

BRB Nos. 92-310
and 92-310A

JAMES V. BYRD)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
ALABAMA DRY DOCK &)
SHIPBUILDING COMPANY)
)
Self-Insured)
Employer-Respondent)
Cross-Respondent) DATE ISSUED: _____
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)
)
Petitioner) DECISION and ORDER

Appeal of the Decision and Order and the Order Amending Prior Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

Walter R. Meigs, Mobile, Alabama, for employer.

LuAnn Kressley (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: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

*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).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and claimant cross-appeals the Decision and Order and the Order Amending Prior Decision and Order (90-LHC-1171) of Administrative Law Judge James W. Kerr 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer for 25 years as a welder before he retired in 1980. Tr. at 14-15. He underwent an audiological evaluation on December 22, 1986, which revealed a 49.4 percent binaural impairment. Cl. Ex. 4. In January 1987, claimant filed a claim for compensation. On February 26, 1988, claimant underwent another audiometric evaluation, the results of which revealed a 52.1 percent binaural impairment. Cl. Ex. 5. In November 1989, he underwent a third evaluation, and the results of that exam revealed a 42.2 percent binaural impairment. Cl. Ex. 6.

A hearing was held, wherein the parties disputed whether claimant's compensation should be calculated under Section 8(c)(13) or 8(c)(23) of the Act, 33 U.S.C. §908(c)(13), (c)(23) (1988), and whether employer is liable for a Section 14(e), 33 U.S.C. §914(e), penalty. All other issues were resolved by stipulation, *e.g.*, the parties stipulated that the date of injury is December 22, 1986, and that the applicable average weekly wage is \$302.66. Decision and Order at 2. The administrative law judge determined that claimant's compensation is properly computed under Section 8(c)(23) as claimant is a retiree. Decision and Order at 3. Therefore, he converted the average of the three evaluations, 47.92 percent, into a 17 percent impairment of the whole person. *Id.* Although the administrative law judge held employer liable for permanent partial disability benefits, medical expenses, and interest, he found that employer is not liable for a Section 14(e) penalty. Decision and Order at 3-4. Subsequently, the administrative law judge amended his Decision and Order to reflect employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability. Order at 1.

Claimant appeals the award of benefits under Section 8(c)(23). Employer has filed a motion to vacate and remand the case for further consideration of the average weekly wage issue in light of the Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993). The Director responds to employer's motion and agrees that the case should be remanded for further findings

regarding the proper average weekly wage and the proper calculation of interest.¹ Claimant also responds to the motion, requesting that the Board resolve the issues instead of remanding the case.

In *Bath Iron Works*, the Supreme Court 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*, ___ U.S. at ___, 113 S.Ct. at 700, 26 BRBS at 154-155 (CRT). Pursuant to *Bath Iron Works*, we modify the award to reflect claimant's entitlement to permanent partial disability benefits under Section 8(c)(13) for a 47.92 percent binaural impairment. Consequently, claimant is entitled to 95.84 weeks of compensation from his date of retirement. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76, 79 (1993); 33 U.S.C. §908(c)(13) (1988).

We grant, however, employer's motion to vacate the award and remand the case for an average weekly wage determination in accordance with *Bath Iron Works*. At the hearing, the parties stipulated to the applicable average weekly wage, and the administrative law judge accepted that stipulation. In *Bath Iron Works*, the Supreme Court held that a hearing loss injury is complete on the date an employee is last exposed to injurious stimuli, which in this case is the date of retirement. *Bath Iron Works*, ___ U.S. at ___, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *see also Moore*, 27 BRBS at 79. Thus, the Supreme Court held that the proper calculation of benefits under the Act requires use of the average weekly wage in effect at the date of last exposure. *Bath Iron Works*, ___ U.S. at ___, 113 S.Ct. at 699-700 n. 13, 26 BRBS at 154 n. 13 (CRT). 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 \$302.66, the national average weekly wage in effect at the time of claimant's first audiogram, is incorrect. A stipulation that evinces an incorrect application of law is not binding. *See Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). Therefore, we vacate the award of benefits, and we remand the case to the administrative law judge for findings regarding claimant's average weekly wage in light of *Bath Iron Works*. *See generally* 33 U.S.C. §910. As there is no record evidence regarding claimant's average weekly wage, it will be necessary for the administrative law judge to reopen the record to admit additional evidence on this issue. In addition, the administrative law judge should reconsider the award of interest on remand.²

Accordingly, the Decision and Order and the Order Amending Prior Decision and Order are modified to reflect claimant's entitlement to benefits calculated pursuant to Section 8(c)(13). Employer's motions are granted; the award of benefits is vacated, and the case is remanded for further consideration in accordance with this decision.

SO ORDERED.

¹The Director contends that the award of interest is due from the time entitlement first existed, *i.e.*, the date of last exposure, rather than from the date employer's obligation to pay benefits arose. Employer avers that this issue should be addressed by the administrative law judge in the first instance.

²On remand the administrative law judge should recalculate the Section 8(f) award consistent with claimant's entitlement to benefits under Section 8(c)(13). *See* 33 U.S.C. §908(f)(1)(1988).

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge