

BRB Nos. 92-0465  
and 92-0465A

MARSHALL CREWS	)	
	)	
Claimant-Respondent	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED:
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner-	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge,  
United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

Michael S. Hertzog (J. David McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate  
Solicitor; Janet R. Dunlop, Counsel for Longshore), 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, and employer cross-appeals, the Decision and Order (91-LHC-0317) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act as amended in 1984, 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 worked for employer from March 26, 1951 until June 1, 1977, when he retired from the shipyards at age 65. The parties stipulated before the administrative law judge that claimant sustained a loss of hearing due to his employment which was first diagnosed on June 22, 1990, that claimant gave timely notice of his injury and filed a timely claim, and that employer timely filed its Notice of Controversion. In addition, the parties stipulated that the applicable average weekly wage in the instant case is \$330.21, the National Average Weekly Wage on June 22, 1990, the date of claimant's awareness of his hearing loss. Employer and claimant disagreed, however, on the issues of the percentage of claimant's hearing loss and whether claimant's compensation award should be calculated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), or Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988).

In his Decision and Order, the administrative law judge determined that claimant had a 41.62 percent binaural hearing loss based upon the average of the three audiograms of record. The administrative law judge further determined that employer must compensate claimant in accordance with Section 8(c)(13)(B), and ordered employer to pay compensation commencing on June 22, 1990, based upon the stipulated average weekly wage of \$330.21.

On appeal,<sup>1</sup> the Director contends that while the administrative law judge's award of compensation pursuant to Section 8(c)(13) of the Act was proper in light of the subsequent decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113

---

<sup>1</sup>The Director filed a Notice of Appeal with the Board on November 14, 1991, and employer filed its Notice of Appeal on November 21, 1991, which the Board accepted as employer's cross-appeal. Employer subsequently filed a Petition for Review and brief, and claimant filed a response brief. The Director, however, filed a motion to hold this 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). Employer responded to the motion by joining in the Director's request. The Board granted the motion to hold the case in abeyance in an Order dated December 17, 1992. The United States Supreme Court issued its decision in *Bath Iron Works* on January 12, 1993. By Order dated June 1, 1994, the Board ordered that the instant case was consequently, no longer being held in abeyance, and ordered the Director to file a Petition for Review and brief in support of his appeal within thirty days. The Director thereafter filed a timely Motion for Summary Disposition in Lieu of Brief, which the Board accepted as the Director's Petition for Review and brief in an Order dated June 26, 1995.

S.Ct. 692, 26 BRBS 151 (CRT) (1993), his determination of the applicable average weekly wage is not consistent with this decision. Accordingly, the Director argues that the case must be remanded for the administrative law judge to determine claimant's average weekly wage as of the date of his last exposure to harmful noise levels. On cross-appeal, employer challenges the administrative law judge's decision to award claimant benefits pursuant to Section 8(c)(13) and, in addition, argues that the award of benefits should have been based on the National Average Weekly Wage on June 1977, when claimant was last exposed to injurious noise prior to his retirement.<sup>2</sup> Claimant responds, urging affirmance of the administrative law judge's decision.

Initially, we agree with the Director that the administrative law judge properly calculated claimant's award under Section 8(c)(13), and reject employer's contention that because claimant was a retiree, his award should have been calculated under Section 8(c)(23). In *Bath Iron Works*, which was issued after employer filed its brief on appeal, the United States Supreme 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), rather than Section 8(c)(23), of the Act. Thus, for the reasons stated in *Bath Iron Works*, we affirm the administrative law judge's finding that claimant must be compensated under Section 8(c)(13).

The United States Supreme Court's decision in *Bath Iron Works* also is dispositive of the average weekly wage issue raised on appeal. In *Bath Iron Works*, the Court also held that the date of the last exposure to injurious noise, rather than the date of awareness pursuant to Section 10(d)(2), (i), 33 U.S.C. §910(d)(2), (i), is the relevant time of injury for calculating average weekly wage. While the administrative law judge awarded claimant compensation based on an average weekly wage of \$330.21, the stipulated National Average Weekly Wage on the date of claimant's awareness, the parties' stipulation evidenced an incorrect application of law under *Bath Iron Works*. See generally *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). Accordingly, we reject employer's assertion that the 1977 National Average Weekly Wage should be applied, vacate the administrative law judge's average weekly wage finding, and remand the case for him to determine claimant's average weekly wage as of the date of his last exposure to injurious noise, re-opening the record if necessary. Claimant is entitled to receive permanent partial disability compensation for a 41.62 percent binaural impairment pursuant to Section 8(c)(13)(B) at a rate to be determined by the administrative law judge on remand. See generally *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

Accordingly, the administrative law judge's Decision and Order is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

---

<sup>2</sup>In its brief, employer states that if benefits are awarded pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), the applicable average weekly wage should be \$253.85. Although employer's voluntary payments of compensation were based on this rate, it is unclear how employer arrived at this figure.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge