritless.

[5]Claimant's contention that it was improper for the administrative law judge to award benefits based on a compensation rate that is less than the rate under which employer previously voluntarily paid compensation in 1986 is without merit. Under the United States Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993), the average weekly wage in hearing loss cases is to be calculated from the date of last exposure. In the instant case, the administrative law judge's calculation of claimant's average weekly wage under Section 10(c), based upon his 1987 and 1988 earnings, reflects an effort to reach a fair and reasonable approximation of claimant's wage-earning capacity at the time of injury, June 14, 1989. Moreover, claimant has not presented any evidence that employer intended to be bound in future cases by the voluntary compensation rate set in 1986. *See generally Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). Consequently, that figure has no bearing on the instant case. *Id.*

judge's decision to reflect that benefits shall commence from June 14, 1989.

Accordingly, the administrative law judge's decision regarding the extent of claimant's hearing loss is vacated and the case is remanded for further consideration consistent with this opinion. In addition, the administrative law judge's decision is modified to reflect that the commencement date for the payment of benefits shall be June 14, 1989. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge