

JOSEPHINE GANGLOFF)	
(Widow of JOHN GANGLOFF))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: _____
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order and the Order Granting in Part Claimant's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and the Order Granting in Part Claimant's Motion for Reconsideration (89-LHC-2983) of Administrative Law Judge Richard D. Mills awarding benefits on a claim

*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).
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).

Decedent¹ worked for employer as a welder from 1933 until 1962, and during the course of his employment, he was exposed to injurious noise. Jt. Ex. 1; Decision and Order at 2. He underwent an audiological evaluation on October 22, 1986, the results of which revealed a 31.56 percent binaural impairment. Cl. Ex. 2. Based on these results, he notified employer of his injury and filed a claim for permanent partial disability benefits on November 25, 1986. Jt. Ex. 1. Employer filed its first report of injury on December 2, 1986. *Id.* The district director sent formal notice of the claim to employer on June 18, 1987, which employer received on June 22, 1987. Emp. Ex. 2; Jt. Ex. 1. On July 30, 1987, decedent underwent a second evaluation, the results of which revealed a 9.4 percent binaural impairment. Emp. Ex. 6. Employer filed two notices of controversion, dated March 2, 1989 and October 12, 1989, respectively. Jt. Ex. 1.

A hearing was held on September 30, 1990, wherein the parties disputed the nature and extent of disability, and employer's liability for a Section 14(e), 33 U.S.C. §914(e), penalty and an attorney's fee. Decision and Order at 2. They agreed, *inter alia*, that the date of injury was October 22, 1986, the date of the filing audiogram, and that the applicable average weekly wage is \$302.66. *Id.* The administrative law judge credited the more recent audiogram and found the degree of decedent's hearing loss to be 9.4 percent. Additionally, as decedent retired prior to the date of his first evaluation, the administrative law judge followed the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), and concluded that benefits must be determined in accordance with Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23) (1988). Decision and Order at 4. Consequently, he awarded permanent partial disability benefits for a three percent impairment to the whole man at the rate of \$6.05 per week, a Section 14(e) penalty and interest. Decision and Order at 5.

On claimant's motion for reconsideration, the administrative law judge substituted decedent's widow as the new claimant. Additionally, he reviewed the medical evidence but rejected the argument that the first audiogram is more reliable, leaving his initial award unchanged. Decision and Order on Recon. at 1-2. The Director appeals, and employer responds, urging affirmance. Claimant has not responded to this appeal.

The Director contends the administrative law judge erred in failing to determine the onset date of decedent's disability. The Director argues that such date should be the date decedent was last exposed to noise, which presumably is the date he retired. In response, employer argues that the onset date should be the date of the first audiogram. The Director also argues that the Decision and Order sets forth no information as to whether the stipulated compensation rate is the correct rate in accordance with *Ingalls Shipbuilding*, 898 F.2d at 1088, 23 BRBS at 61 (CRT).

¹Decedent died on March 19, 1988.

The Board's holding in *Moore v. Ingalls Shipbuilding, Inc.*, ___ BRBS___, BRB No. 91-1598 (June 30, 1993), relying on the Supreme Court's holding in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), is dispositive of the first issue raised by the Director. In *Moore*, a case involving a retiree with an occupational hearing loss, the Board held that the date on which disability benefits are to commence is the date of last exposure to workplace noise. *Moore*, slip op. at 3. For the reasons set forth in *Moore*, and because the administrative law judge did not determine the date on which decedent was last exposed to workplace noise, we remand the case for him to do so.²

With regard to the Director's contention that the Decision and Order lacks sufficient information regarding whether the stipulated compensation rate is in accordance with *Ingalls Shipbuilding*, we hold that the administrative law judge has committed no reversible error in accepting the parties' stipulations that the applicable average weekly wage is \$302.66, and that the applicable compensation rate is \$201.77. *See Bath Iron Works*, 113 S.Ct. at 698 n. 12, 26 BRBS at 153 n. 12 (CRT). As neither employer nor claimant has appealed this matter, on remand, in view of the change in law, the administrative law judge may exercise his discretion to permit the parties to reopen this issue.

Additionally, although no party explicitly challenges the calculation of benefits under Section 8(c)(23), it would be incongruous to commence a Section 8(c)(23) award on the date of last exposure in light of the Supreme Court's decision in *Bath Iron Works*. *See Moore*, slip op. at 4. We therefore modify the award to comply with the Supreme Court's holding that benefits for all occupational hearing loss claims are to be calculated under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13) (1988). *Id.* Thus, we hold that decedent's 9.4 percent binaural impairment entitles claimant to 18.8 weeks of compensation (9.4 percent impairment x 200 weeks). *See* 33 U.S.C. §908(c)(13)(B) (1988).

²Because employer did not voluntarily pay benefits and because it filed an untimely notice of controversion, the administrative law judge held it liable for a Section 14(e) penalty. We note that determination of the onset date may affect the amount of compensation subject to the Section 14(e) assessment and interest. *See Pullin v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB No. 91-131 (May 17, 1993).

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to 18.8 weeks of permanent partial disability benefits. The case is remanded for the administrative law judge to determine the onset date of decedent's disability, consistent with the Supreme Court's holding in *Bath Iron Works*, and other related issues consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge