

GARY COOKSON)
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 Claimant-Petitioner)
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 v.)
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 ELECTRIC BOAT CORPORATION) DATE ISSUED:
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denying Additional Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

BEFORE: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Additional Benefits (98-LHC-2263) of Administrative Law Judge David W. Di Nardi 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer from November 1975 through February 11, 1994, during which time he was exposed to loud noise. During the period of his employment with employer, claimant underwent eight hearing evaluations which revealed hearing impairments of between 5.31 and 35.63 percent. *See* CX-1. On May 4, 1994, following the cessation of his employment with employer, claimant underwent an audiometric evaluation which was interpreted as indicating a 25.3 percent binaural hearing loss. *See* CX-4. In June 1997 and September 1998, claimant underwent audiometric evaluations which were interpreted as indicating a 36.5 percent binaural hearing loss. *See* CXS-2, 3. Employer, pursuant to the results of claimant's May 1994 audiometric evaluation, voluntarily paid claimant permanent partial disability compensation based upon a 25.3 percent binaural loss

of hearing. 33 U.S.C. §908(c)(13).

In his Decision and Order, the administrative law judge, citing the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993), found claimant to be entitled to permanent partial disability compensation, pursuant to Section 8(c)(13) of the Act, for a 25.3 percent binaural hearing impairment, as evidenced by the results of claimant's May 4, 1994, audiogram. As employer had voluntarily paid permanent partial disability benefits to claimant for this loss of hearing, the administrative law judge denied claimant's request for additional benefits under the Act.

On appeal, claimant challenges the administrative law judge award of permanent partial disability benefits for a 25.3 percent binaural hearing loss; specifically, claimant contends that the administrative law judge erred in not considering the progressive nature of claimant's hearing loss when determining the extent of that loss. Employer has not responded to this appeal.¹

Initially, we reject claimant's assertion that the Section 20(a), 33 U.S.C. §920(a), presumption applies to the issue of the extent of claimant's hearing loss. The Section 20(a) presumption applies to the issue of whether an injury arises in the course of employment and, thus, is work-related, *see Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301(1998); *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989), and does not apply to the issues of nature and extent of disability. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999). Thus, as in the instant case wherein the causal relationship between claimant's employment and his disability is undisputed, claimant bears that burden of establishing the nature and extent of his work-related disability. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

¹On April 24, 2000, the Board issued an Order directing employer to provide Employer's Exhibits 1 through 8, 10 and 11, to the Board. As of this date, those exhibits have not been received. Upon further review of the record, the Board has determined that claimant's contentions on appeal may be completely addressed with reference to claimant's exhibits. Accordingly, the Board will proceed to consider claimant's appeal.

In challenging the administrative law judge's decision to credit and rely upon the results of claimant's May 4, 1994, audiometric evaluation, claimant asserts that substantial evidence supports a finding that he sustained a progressive hearing loss and that, contrary to the administrative law judge's finding, the decision of the Supreme Court in *Bath Iron Works* does not preclude a finding that an individual claimant's hearing loss progressed after the termination of his exposure to injurious noise. For the reasons that follow, we reject claimant's contentions and we affirm the administrative law judge's decision in its entirety.

Although, as claimant asserts, the nature of hearing loss was not in dispute by the parties in *Bath Iron Works*, the Supreme Court specifically stated in that case that it found no basis for disputing the lower court's characterization of occupational hearing loss and that, once it accepted that characterization, it could determine the applicable subsection under which a claimant should be compensated under the Act. The Court then held that occupational hearing loss occurs simultaneously with the exposure to excessive noise, and that the injury is complete when the exposure ceases. *See Bath Iron Works*, 506 U.S. at 163, 26 BRBS at 154 (CRT). Accordingly, we hold that the administrative law judge in the case at bar committed no error when he relied upon the Court's decision in *Bath Iron Works* for the proposition that an employee's work-related hearing loss is not progressive once the employee is removed from the injurious noise.

Claimant next contends that the administrative law judge erred in concluding that claimant sustained a 25.3 percent binaural hearing loss. Specifically, claimant alleges that the administrative law judge erred in crediting claimant's May 4, 1994, audiometric evaluation over the other audiometric evaluations of claimant, both pre- and post-employment, which consistently indicate a loss greater than 30 percent. We disagree. In the instant case, the administrative law judge specifically found that the audiograms performed during claimant's employment with employer were "screening" tests designed to identify workers who are at risk for hearing problems, and that those examinations were performed after claimant was taken from his immediate work area, thus resulting in a "temporary threshold shift." *See* Decision and Order at 12. Next, the administrative law judge determined that claimant's May 4, 1994, audiometric evaluation was administered by a highly trained certified audiologist. Having previously acknowledged that the Court in *Bath Iron Works* had stated that an employer could limit its liability for an occupational hearing loss by ordering an audiometric evaluation at the time of its employee's retirement, *see Bath Iron Works*, 506 U.S. at 165, 26 BRBS at 154 (CRT), the administrative law judge credited the results of claimant's May 4, 1994 audiogram, which reflects a 25.3 percent binaural hearing loss, as that evaluation reflected claimant's hearing condition immediately after his last injurious exposure to noise while working for employer.

We affirm the administrative law judge's use of the results of claimant's May 4, 1994, audiometric evaluation to determine the extent of claimant's work-related hearing loss. *See*

generally Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991). The administrative law judge rationally determined that this audiogram best reflected claimant's loss of hearing caused by his employment with employer. *See Bath Iron Works*, 506 U.S. at 153, 26 BRBS at 151 (CRT); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). Accordingly, the administrative law judge's determination that claimant sustained a 25.3 percent binaural hearing loss, and his consequent denial of additional compensation benefits to claimant, are affirmed. *See Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991).

Accordingly, the administrative law judge's Decision and Order - Denying Additional Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge