

DONALD E. SPEAR)
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 Claimant-Respondent)
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 v.)
)
 BATH IRON WORKS)
 CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 and)
)
 COMMERCIAL UNION INSURANCE)
 COMPANY)
)
 and)
)
 AMERICAN MUTUAL INSURANCE)
 COMPANY)
)
 Carriers)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Petitioner)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Michelle Jodoin LaFond (Norman, Hanson & DeTroy), Portland, Maine, for employer/carrier.

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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (90-LHC-2210) of Administrative Law Judge David W. DiNardi 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).

Claimant, who retired from employer's employ on July 31, 1986, sought benefits under the Act for an occupational hearing loss. The administrative law judge found that claimant has an 8.8 percent work-related binaural impairment, and he determined that claimant should be compensated pursuant to Section 8(c)(13), rather than Section 8(c)(23), of the Act, 33 U.S.C. §908(c)(13), (23) (1988). Based on the parties' stipulation, the administrative law judge awarded benefits based on the national average weekly wage on November 18, 1987, which he found was claimant's date of awareness under Section 10(i), 33 U.S.C. §910(i)(1988). In determining that Liberty Mutual Insurance Company is the responsible carrier, the administrative law judge relied in part on claimant's uncontradicted testimony, that he was exposed to loud noise through his last day of employment, and that the hearing protection he wore during his last years of work was ineffective in blocking out all noise. Decision and Order at 13. Claimant also was awarded interest, payment of medical expenses and a penalty pursuant to 33 U.S.C. §914(e).

The Director appeals the Decision and Order, contending that, pursuant to the decision of the Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), the case must be remanded for calculation of claimant's average weekly wage as of his last date of exposure to injurious stimuli, with an award of interest if appropriate. Employer and Liberty Mutual respond, urging dismissal of the Director's appeal for lack of standing. Claimant has not responded to this appeal.

We reject employer's contention that the Director lacks standing to file an appeal in this case. See *White v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 12 BRBS 905 (1980), *aff'd in part*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982). Section 21(b)(3) of the Act, 33 U.S.C. §921(b)(3), permits "any party in interest" to file an appeal with the Board raising a substantial question of law or fact. See also 20 C.F.R. §§801.102, 802.201. *Cf. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, ___ U.S.

_____, 115 S.Ct. 1278 (1995) (under 33 U.S.C. §921(c) the Director is not a person "adversely affected or aggrieved," and thus lacks standing to appeal to a circuit court, when she alleges error in a Board decision that does not involve her statutory administrative functions). The Director, as the designee of the Secretary of Labor, is always a party in interest before the Board. *White*, 12 BRBS at 908; 20 C.F.R. §§701.201, 801.2(a)(8), (10). Employer's motion to dismiss is therefore denied.

With respect to the Director's contention, she correctly asserts that the issue presented is controlled by the Supreme Court's decision in *Bath Iron Works*. The Court held that in a claim for an occupational hearing loss, whether filed by a current or a retired employee, benefits are to be calculated pursuant to Section 8(c)(13) and not Section 8(c)(23). *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154-155 (CRT). Further, the Court held that the date of last exposure to injurious noise, rather than the date of awareness pursuant to Section 10(i), see 33 U.S.C. §910(d)(2), (i), is the relevant time of injury for calculating average weekly wage. *Id.* Consequently, the parties in this case stipulated to an average weekly wage which evinces an incorrect application of the law under *Bath Iron Works*.

We need not remand the case, however, as the administrative law judge found that claimant was exposed to noise through his last day of employment, Decision and Order at 13; Tr. at 27, and the record contains evidence of claimant's wages at the time of his retirement. Employer's First Report of Injury form states that claimant's weekly wage was \$625.96, with annual earnings of \$32,550. CX 5. Claimant's employment records indicate he earned this annual salary from July 16, 1984 until his retirement on July 31, 1986. CX 8. We, therefore, modify the administrative law judge's Decision and Order to reflect claimant's entitlement to benefits for an 8.8 percent binaural impairment pursuant to Section 8(c)(13), at a rate of two-thirds of claimant's average weekly wage of \$625.96, plus interest at the appropriate rate. See generally *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *clarified on recon.*, 17 BRBS 20 (1985).

Accordingly, the administrative law judge's Decision and Order is modified as stated herein. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge