

WILLIAM E. LIDDELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED:
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 & 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-3293) 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. In his initial decision in this case, the administrative law judge granted claimant's motion for summary judgment and found that claimant, a retiree, should be compensated for his work-related hearing loss 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), of the Act. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$561.75, to be paid by employer.

Employer appealed these decisions to the Board. Employer subsequently moved to remand the case to the administrative law judge for further action consistent with the decision of the United

States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), in which the court held that a retiree's hearing loss benefits are to be calculated pursuant to Section 8(c)(23). In an Order dated September 19, 1991, the Board granted the motion to remand. *Liddell v. Ingalls Shipbuilding, Inc.*, BRB No. 89-599 (September 19, 1991)(order). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). Lastly, the Board vacated the attorney's fee award and instructed the administrative law judge to reconsider the fee in light of his decision on remand.

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 28.09 percent binaural loss, converted to a 10 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The administrative law judge further found that employer is liable for a Section 14(e) penalty. The administrative law judge also reaffirmed his award of an attorney's fee to claimant's counsel.

On appeal, claimant requests that the Board modify the administrative law judge's Decision and Order on Remand to provide that benefits are payable under Section 8(c)(13) of the Act, consistent with 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 responds, assenting to claimant's request.

The United States Supreme Court's decision in *Bath Iron Works* is dispositive of the issue presented by claimant in this case. In *Bath Iron Works*, the 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). Specifically, the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries.

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). Inasmuch as the administrative law judge's finding that claimant has a 28.09 percent binaural hearing loss is unchallenged, we modify the administrative law judge's award to reflect that claimant is entitled to receive permanent partial disability benefits for this hearing loss pursuant to Section 8(c)(13) of the Act.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is modified to reflect claimant's entitlement to permanent partial disability benefits pursuant to Section 8(c)(13). In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge