

W.J. FOWLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED: _____
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 of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

Joshua T. Gillelan II (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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (89-LHC-3267) of Administrative Law Judge Richard D. Mills 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 as a welder in the 1940's and as a burner from 1965 through 1978, and during the course of his employment, he was exposed to injurious noise. Emp. Ex. 14 at 8, 10, 12; Jt. Ex. 1. He underwent an audiological evaluation on January 22, 1987, the results of which revealed a 34.1 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 February 25, 1987. Jt. Ex. 1. Employer filed its first report of injury on March 18, 1987. *Id.* On September 21, 1987, claimant underwent a second evaluation, the results of which revealed a 37.51 percent binaural impairment. Cl. Ex. 11. Employer received formal notice of the claim from the district director on November 30, 1987. Emp. Ex. 3; Jt. Ex. 1. Employer filed a notice of controversion on December 7, 1987. Jt. Ex. 1.

A hearing was held on September 12, 1990, wherein the parties disputed the 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 January 22, 1987, the date of the filing audiogram, and that the applicable average weekly wage is \$302.66. *Id.* The administrative law judge averaged the results of the two audiograms and determined that claimant has a binaural impairment of 35.8 percent. Additionally, as claimant retired prior to the date of his first evaluation,¹ 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 [Fairley]*, 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), 33 U.S.C. §908(c)(23) (1988). Decision and Order at 5-6. Consequently, he awarded permanent partial disability benefits for a 12 percent impairment to the whole man at the rate of \$24.21 per week, a Section 14(e) penalty, medical benefits, and interest. Decision and Order at 6-7. The Director appeals the administrative law judge's decision, and employer responds, urging affirmance. Claimant has not responded to the appeal.

The Director contends the administrative law judge erred in failing to determine the onset date of claimant's disability, arguing that such date should be the date claimant was last exposed to noise, which presumably is the date he retired from employer's employ. In response, employer argues that the onset date should be the date of the first audiogram. The Director also contends the administrative law judge erred in failing to determine the proper assessment period of the Section 14(e) penalty and the amount of benefits to which it attaches.

¹According to claimant's testimony, he was laid off by employer in 1978; however, he did not retire from the workplace until the mid-1980's. Emp. Ex. 14 at 5.

The Board's holding in *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (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 in this case. 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*, 27 BRBS at 79. For the reasons set forth in *Moore*, and because the administrative law judge did not determine the date on which claimant was last exposed to workplace noise, we remand the case for him to do so, as the award of benefits must run from this date.

Additionally, although no party explicitly challenges the calculation of benefits under Section 8(c)(23), we modify the award to comply with the Supreme Court's holding in *Bath Iron Works* 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). See *Moore*, 27 BRBS at 79. Thus, we hold that claimant's 35.8 percent binaural impairment entitles him to 71.6 weeks of compensation (35.8 percent impairment x 200 weeks) based on two-thirds of the stipulated average weekly wage. See 33 U.S.C. §908(c)(13)(B) (1988).

Because 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. The proper period of assessment of a Section 14(e) penalty is the period between the date a claimant notifies his employer of his injury and the date the employer files a notice of controversion or the date of the informal conference, whichever comes first. See *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (Decision on Recon.), *aff'd on recon.*, 27 BRBS 218 (1993); *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17, 20-21 (1992); *Browder v. Dillingham Ship Repair*, 25 BRBS 88, *aff'g on recon.*, 24 BRBS 216 (1991); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). Because a claimant is entitled to receive disability benefits for all disability resulting from his injury, benefits may well accrue in the period between the injury and the employer's receipt of the notice of injury; thus, benefits which become "due" under Section 14(b), 33 U.S.C. §914(b), include all of the accrued benefits from the date of injury. *Pullin*, 27 BRBS at 46; *Browder*, 25 BRBS at 90-91. As it is necessary to remand this case for the administrative law judge to determine claimant's date of retirement, and thus his commencement date of benefits, which may affect the amount of compensation subject to the Section 14(e) penalty, on remand, the administrative law judge must also determine the amount of compensation to which the Section 14(e) penalty attaches. *Moore*, 27 BRBS at 79 n.1.

Accordingly, the Decision and Order is modified to reflect claimant's entitlement to 71.6 weeks of permanent partial disability benefits pursuant to Section 8(c)(13). The case is remanded for the administrative law judge to determine the onset date of claimant's disability, consistent with the Supreme Court's holding in *Bath Iron Works*, and the amount of benefits to which the Section 14(e) penalty attaches. 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

REGINA C. McGRANERY
Administrative Appeals Judge