

BRB No. 94-3702

MALCOLM BILLINGS)
)
 Claimant-Respondent)
)
 v.)
)
 BATH IRON WORKS CORPORATION)
)
 and)
)
 COMMERCIAL UNION INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DATE ISSUED:
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Martin J. Dolan, Jr., Administrative Law Judge and the Decision and Order on Reconsideration-Awarding Benefits of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Michael S. Hertzog (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order-Awarding Benefits of Administrative Law Judge Martin J. Dolan, Jr.¹ and Decision and Order on Reconsideration-Awarding Benefits (89-LHC-3246) of Administrative Law Judge Joan Huddy Rosenzweig 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).

To recapitulate briefly the proceedings in this case, Administrative Law Judge Dolan, in a Decision and Order issued October 10, 1990, awarded claimant, a retiree, benefits for a 29.08 percent binaural hearing loss pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), based on the national average weekly wage of \$289.83, commencing May 7, 1985. The administrative law judge based the award on 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 is to be compensated pursuant to Section 8(c)(23). In an amended Decision and Order issued November 1, 1990, Administrative Law Judge Dolan converted claimant's 29.08 percent binaural hearing loss to a 10 percent whole man impairment in accordance with Section 8(c)(23). The Director appealed Judge Dolan's Decision and Order. The Board initially granted claimant's motion for a stay and held the case in abeyance pending 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). Subsequent to the issuance of the Supreme Court's decision in *Bath Iron Works*, employer filed a motion to remand the case to the administrative law judge for further action, which was granted by the Board.

In his Decision and Order Awarding Benefits Upon Remand, Judge Dolan awarded claimant benefits under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), for a 29.08 percent binaural hearing loss for 58.16 weeks based on an average weekly wage of \$420.80 determined as of the date of claimant's last injurious exposure, which he determined occurred on June 30, 1983, immediately prior to claimant's retirement. Employer filed a motion for reconsideration, in which claimant concurred, alleging that the administrative law judge erred in calculating the average weekly wage as of claimant's retirement date inasmuch as Judge Dolan found in his initial decision that claimant's last injurious exposure occurred in 1980. At that time, claimant's hourly rate was \$7.55, yielding an average weekly wage of \$302. On reconsideration, Administrative Law Judge Joan Huddy Rosenzweig, who entertained the case upon Judge Dolan's retirement,² agreed with the parties that

¹All of the Director's arguments, however, appear to relate to the Decision and Order on Reconsideration of Administrative Law Judge Joan Huddy Rosenzweig.

²Upon Judge Dolan's retirement the parties agreed to have the case decided without a *de novo* proceeding. See Decision and Order on Reconsideration at 2 n.1.

as the date of last injurious exposure was in 1980, claimant's average weekly wage is \$302. Pertinent to the present proceedings, she also found, in accordance with the parties' motion, that the award was to commence on May 7, 1985, the date of the filing of the claim, rather than on June 30, 1983,³ as found by Judge Dolan, and awarded interest "on all compensation and unpaid benefits . . . from the date such payment was originally due until actually paid." Decision and Order on Reconsideration at 3.

On appeal, the Director contends that claimant is entitled to interest on unpaid benefits which accrued from the date of his injury in 1980, rather than from the date when employer was first "notified" or otherwise obtained "knowledge" of the impairment, shortly following the receipt of the audiogram in May 1985. Accordingly, the Director avers that the administrative law judge's commencement of the award of benefits on May 7, 1985, should be vacated, and the case remanded to allow her to determine the precise date of claimant's last injurious exposure in 1980, and to modify her order to reflect an award of interest running as of that date. Employer and claimant respond, agreeing with Director.

We agree with the Director that the administrative law judge erred in determining that the commencement date for the award of claimant's hearing loss benefits was May 7, 1985. Pursuant to the Supreme Court's holding in *Bath Iron Works*, the relevant time of injury for calculating a retiree's hearing loss benefits is the date of his last exposure to injurious noise levels. Claimant's benefits thus commence on the date of his last injurious exposure. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). Inasmuch as *Bath Iron Works* is dispositive of the onset issue raised in this case, we vacate Judge Rosenzweig's determination regarding the commencement date for the reasons stated in *Moore* and modify her decision to reflect that claimant's award under Section 8(c)(13) commenced in 1980 consistent with the finding she made regarding claimant's last injurious exposure and the applicable average weekly wage. We find it unnecessary, however, to remand for the administrative law judge to determine the precise date in 1980 when claimant's last injurious exposure occurred for purposes of the award of interest. Inasmuch as claimant is entitled to simple, not compound, interest at a rate determined under 28 U.S.C. §1961, and the entire award of compensation for 58.16 weeks was due prior to the time that the award of benefits was made, claimant is entitled to interest on the entire award. See *Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *aff'd on recon.*, 17 BRBS 20 (1985).

Accordingly, the administrative law judge's finding regarding the commencement date for claimant's award of benefits contained in the Decision and Order On Reconsideration is vacated and this decision is modified to reflect that the commencement date for claimant's award of benefits occurred in 1980 consistent with the administrative law judge's determination that claimant's last injurious exposure occurred at that time. As the entire disability award had elapsed as of the time the award of benefits was made, the Decision and Order On Reconsideration is further modified to reflect that claimant is entitled to interest on the entire award of benefits calculated pursuant to 28

³In several places in the Decision and Order On Reconsideration, the date of retirement is mistakenly given as June 10, 1993, rather than June 30, 1983. *Id.* at 2-3.

U.S.C. §1961. In all other respects, the Decision and Order on Reconsideration is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge