

JOHN E. SMITH, SR. )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 INGALLS SHIPBUILDING, )  
 INCORPORATED )  
 )  
 Self-Insured )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT )  
 OF LABOR )  
 )  
 Respondent )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

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

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Karen B. Kracov (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: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (89-LHC-2408) of Administrative Law Judge Quentin P. McColgin 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

At the hearing, the parties stipulated that: a) some degree of hearing loss was sustained by

claimant in the course and scope of his employment with employer; b) claimant was exposed to workplace noise while employed by employer which could have caused hearing loss; c) claimant is employed. The results of three audiograms were introduced into evidence: a January 17, 1987 audiogram demonstrating a 35.5 percent binaural impairment, a November 19, 1987 audiogram demonstrating a 23 percent binaural impairment, and a June 19, 1989 audiogram demonstrating a 25.6 binaural impairment. The administrative law judge noted that the three audiograms all reflected a 100 percent loss of hearing in claimant's right ear, which is unrelated to noise exposure, but that the loss of hearing in claimant's left ear is noise-induced.

The administrative law judge found that claimant's work-related left ear hearing loss combined with claimant's existing right ear hearing loss to produce a greater impairment than the left ear loss alone would have caused. Thus, the administrative law judge found that claimant's right ear was not able to compensate for the work-related hearing loss in claimant's left ear. The administrative law judge concluded that under these facts, claimant is entitled to compensation for his entire binaural hearing loss even though the loss of hearing in claimant's right ear is not work-related. In determining the amount of hearing impairment, the administrative law judge rejected the first audiogram as unreliable because it exceeded the next highest audiogram by over thirteen percentage points, and he averaged the results of the remaining two audiograms to award claimant benefits for a binaural impairment of 24.3 percent pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B)(1988). Employer also was assessed a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), for its failure to either timely pay benefits or controvert the claim for compensation.

On appeal, employer contends that the administrative law judge erred in finding employer liable for the full amount of claimant's binaural hearing loss inasmuch as a portion thereof is not noise-related. Claimant and the Director respond, urging affirmance of the administrative law judge's award for a 24.3 percent binaural impairment as it is in accordance with law.

We reject employer's contention, as it is without merit. Claimant is entitled to compensation for the combination of his pre-existing 100 percent right ear impairment and his left ear work-related noise-induced impairment pursuant to the aggravation rule. *See Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 193 (1980); *see also Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 201-202 (1986); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52 (CRT) (4th Cir. 1982). Since the administrative law judge reasonably relied on the average of the results recorded by the latter two audiograms of record, we affirm his finding of a 24.3 percent binaural impairment as it is rational, supported by substantial evidence and in accordance with law. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992)(Stage, C.J., dissenting).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge