

BRB Nos. 91-0256A  
and 91-0256B

HASCEL C. PITTS	)	
	)	
Claimant-	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED: _____
	)	
Self-Insured	)	
Employer-	)	
Cross-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals 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.

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

Samuel J. Oshinsky, Counsel for Longshore (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), and employer cross-appeal the Decision and Order - Awarding Benefits (88-LHC-3285) 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).<sup>1</sup> 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 November 3, 1987, claimant, a retiree, filed a claim for benefits under the Act for a work-related hearing loss. CXS 3, 4. Employer filed Notices of Controversion on January 1, 1988, and April 26, 1988. EXS 2, 3. The case was referred to the Office of Administrative Law Judges for a formal hearing. The administrative law judge found that claimant has a 73.75 percent binaural hearing impairment, and awarded claimant benefits pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), of the Act, commencing October 3, 1987, which was the date of the filing audiogram as stipulated by the parties. The administrative law judge further determined that employer is liable for a penalty under Section 14(e), 33 U.S.C. §914(e).

On appeal, the Director contends that the administrative law judge's order of compensation commencing October 3, 1987, is erroneous as benefits should properly commence as of the date of claimant's last exposure to injurious noise levels. Because the administrative law judge did not determine this date, the Director seeks remand of the case. Employer responds, urging affirmance of the administrative law judge's order. Employer, in its cross-appeal, challenges the administrative law judge's finding that claimant is entitled to a penalty under Section 14(e). Claimant responds, urging affirmance of the administrative law judge's finding on this issue.

We first address the Director's contention that the case must be remanded for a determination as to the date claimant's benefits should commence, specifically the date of claimant's retirement. BRB No. 91-0256A. Since the parties filed their briefs on appeal in the instant case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which is dispositive of the issue raised by the Director. In *Bath Iron Works*, the Court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. 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). Based on this analysis, the court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), and 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), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23).

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<sup>1</sup>In an Order dated January 22, 1991, the Board dismissed the appeal of the administrative law judge's Decision and Order filed by claimant, the original petitioner in this case. BRB No. 91-0256.

Pursuant to the Supreme Court's decision in *Bath Iron Works* that the relevant time of injury for calculating a retiree's hearing loss benefits is the date of his last exposure to injurious noise levels, 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, the administrative law judge made no findings as to the date of claimant's last exposure to injurious noise levels. Accordingly, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to determine, in accordance with the holding of *Bath Iron Works*, the onset date for the commencement of claimant's benefits.

In *Moore*, 27 BRBS at 76, the Board held that as the Supreme Court's decision in *Bath Iron Works* is dispositive of the Director's appeal of the issue of the onset date for claimant's award, it would be incongruous to commence a Section 8(c)(23) award on the date of claimant's last exposure with employer and ignore the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13) of the Act. Thus, although no party on appeal has explicitly challenged the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23), in accordance with the holding of *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23), and we modify that award to reflect that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(13) of the Act for a 73.75 percent binaural impairment. On remand, the administrative law judge should enter an award under Section 8(c)(13) commencing on the date of last exposure to injurious noise at the appropriate average weekly wage.<sup>2</sup>

In its cross-appeal, employer contends that the administrative law judge erred in holding it liable for a Section 14(e), 33 U.S.C. §914(e), assessment. BRB No. 91-0256B. Specifically, employer asserts that the administrative law judge erred in finding that the "excuse" granted by the district director is invalid. Employer further contends that the instant case is distinguishable from *Ingalls v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *aff'g in part part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), because the excuse was granted prior to the date claimant notified employer of his injury rather than retroactively. Additionally, employer contends that even if it had not been excused, the concept of "replacement income" is not applicable in this case, and thus the Section 14(e) penalty should not apply.

The precise arguments raised by employer regarding the excuse granted by the district director, the inapplicability of *Fairley*, *supra*, and the concept of "replacement income," have been rejected by both the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises. See *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934 (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); see also *Ingalls Shipbuilding, Inc.*, 898 F.2d at 1095, 23 BRBS at 67 (CRT). We therefore reject these specific allegations of error raised by employer, and affirm the administrative law judge's finding that

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<sup>2</sup>Although the parties stipulated to an average weekly wage below, in view of the decision in *Bath Iron Works* that average weekly wage is calculated as of the date of last exposure, the administrative law judge should reconsider this issue if it is raised by a party on remand.

employer is liable for a Section 14(e) assessment.

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23) is vacated and modified to reflect claimant's entitlement to an award pursuant to Section 8(c)(13), and the case is remanded to the administrative law judge for determination of the onset date for the commencement of claimant's benefits. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge