

HERMAN J. HEBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED: _____
INCORPORATED	)	
	)	
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.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (90-LHC-1155) 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).

On April 28, 1987, claimant filed a claim for benefits under the Act for a work-related hearing loss. Claimant's Exhibit 4. Claimant had undergone an audiometric examination on March 6, 1987, which revealed a 24.1 percent binaural impairment. Employer's Exhibit 9. A subsequent audiometric evaluation performed on November 9, 1988, revealed a 31.88 percent binaural impairment. *Id.* Employer filed a notice of controversion on June 12, 1989. Employer's Exhibit 4. At the formal hearing, the parties stipulated, *inter alia*, that claimant was entitled to compensation at a rate of \$307.30 per week. Joint Exhibit 1.

In his Decision and Order, the administrative law judge relied on the results of the March 1987 audiogram to find that claimant sustained a 24.1 percent noise-induced work-related binaural hearing loss. He also determined that claimant was a retiree within the meaning of the regulations

and, accordingly, should be compensated under Section 8(c)(23) pursuant to the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). The administrative law judge further found that employer was liable for an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e), and was barred from the relief provided under Section 8(f) of the Act, 33 U.S.C. §908(f). Lastly, the administrative law judge found that claimant was entitled to medical benefits pursuant to Section 7, and interest on past-due compensation payments at the rate specified in 28 U.S.C. §1961.<sup>1</sup>

On appeal, claimant contends that the administrative law judge erred in concluding that claimant's award of compensation for his work-related loss of hearing should be made pursuant to Section 8(c)(23) of the Act. Specifically, claimant argues that benefits must be computed under Section 8(c)(13) pursuant to the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). Employer responds, assenting to the application of *Bath Iron Works*.

The decision of the United States Supreme Court in *Bath Iron Works* is dispositive of the issue presented in this case. In *Bath Iron Works*, the Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13). Specifically, the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23), 33 U.S.C. §908(c)(23), only applies to retirees with such occupational diseases, Section 8(c)(23) is inapplicable to hearing loss injuries.

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Since the administrative law judge's finding that claimant suffered a 24.1 percent binaural hearing loss is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits in the amount of \$307.30 per week for 48.2 weeks (24.1 percent of 200 weeks) pursuant to Section 8(c)(13) of the Act.

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<sup>1</sup>The administrative law judge also indicated that he would address claimant's counsel's fee petition in a separate Decision and Order.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is modified to reflect claimant's entitlement to benefits for a 24.1 percent binaural impairment pursuant to Section 8(c)(13) of the Act. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge