

BRB Nos. 91-2050
and 91-2050A

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

Appeals of the Decision and Order of James W. Kerr, 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.

Mark A. Reinhalter (Thomas S. Williamson, Solicitor of Labor, Carol DeDeo, Associate Solicitor, Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), appeal the Decision and Order - Awarding Benefits (89-LHC-2936) of Administrative Law Judge James W. Kerr, Jr. 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, a retiree, received injurious noise exposure while working for employer as a carpenter from 1965 until 1975. On August 14, 1987, claimant underwent an audiometric evaluation by Dr. Wold which revealed a 28.4 percent binaural hearing impairment. On September 1, 1987, claimant filed a claim for occupational hearing loss and notified employer of his injury. Employer filed notices of controversion on December 30, 1987, and March 21, 1989. On June 22, 1989, the case was referred to the Office of Administrative Law Judges for a formal hearing. On September 20, 1990, a second audiometric examination was performed by Dr. McDill which revealed a 1.9 percent binaural hearing impairment. Employer made no voluntary payments of compensation or medical benefits.

Crediting the 1.9 percent binaural hearing impairment reflected on the 1990 audiogram, the administrative law judge, relying on *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *rev'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1980)(*en banc*), converted claimant's binaural hearing impairment to a one percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (*AMA Guides*) consistent with Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). The administrative law judge, however, refused to award claimant compensation for his measurable hearing loss on the rationale that a one percent impairment is *de minimis*. The administrative law judge further determined that as no compensation was due, Section 14(e), 33 U.S.C. §914(e), was inapplicable. The administrative law judge, however, awarded claimant medical expenses pursuant to Section 7, 33 U.S.C. §907. Claimant and Director appeal the administrative law judge's denial of disability compensation under Section 8(c)(23). Claimant also appeals the administrative law judge's failure to award an assessment pursuant to Section 14(e). Employer responds, urging that the administrative law judge's denial of disability compensation be affirmed.

On appeal, claimant contends that the administrative law judge erred in refusing to award him compensation for his hearing loss on the rationale that a one person whole person impairment is *de minimis*. Claimant contends that Section 8(c)(23) of the Act provides for an award of continuing benefits where, as here, claimant has succeeded in establishing a measurable physical impairment under the *AMA Guides*. While cognizant of the Board's position that *de minimis* awards are not authorized under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), *see Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d

1489, 19 BRBS 53 (CRT) (9th Cir. 1986), claimant asserts the concept of a *de minimis* award does not apply in this case. Claimant asserts that the Act provides for recovery of benefits to retired claimants who have demonstrated a ratable hearing impairment based on the threshold requirements of the *AMA Guides* and that the administrative law judge cannot arbitrarily raise the minimum degree of loss for which compensation will be paid without running the risk of producing non-uniformity in awards. Finally, claimant contends that if the Board agrees that the administrative law judge erred in failing to award him compensation, the case should be remanded for the administrative law judge to address his entitlement to a Section 14(e) assessment.

In his appeal, the Director agrees with claimant that the administrative law judge abused his discretion in refusing to award compensation for claimant's demonstrated one percent whole person impairment pursuant to Section 8(c)(23). The Director contends that Section 8(c)(23) authorizes payment of compensation for retired employees, such as the present claimant, in accordance with the *AMA Guides* for a permanent physical impairment based on a statutorily presumed scheduled rate regardless of the effect that the impairment has, or is likely to have, on the injured employee's wage-earning capacity in the future. The Director maintains that this statutory scheme is not related to a *de minimis* award is under Section 8(h) of the Act, 33 U.S.C. §908(h), which permits an administrative law judge to account for the prospective effects of an employment-related injury in determining the employee's post-injury wage-earning capacity. The Director further asserts that given the administrative law judge's finding that claimant had a one percent whole person impairment under the *AMA Guides*, it was mandatory that he award claimant compensation, as Section 8(c)(23) states, "the compensation *shall be* 66 2/3 percentum of such average weekly wages multiplied by the percentage of permanent impairment." 33 U.S.C. §908(c)(23)(emphasis added).

We agree with claimant and the Director that the administrative law judge erred in refusing to award claimant compensation where he established a binaural hearing loss resulting in a measurable impairment. The administrative law judge's denial of compensation on the theory that an award of compensation based on a one percent whole person impairment is *de minimis* is not supported by the statute or case law. The Act contains no provision which allows the administrative law judge to refuse to award claimant compensation because he finds the amount of benefits owed inconsequential.¹ The administrative law judge's denial of permanent partial disability benefits for

¹In their briefs, claimant and the Director address the line of cases involving *de minimis* awards under Section 8(c)(21) and (h). See, e.g., *Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3 (9th Cir. 1986). As the Director, asserts, this case law is inapposite, as it involves whether a claimant is entitled to receive a small award to compensate him for future loss in wage-earning capacity where he has no actual loss at the time of the award. Unlike a Section 8(c)(21) award, however, awards under Section 8(c)(13) and Section 8(c)(23) are based solely on the degree of permanent physical impairment. In any event, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has specifically approved the payment of *de minimis* awards as low as one percent under Section 8(c)(21) in appropriate cases. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981).

claimant's occupational hearing loss in this case was arbitrary and must be reversed.

We note, however, that since the parties' briefing in the present case, the United States Supreme Court has determined that hearing loss claims, whether for current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), rather than under Section 8(c)(23). *Bath Iron Works Corp v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). Because the arguments raised by the parties on appeal go to the merits of the underlying award, and inasmuch as retroactive application of this intervening change in law will not result in manifest injustice, we vacate the administrative law judge's denial of benefits under Section 8(c)(23) and modify the administrative law judge's Decision and Order to reflect that claimant is entitled to compensation for his occupational hearing loss pursuant to Section 8(c)(13). See generally *Bradley v. School Board of Richmond*, 444 U.S. 686 (1974); *Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376, 380 (1989). Since the administrative law judge's finding that claimant suffered a 1.9 percent binaural hearing impairment is unchallenged, pursuant to *Bath Iron Works*, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits at a rate of \$201.77 per week (66 2/3 percent of the stipulated average weekly wage of \$302.66) for 3.8 weeks (1.9 percent of 200).

In light of our reversal of the administrative law judge's denial of disability compensation, we must also reverse his determination that Section 14(e) is inapplicable. Section 14(e) provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing that owing to conditions over which employer had no control, such installment could not be paid within the period prescribed for the payment. Section 14(b) of the Act, 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury. See generally *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991). In the instant case, the parties stipulated that employer received notice of claimant's injury on September 1, 1987, and that employer filed its first notice of controversion on December 30, 1987. Because the award of benefits in this case is for 3.8 weeks from claimant's August 14, 1987 date of injury, claimant is entitled to a Section 14(e) penalty on the entire award of benefits as the period of entitlement ended before employer controverted the claim on December 30, 1987. See *Pullin v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 91-131 (May 17, 1993)(decision on reconsideration). The administrative law judge's Decision and Order is therefore modified to reflect that employer is liable for a Section 14(e) penalty on the entire award of compensation in this case.

Accordingly, the administrative law judge's denial of disability compensation and a Section 14(e) assessment are reversed. The Decision and Order - Awarding Benefits is modified to reflect that claimant is entitled to an award for his 1.9 percent binaural hearing impairment pursuant to Section 8(c)(13) of the Act. It is also modified to reflect that employer is liable for a ten percent assessment pursuant to Section 14(e) on the entire award of compensation. In all other respects, the

Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge