

ABRAHAM BROTHERS	)	
	)	
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 and Order Granting Employer's Motion for Reconsideration 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Awarding Benefits and Order Granting Employer's Motion for Reconsideration (88-LHC-3224) 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 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 applicable law. *O'Keeffe 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. Claimant, a retiree, was exposed to loud noise while in the course of his employment and sought benefits under the Act for a work-related hearing loss. Prior to a hearing on this claim, both parties filed a Motion for Summary Judgement asserting that the only issue remaining was under which section claimant should be compensated. In his Decision and Order Granting Claimant's Motion for Summary Judgment and Denying Employer's Motion for Summary Judgment, the administrative law judge found that claimant should be compensated for a 29.6 percent binaural hearing loss pursuant to Section 8(c)(13), 33 U.S.C.

§908(c)(13), of the Act.

Both employer and the Director, Office of Workers' Compensation Programs (the Director), appealed this decision to the Board, arguing that the case should be held in abeyance pending a decision from 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 an Order dated September 18, 1991, the Board remanded the case for further consideration consistent with the decision in *Fairley*. The Board further directed the administrative law judge to consider claimant's entitlement to a penalty under Section 14(e), 33 U.S.C. §914(e). *Brothers v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-0582/A (Sept. 18, 1991) (unpublished).

On remand, consistent with the Fifth Circuit's decision in *Fairley*, the administrative law judge awarded claimant compensation pursuant to Section 8(c)(23) for a 29.6 percent binaural loss converted to a ten percent impairment of the whole person, at a weekly compensation rate of \$22.18. Furthermore, the administrative law judge found that claimant is entitled to additional compensation in accordance with the penalty provisions of the Act pursuant to Section 14(e), 30 U.S.C. §914(e).<sup>1</sup>

Claimant appeals the administrative law judge's decision on remand, arguing that he is entitled to compensation under Section 8(c)(13). Employer responds, conceding that 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), is dispositive of the issue raised on appeal.

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), rather than Section 8(c)(23), of the Act. Consequently, pursuant to the Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of benefits under Section 8(c)(23). Inasmuch as the administrative law judge's finding that claimant has a 29.6 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 claim pursuant to Section 8(c)(13) of the Act.

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<sup>1</sup>In his subsequent Order Granting Employer's Motion for Reconsideration, the administrative law judge modified his previous order to correct his erroneous calculation of claimant's compensation rate; specifically, the administrative law judge determined that claimant is entitled to permanent partial disability benefits at the rate of \$20.18 per week rather than \$22.18 per week.

Accordingly, the administrative law judge's Decision and Order on Remand and Order Granting Employer's Motion for Reconsideration 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 is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge