

BRB Nos. 91-1061
and 91-1061A

LLOYD TANNER)
)
)
Claimant-Petitioner)
Cross-Respondent)
v.)
)
ALABAMA DRY DOCK AND)
SHIPBUILDING CORPORATION) DATE ISSUED:
)
)
Self-Insured)
Employer-Respondent)
Cross-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeals of the Decision and Order of Kenneth A. Jennings, Administrative Law Judge,
United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Walter R. Meigs and Winn S. L. Faulk, Mobile, Alabama, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (89-LHC-2606) of Administrative Law Judge Kenneth A. Jennings 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988). 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).

Claimant, who retired on May 1, 1984, was exposed to injurious noise while working for employer, and filed a claim for a work-related hearing loss. The parties stipulated, *inter alia*, that employer was notified of claimant's injury on January 9, 1987, that employer controverted the claim on January 16, 1987, and that employer paid no compensation or medical benefits to claimant. Claimant underwent audiometric testing by employer on June 3, 1982, by the University of South Alabama on November 14, 1986 revealing a 10 percent binaural hearing loss, and on October 11, 1989 by Dr. McDill revealing a 2.8 percent binaural hearing loss.

In the Decision and Order, the administrative law judge found that the June 1982 audiogram did not comply with 20 C.F.R. §702.441(b)(1) and therefore was not credible, and determined that claimant suffered a binaural hearing loss of 6.4 percent based on the average of the November 1986 and October 1989 audiograms. Utilizing the American Medical Association *Guides to the Evaluation of Permanent Impairment*, the administrative law judge converted the 6.4 percent figure to a 2 percent whole person impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). The administrative law judge also determined that the date of claimant's injury was November 14, 1986, and that claimant's compensation rate should be based on two-thirds of the national average weekly wage on that date, \$201.77. Relying on *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), the administrative law judge awarded claimant continuing permanent partial disability benefits in the amount of \$4.03 a week (\$201.77 multiplied by 2 percent). 33 U.S.C. §908(c)(23)(1988). The administrative law judge also awarded claimant medical expenses, and interest on past due compensation calculated pursuant to 28 U.S.C. §1961. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), after it paid 104 weeks of compensation.

Claimant appeals, contending that the administrative law judge should have awarded benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), instead of Section 8(c)(23). Employer responds, urging affirmance. On cross-appeal, employer contends that the administrative law judge erred in awarding interest on past due compensation as it is not authorized by the Act. Claimant cross-responds, urging affirmance.

Since the parties filed their briefs on appeal in the instant case, 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 is dispositive of the issue raised by claimant as to whether Section 8(c)(13) or 8(c)(23) applies. 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 injury for calculating 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), rather than Section 8(c)(23).

Accordingly, we modify the administrative law judge's permanent partial disability award under Section 8(c)(23) to a scheduled award under Section 8(c)(13). Since the administrative law judge determined that claimant's binaural hearing loss is 6.4 percent, and the average weekly wage found by the administrative law judge is not disputed on appeal, claimant is entitled to an award for 12.8 weeks (6.4 percent x 200) at a weekly rate of \$201.77, commencing May 1, 1984, claimant's date of retirement. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). Moreover, given our modification of the administrative law judge's award for disability, the administrative law judge's Section 8(f) award also must be modified. In awards entered pursuant to Section 8(c)(13), employer's liability under Section 8(f) is limited to the lesser of 104 weeks or the extent of hearing loss attributable to the subsequent injury, and the Special Fund is liable for the pre-existing loss. *See Reggiannini v. General Dynamics Corp.*, 17 BRBS 254 (1985); 33 U.S.C. §908(f)(1)(1988). In his Decision and Order, the administrative law judge found employer entitled to Section 8(f) relief, and he noted that the district director approved an award of Section 8(f) relief based on .3 percent pre-existing binaural hearing loss. Employer therefore is liable for payment of benefits for 12.2 weeks (200 x 6.1), and the Special Fund is liable for benefits for .6 weeks (200 x .3) pursuant to Section 8(f).

In challenging the administrative law judge's award of interest, employer, on cross-appeal, contends that the language in Section 5(a), 33 U.S.C. §905(a), that "employer's liability is in place of all other liability of such employer to the employee . . . at law or in admiralty . . ." precludes an award of interest.¹ Employer argues that prejudgment interest was an element of compensatory damages at law or in admiralty, and therefore cannot be awarded under the Act. Further, employer contends that Section 19(d) of the Act, 33 U.S.C. §919(d),² does not vest any authority in administrative law

¹ Section 5(a) states, in pertinent part:

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death....

33 U.S.C. §905(a).

² Section 19(d) of the Act states, in pertinent part:

All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. §919(d).

judges beyond that contained in the Act itself, and therefore the administrative law judge does not have the powers conferred on the district court by Section 28 U.S.C. §1961 to award interest.³ Moreover, employer contends that there is no authority in the Act in general for awarding interest.

Employer's contentions are rejected. The purpose of Section 5(a) is to make the Act a claimant's exclusive remedy against his employer for a work-related injury. *See generally Texas Employers' Insurance Association v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 1932 (1989). Thus, an injured claimant cannot sue his employer in tort or in admiralty. *Id.* Although interest is not expressly provided for in the Act, the courts and the Board have held that awards of interest serve the congressional purpose of making a claimant whole for his work-related injury as employer had the use of the money until the award issues. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (5th Cir. 1990), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT), *cert. denied*, 111 S.Ct. 2012 (1991); *Newport News Shipbuilding & Dry Dock v. Director, OWCP*, 594 F.2d 986, 987, 9 BRBS 1089 (4th Cir. 1979); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972);⁴ *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Smith v. Ingalls Shipbuilding Division, Litton Systems Inc.*, 22 BRBS 46 (1989); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *on recon.*, 17 BRBS 20 (1985). As interest is awarded on compensation payable under the Act, it cannot be said that claimant is seeking recovery "at law or in admiralty" in violation of Section 5(a).

Further, we reject employer's contention that the administrative law judge does not have the authority to award interest pursuant to 28 U.S.C. §1961 as that section is applicable only to awards of interest on judgments of the district courts. The Board has held that Section 28 U.S.C. §1961 is to be used merely as guidance in setting the interest rate, and Section 1961 has not been adopted into the Act. *See Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989); *Grant*, 16 BRBS at 271. We therefore affirm the administrative law judge's award of interest pursuant to 28 U.S.C. §1961.

³Section 28 U.S.C. §1961 provides in pertinent part:

- (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

28 U.S.C. §1961.

⁴In the absence of an express decision by the court, the United States Court of Appeals for the Eleventh Circuit follows precedent of the United States Court of Appeals for the Fifth Circuit set prior to October 1, 1981. *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982); *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981). Thus, in the absence of an Eleventh Circuit case on the issue of interest, the decision in *Strachan Shipping*, 452 F.2d at 1225, decided before 1981, is binding on the Eleventh Circuit.

Accordingly, the administrative law judge's award of benefits for claimant's hearing loss and for Section 8(f) relief is modified as herein stated. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge