

POLETE N. SHORT)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and Lomax, P.A.), Pascagoula, Mississippi, 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 Decision and Order on Remand Awarding Benefits (88-LHC-3290) of Administrative Law Judge Richard D. Mills 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).

On May 22, 1987, claimant, a sheetmetal worker for employer from 1964 to 1980, filed a claim under the Act for an 8.1 percent noise-induced binaural hearing loss based on an audiogram performed on May 9, 1987. The case was referred to the Office of Administrative Law Judges on August 17, 1988, for a formal hearing. Prior to the scheduled hearing, the parties filed opposing motions for summary judgment on the issue of whether claimant's hearing loss should be calculated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13)(1988), or Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). Relying on *McLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988), the administrative law judge granted claimant's summary judgment motion and found that claimant was

entitled to compensation for an 8.1 percent binaural hearing loss to be calculated pursuant to Section 8(c)(13) of the Act.

Employer appealed and the Director, Office of Workers' Compensation Programs (the Director), cross-appealed, the administrative law judge's Decision and Order Granting Claimant's Motion for Summary Judgment. BRB Nos. 89-569 and 89-569A. In addition, employer filed a supplemental appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees. By Order dated November 4, 1991, the Board granted employer's motion to remand the case to the administrative law judge for further action in accordance with *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). The Board further instructed the administrative law judge to consider whether claimant is entitled to a Section 14(e), 33 U.S.C. §914(e), penalty. Additionally, the Board vacated the administrative law judge's attorney fee award, and instructed him to reconsider his fee award in light of *Fairley* and claimant's possible entitlement to a penalty under Section 14(e).

On remand, consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), the administrative law judge awarded claimant benefits pursuant to Section 8(c)(23) for a 3 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The administrative law judge also held employer liable for a Section 14(e) penalty and reinstated the \$475 in attorney's fees and \$925 in expenses previously awarded to claimant's counsel.

Claimant filed a timely Notice of Appeal and a motion requesting that the case be held 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). Subsequent to the Court's decision in *Bath Iron Works*, the Board denied claimant's motion and directed claimant to file a Petition for Review and brief. On appeal, claimant argues that pursuant to *Bath Iron Works*, he is entitled to compensation under Section 8(c)(13) for an 8.1 percent binaural impairment at the agreed compensation rate of \$201.77 per week. Employer responds, indicating that it has no opposition to the issuance of a decision which is in accordance with *Bath Iron Works*, including its holding that claimant's average weekly wage is to be determined as of the date of claimant's last exposure to injurious noise levels. Inasmuch, however, as the existing record does not contain the relevant wage information, employer contends that the case must be remanded to the administrative law judge for introduction of evidence concerning claimant's average weekly wage.

Subsequent to the issuance of the administrative law judge Decision and Order On Remand in this case, the United States Supreme Court held in *Bath Iron Works* 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). Consequently, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23) and modify his award to reflect that claimant is entitled to receive permanent partial disability benefits for an 8.1 percent binaural hearing loss pursuant to Section 8(c)(13) of the Act consistent with the degree of hearing loss agreed upon in the parties' summary judgement

motions.

We agree with the employer, however, that the case must be remanded for reconsideration of the applicable average weekly wage in light of *Bath Iron Works*. 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 upon an average weekly wage of \$302.66, the stipulated National Average Weekly Wage as of the date of claimant's awareness, the parties' stipulation evidenced an incorrect application of law under *Bath Iron Works*. Accordingly, we 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, reopening the record if necessary. Claimant is thus entitled to receive permanent partial disability benefits for an 8.1 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, pursuant to the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23) is vacated and his decision modified to reflect claimant's entitlement to an award for an 8.1 percent binaural impairment pursuant to Section 8(c)(13)(B). The administrative law judge's average weekly wage finding is also vacated and the case is remanded for further consideration of this issue consistent with this opinion. In all other respects, the Decision and Order On Remand Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge