

BRB No. 92-2661

WAUDINE G. WEST	)	
(Widow of ELMER B. WEST)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: _____
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order of Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

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

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

PER CURIAM:

Claimant appeals the Order of Remand (92-LHC-1140) of Administrative Law Judge James W. Kerr, Jr. 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).

Decedent worked for employer as a shipbuilder and was exposed to injurious noise. He underwent an audiometric evaluation on April 24, 1990, and the results revealed a 2.8 percent binaural impairment. Cl's Attach. B at 5-6. He filed a claim for compensation, but he died before the claim could be adjudicated, and his widow was substituted as claimant herein.

On July 14, 1992, the administrative law judge scheduled the formal hearing for October 7,

1992. CI's Attach. A. On July 17, 1992, employer filed a Motion to Remand on the grounds that there were no unresolved issues as it accepted the claim for compensation and medical benefits and it paid permanent partial disability benefits for a one percent impairment of the whole man pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). CI's Attach. B. Claimant objected to the motion, arguing that because the Supreme Court of the United States had granted *certiorari* to address the issues in *Bath Iron Works Corp. v. Director, OWCP [Brown]*, 942 F.2d 811 (1st Cir. 1991), the question still remained as to whether Section 8(c)(13) or (23), 33 U.S.C. §908(c)(13), (23) (1988), applies in hearing loss cases. The administrative law judge determined that employer's motion was meritorious, and he remanded the case to the district director for "appropriate action." Claimant appeals the order of remand, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in granting employer's Motion to Remand because such action summarily denied her the right to a hearing on the issue of whether Section 8(c)(13) or Section 8(c)(23) applies in this hearing loss case. Claimant argues that the remand was effectively a dismissal and, relying on *Brown v. Reynolds Shipyards*, 14 BRBS 460 (1981), contends that the administrative law judge does not have the authority to dismiss a claim. Further, claimant argues that this could not be considered a waiver of her right to a hearing because she did not file a written waiver as required by the regulations. Employer argues that it accepted the claim and paid benefits in accordance with the controlling law of the United States Court of Appeals for the Fifth Circuit. Additionally, employer asserts that the administrative law judge has the authority to dismiss a case in which there are no disputed facts.

Although the administrative law judge's Order of Remand is not a final order, as it remands the case to the district director without an award or a denial of benefits, *see Hartley v. Jacksonville Shipyards, Inc.*, 28 BRBS 100 (1994); *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991), it effectively disposes of this claim by accepting employer's legal position on the applicability of Section 8(c)(23). The Board previously has stated that it will entertain interlocutory appeals in the interest of justice to direct the course of the adjudication process. *See Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). Therefore, we shall address claimant's appeal.<sup>1</sup> *Id.*; *see generally Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994); *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994).

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<sup>1</sup>Contrary to claimant's assertions, the administrative law judge did not dismiss this claim. He merely accepted employer's adverse position and approved its calculation of benefits. Consequently, claimant's reliance on *Brown*, 14 BRBS at 460, is misplaced.

Claimant contends the administrative law judge denied her the opportunity to attend a formal hearing and address the issue of whether Section 8(c)(13) or Section 8(c)(23) is applicable in computing benefits for decedent's work-related hearing loss. Although an administrative law judge has the authority to grant summary judgment if there are no facts in dispute, 29 C.F.R. §18.41, in this case claimant contended before the administrative law judge that employer had not formally accepted liability for the claim. Moreover, claimant is correct in asserting that the administrative law judge improperly approved employer's application of Section 8(c)(23) in this case. The Supreme Court has determined that compensation for industrial hearing loss must be calculated pursuant to Section 8(c)(13) of the Act. *Bath Iron Works Corp. v. Director, OWCP*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993). As *Bath Iron Works* is controlling and as the administrative law judge did not make any factual determinations, we vacate the Order of Remand and remand the case for him to make the necessary findings of fact consistent with law and to enter an award or denial of benefits. See *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994) (Decision on Remand); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), modified in part on recon., 28 BRBS 156 (1994).

Accordingly, the administrative law judge's Order is vacated, and the case is remanded for action consistent with this opinion.<sup>2</sup>

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>2</sup>In light of our decision herein, we need not address claimant's waiver argument.