

JULIUS HOSKINS, JR.)	
(Deceased))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED: _____
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, 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 employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. 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:

Claimant¹ appeals the Decision and Order Awarding Benefits (91-LHC-530) 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).

Decedent, who retired in 1985, was exposed to injurious noise during the course of his employment with employer. Decedent underwent an audiometric evaluation on January 28, 1987, the results of which revealed a 29.1 percent binaural impairment. Based on these results, decedent filed a claim for compensation under the Act on February 23, 1987; however, he died on April 22, 1989, due to non work-related causes.

The administrative law judge awarded permanent partial disability compensation pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), payable by employer to the Special Fund under Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3)(1988). The administrative law judge subsequently awarded an attorney's fee to claimant's counsel.

On appeal, claimant challenges the administrative law judge's decision to award benefits to the Special Fund rather than to claimant's estate. Employer responds, asserting that the administrative law judge's decision is supported by substantial evidence and in accord with law.² The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the award of benefits to the Special Fund.

I. Award of Benefits.

Initially, we note that, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which must be addressed in order to resolve correctly the issue presented by this case. *See generally Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994). In *Bath Iron Works*, the Court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of

¹The heirs of decedent's estate were substituted for decedent in the proceedings below.

²Employer further asks that if the Board determines that benefits are payable to claimant's estate, that the Board order the Special Fund to make such payment to claimant's estate because employer has previously made payment to the Special Fund in accordance with the administrative law judge's Decision and Order.

injury for calculating a retiree's benefits for occupational hearing loss. *See Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Based on this analysis, the Court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), and 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), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23).

Pursuant to the Supreme Court's decision in *Bath Iron Works*, we hold that decedent's benefits must be calculated pursuant to Section 8(c)(13) of the Act. *See Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). Accordingly, while we note that no party challenges the accuracy of the audiological evaluation which revealed a 29.1 percent binaural impairment, we vacate the administrative law judge's award of benefits under Section 8(c)(23) and remand the case for the administrative law judge to recalculate decedent's benefits in accordance with the holding of the Supreme Court in *Bath Iron Works*.

II. Section 8(d).

Claimant contends the administrative law judge erred in awarding decedent's benefits to the Special Fund. In response, the Director argues that, as decedent died without statutory survivors,³ the plain language of Section 8(d)(3) mandates payment of the award to the Special Fund. Section 8(d) of the Act provides for the disbursement of a deceased employee's scheduled disability benefits in the event he dies prior to the payment of benefits for reasons unassociated with his work-related injury. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid scheduled benefits are distributed accordingly; however, if he dies without statutory survivors, his benefits are paid to the Special Fund pursuant to Section 8(d)(3). The Board has recently interpreted Section 8(d) and held that an employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is entered. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72, 73 (1994)(McGranery, J., dissenting on other grounds); *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), *modified in part on recon.*, 28 BRBS 156 (1994). *See generally Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT)(11th Cir. 1986); *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948); *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983). The Board additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors. *Krohn*, 29 BRBS at 73; *Clemon*, 28 BRBS at 112-113; *Wood*, 28 BRBS at 36-38.

In the instant case, it is clear that any permanent partial disability compensation due decedent for his hearing loss claim accrued prior to his death in 1989. 33 U.S.C. §908(c)(13) (1988); *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore*, 27 BRBS at 79. For the reasons

³Ethaniel Hoskins, claimant's brother, testified on deposition that claimant never married and had no minor children at the time of his death. Employer's Exhibit 9 Deposition Transcript at 20. The claim for benefits is being pursued by claimant's nine siblings.

set forth in *Krohn, Clemon and Wood*, we reverse the administrative law judge's award of decedent's accrued benefits to the Special Fund, and we modify the administrative law judge's decision to reflect decedent's estate's entitlement to any accrued scheduled permanent partial disability benefits awarded by the administrative law judge on remand. *Krohn*, 29 BRBS at 74; *Clemon*, 28 BRBS at 112; *Wood*, 28 BRBS at 36. As employer paid benefits to the Special Fund under the administrative law judge's award, the Special Fund will be responsible for reimbursement of that amount in accordance with the administrative law judge's award on remand.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated and the case is remanded for findings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge