

STANLEY FRASER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	
)	DATE ISSUED:_____
and)	
)	
COMMERCIAL UNION INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Petition for Reconsideration of Martin J. Dolan, Administrative Law Judge, United States Department of Labor.

Ronald W. Lupton (Stinson, Lupton & Weiss, P.A.), Bath, Maine, for claimant.

Michelle Jodoin LaFond and Patricia A. Lerwick (Norman, Hanson & Detroy), Portland, Maine, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Petition for Reconsideration (90-LHC-1039) of Administrative Law Judge Martin J. Dolan awarding benefits 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

With the exception of a three year layoff beginning in 1931, claimant performed various duties for employer from 1929 until his retirement on August 31, 1976. During this time, claimant was exposed to noise. Based on the results of an audiometric evaluation dated August 2, 1989, he filed a claim for a work-related hearing loss.

A hearing was held on May 9, 1990, wherein the parties disputed, *inter alia*, the cause of

claimant's injury and the applicable average weekly wage. The administrative law judge awarded benefits for a 68.7 percent binaural impairment pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988), based on an average weekly wage of \$318.12, the national average weekly wage in effect on August 2, 1989, the date of claimant's audiometric evaluation. Decision and Order at 4-5. Additionally, the administrative law judge awarded claimant medical benefits and interest, and he awarded employer Section 8(f), 33 U.S.C. §908(f), relief.¹ On employer's motion, the administrative law judge reconsidered his Order regarding Section 8(f) relief and restated it so as to clarify that employer is liable for 104 weeks of benefits and the Special Fund is liable for the remaining weeks. Decision and Order on Recon. at 1-2; 33 U.S.C. §908(f)(1) (1988). Employer appeals the award of benefits, and claimant responds, urging affirmance.² Claimant's counsel also has filed a petition for an attorney's fee for services performed before the Board. Employer has not filed objections to the petition.

Employer first contends that the administrative law judge erred in awarding claimant benefits under Section 8(c)(13). It argues that he should have awarded benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23) (1988), as claimant's hearing loss was not discovered until more than one year after he retired. Since the administrative law judge decided this case, the Supreme Court has held that benefits for hearing loss claims under the Act, whether filed by a current or a retired worker, are to be calculated pursuant to Section 8(c)(13) of the Act. *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 700, 26 BRBS 151, 154-155 (CRT) (1993). In light of the Supreme Court's holding, the administrative law judge properly awarded claimant benefits for his 68.7 percent binaural impairment pursuant to Section 8(c)(13). Consequently, we reject employer's first contention.

Alternatively, employer contends that if claimant is entitled to benefits under Section 8(c)(13), then the administrative law judge erred in using Section 10(d)(2), (i), 33 U.S.C. §910(d)(2), (i) (1988), to calculate claimant's average weekly wage. Employer argues that the case should be remanded for calculation of claimant's average weekly wage under Section 10(a), 33 U.S.C. §910(a). Additionally, claimant moves to remand the case for recalculation of his award in accordance with *Bath Iron Works*. In *Bath Iron Works*, the Supreme Court held that a hearing loss injury is complete on the date an employee is last exposed to the injurious stimuli. *Bath Iron Works*, ___ U.S. at ___, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *see also Moore v. Ingalls Shipbuilding, Inc.*, 27

¹The administrative law judge based the award of Section 8(f) relief on a 1973 audiogram which he stated reflected a pre-existing 9.7 percent binaural impairment. Thus, he held employer liable for a 59 percent binaural impairment and the Special Fund liable for a 9.7 percent binaural impairment. Decision and Order at 6-7; *see also* Decision and Order on Recon. at 1-2; 33 U.S.C. §908(f).

²Subsequent to the decision of the Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), claimant also filed a motion to remand the case to the administrative law judge for a new calculation of benefits based on the Court's decision. *See* Motion for Remand dated March 9, 1993. Employer does not object to this motion. *See* letter dated March 29, 1993.

BRBS 76, 79 (1993). Further, the Supreme Court noted that the proper calculation of benefits under the Act requires use of the average weekly wage in effect at the time of the injury. *Bath Iron Works*, ___ U.S. at ___, 113 S.Ct. at 699-700, n. 13, 26 BRBS at 154, n. 13 (CRT). In this case, the time of injury is the date of claimant's retirement, August 31, 1976. See *Moore*, 27 BRBS at 79; Emp. Ex. 13 at 3. Because the time of injury in this case is the date of claimant's retirement, the calculation of claimant's benefits based on an average weekly wage of \$318.12, the national average weekly wage in effect at the time of claimant's August 2, 1989 audiogram, is incorrect. Therefore, we vacate that portion of the Decision and Order concerning average weekly wage, and we grant claimant's motion to remand the case to the administrative law judge for further consideration of average weekly wage pursuant to Section 10(a)-(c), 33 U.S.C. §910(a)-(c), in light of *Bath Iron Works*. As there is no record evidence of average weekly wage beyond what appears to be claimant's hourly wage, it may be necessary for the administrative law judge to reopen the record to admit additional evidence on this issue. See Emp. Ex. 13.

Claimant's counsel has submitted a petition for an attorney's fee for work performed before the Board. He requests 6.7 hours for attorney time at a rate of \$125 per hour, .5 hour for non-attorney time at a rate of \$45 per hour, and \$71.81 in expenses, for a total fee of \$931.81. Employer has not filed any objections. Claimant is entitled to a fee reasonably commensurate with the work performed before the Board if he successfully defends his award on appeal. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203. Claimant has succeeded in defending his entitlement to benefits under Section 8(c)(13), and employer does not object to the requested attorney's fee. As the amount requested is reasonable, we award counsel an attorney's fee of \$931.81 for services performed before the Board. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, that part of the administrative law judge's Decision and Order pertaining to average weekly wage and the calculation of claimant's benefits is vacated. Claimant's

motion to remand is granted, and the case is remanded to the administrative law judge for further consideration in accordance with this decision. In all other respects, the administrative law judge's Decision and Order and Decision and Order on Petition for Reconsideration are affirmed. Additionally, employer is liable for an attorney's fee in the amount of \$931.81, payable directly to claimant's counsel.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge