

AULTON G. TOOTLE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: _____
)	
INGALLS SHIPBUILDING,)	
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 & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (88-LHC-2524) 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 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a straightener and was exposed to injurious noise from 1946 until his retirement in 1974. When this case was before the administrative law judge initially, claimant and employer each sought summary judgment, maintaining there were no factual disputes, only disagreement as to whether the injury should be treated as a scheduled injury under Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988), or as an impairment of the whole person pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988). Based upon then-existing law, the administrative law judge ruled in favor of claimant and awarded benefits pursuant to Section 8(c)(13) for a 25.5 percent binaural impairment. In light of *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), employer appealed the Order. The Board vacated the Section 8(c)(13) award and remanded the case for further consideration. *Tootle v. Ingalls Shipbuilding, Inc.*, BRB No. 89-1540 (Oct. 22, 1991). The Board also ordered the administrative

law judge to reconsider claimant's entitlement to a Section 14(e), 33 U.S.C. §914(e), penalty and an attorney's fee. *Id.*

On remand, the administrative law judge awarded benefits pursuant to Section 8(c)(23), converting claimant's 25.5 percent binaural impairment to a nine percent impairment of the whole person. Decision and Order on Remand at 2-3. The administrative law judge also ordered employer to pay a Section 14(e) penalty, and he reaffirmed his original attorney's fee award. *Id.* at 3-4. Claimant appeals, contending he is entitled to benefits pursuant to Section 8(c)(13). Employer responds, having no opposition to a decision issued in accordance with *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993).

In *Bath Iron Works*, the Supreme Court held that claims for hearing loss under the Act, whether filed by current or retired employees, are claims for a scheduled injury and must be compensated under Section 8(c)(13). Specifically, the Court stated that an employee who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to injurious noise and, consequently, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." *See* 33 U.S.C. §910(i). As the Court's holding in *Bath Iron Works* is dispositive of the issue presented in this case, we modify the administrative law judge's decision on remand to reflect claimant's entitlement to benefits for a 25.5 percent binaural impairment pursuant to Section 8(c)(13).

Accordingly, the administrative law judge's decision on remand is modified to reflect claimant's entitlement to benefits pursuant to Section 8(c)(13). In all other respects, the decision on remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge