

JACK THOMAS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION AND ORDER

Appeal of the Decision and Order On Remand of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and 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 on Remand (88-LHC-2173) of Administrative Law Judge Kenneth A. Jennings 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).

This case is before the Board for the second time. In his initial decision in this case, the administrative law judge granted claimant's motion for summary judgment and found that claimant, a retiree, suffered a noise-induced binaural hearing loss of 43.7 percent and that claimant's benefits should be calculated 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), of the Act.

Thereafter, claimant's counsel submitted a Petition for Approval of Attorney's Fee to the administrative law judge. She requested a fee of \$858.25, representing 6.75 hours of services at a rate of \$125 per hour, plus \$14.50 in expenses. Employer filed objections to the requested fee,

challenging both the requested hours and the requested rate. The administrative law judge agreed with employer's contention that \$125 per hour is excessive and reduced it to an hourly rate of \$100; however, he rejected employer's remaining objections. The administrative law judge thus awarded a total fee of \$689.50.

Employer appealed these decisions to the Board. Employer subsequently moved to remand the case to the administrative law judge for further action consistent with 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), in which the court held that a retiree's hearing loss benefits are to be calculated pursuant to Section 8(c)(23). In an Order dated September 12, 1991, the Board granted the motion to remand. *Thomas v. Ingalls Shipbuilding, Inc.*, BRB No. 89-0567 (Sept. 12, 1991)(order). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e). Lastly, the Board vacated the attorney's fee award and instructed the administrative law judge to reconsider the fee in light of his decision on remand.

On remand, consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), the administrative law judge awarded claimant benefits pursuant to Section 8(c)(23) for a 43.7 percent binaural loss converted to a 15 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The administrative law judge further found that employer is liable for a Section 14(e) penalty. The administrative law judge rejected employer's contentions that it is not liable for the penalty because it was "excused" from filing a notice of controversion by the district director and, alternatively, that the Form LS-202 which it filed on December 4, 1987, constituted the functional equivalent of a notice of controversion. The administrative law judge also reaffirmed the attorney's fee award to claimant's counsel.

On appeal, claimant requests that the Board vacate its prior order and reinstate the administrative law judge's original determination that benefits are payable under Section 8(c)(13) of the Act, consistent with the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 629, 26 BRBS 151 (CRT)(1993); employer responds, assenting to claimant's request.

The Supreme Court's decision in *Bath Iron Works* is dispositive of the issue presented by claimant 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). 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) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries.

Consequently, 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). Inasmuch as the administrative law judge's finding that claimant has a 43.7 percent binaural hearing loss is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits for this hearing loss pursuant to Section 8(c)(13) of the Act.

Accordingly, the Decision and Order on Remand of the administrative law judge is modified to reflect claimant's entitlement to benefits for a 43.7 percent binaural impairment pursuant to Section 8(c)(13). In all other respects, the Decision and Order on Remand is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge