BRB No. 89-3271

MAXWELL R. PAYNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANIES	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Kevin M. Gillis and Allan M. Muir (Richardson & Troubh), Portland, Maine, for employer/carrier.

Michael S. Hertzig (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE, 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:

Employer appeals the Decision and Order - Awarding Benefits (88-LHC-1668) of Administrative Law Judge Martin J. Dolan, Jr., 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 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 received injurious noise exposure while working for employer in various capacities intermittently between 1951 and 1958, and continuously from 1959 until 1980. In 1980, claimant was transferred to employer's painting shop where he was no longer exposed to loud noise, and he continued to work there until he retired on August 3, 1985. In 1977 and 1979, claimant received treatment from Drs. Lang and Dixon for a mastoid problem in his right ear and underwent a series of surgeries in that ear. Although audiograms were performed on claimant by employer's infirmary dating back as early as 1955, claimant was not advised of the results of these tests or provided with a copy of the test reports. On July 14, 1977, at the request of Dr. Lang, claimant underwent an audiogram at the Pine Street Society which revealed a moderate to severe mixed type hearing loss in the right ear and a mild to moderate sensorineural hearing loss in the left ear. Three additional audiometric tests were performed at the Regional Memorial Hospital on December 26, 1984, on January 8, 1985, and on October 5, 1988, which revealed a 44.9 percent, a 33.19 percent, and 46.4 percent binaural hearing loss respectively. On January 17, 1986, claimant was mailed a copy of the 1984 and 1985 audiograms and accompanying reports and filed his claim for binaural hearing loss under the Act on January 21, 1987.[1] CX 3.

In his Decision and Order, the administrative law judge determined that claimant was entitled to permanent partial disability benefits pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), for a 39.75 percent binaural hearing loss based on the average of the January 8, 1985 and October 5, 1988 audiograms.[2] The administrative law judge further found that as the occupational disease provisions of the Act, as amended in 1984, are applicable to hearing loss claims, and as claimant first became aware of his work-related hearing loss when he was provided with a copy of the 1984 and 1985 audiograms on January 17, 1986, within a year of his retirement, the applicable average weekly wage for calculating claimant's award of benefits is claimant's average weekly wage for the 52 week period prior to his retirement, or $450.80, as established by employer's wage records. *See* 33 U.S.C. §910(d)(2), (i). The administrative law judge also determined that Commercial Union Insurance Company, the carrier providing insurance coverage from January 1, 1963 through February 28, 1981, was liable as the responsible carrier because claimant received no additional noise exposure

[1]In his Decision and Order, the administrative law judge erroneously states that claimant filed his claim on January 17, 1987. See Decision and Order at 4.

[2]The administrative law judge disregarded the results of the December 26, 1984 audiogram because both Dr. Haughwout, an otolaryngologist, and the audiologist who performed the testing deemed it unreliable.

after he transferred to employer's paint shop in 1980. The administrative law judge further found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), based on claimant's pre-existing 1.9 percent binaural hearing loss revealed on an August 9, 1973 audiogram. The administrative law judge therefore held the Special Fund liable for 1.9 percent of claimant's award and held employer liable for the remaining 37.85 percent.[3]

On appeal, employer contends that inasmuch as claimant is a retiree, the administrative law judge erred in calculating his award of hearing loss benefits pursuant to Section 8(c)(13) rather than Section 8(c)(23), 33 U.S.C. §908(c)(23). Employer further avers that inasmuch as the administrative law judge determined that employer is eligible for Section 8(f) relief, its liability should be limited to 104 weeks of benefits for a 13 percent permanent whole person impairment (39.75 percent binaural hearing loss converted to a whole man impairment) and that the Special Fund is liable for benefits thereafter.[4] Employer also contends that inasmuch as claimant had a non-occupational hearing loss in his right ear and an occupational hearing loss in the left, the administrative law judge erred in failing to limit its liability under Section 8(f) to the increase in claimant's binaural hearing loss attributable to the hearing loss in claimant's left ear. Claimant responds, urging affirmance of the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(13).

The Director, Office of Workers' Compensation Programs, also responds, urging affirmance of the administrative law judge's Section 8(f) award, noting that employer's contention that it should be held liable only for the occupationally-related hearing loss in claimant's left ear is contrary to the express terms of Section 8(f) and undermines the "aggravation rule." Director further asserts that the administrative law judge erred in applying Section 10(i), 33 U.S.C. §910(i)(1988), to ascertain the time of claimant's injury for purposes of determining the applicable average weekly wage as Section 10(i) only applies to a claim for compensation for disability due to an occupational disease which does not immediately result in death or disability. Director asserts that because noise-induced hearing loss results in immediate permanent physical impairment, the "time of injury" for purposes of determining claimant's average weekly wage in occupational hearing loss cases is the date of claimant's last injurious exposure to noise, which occurred in the present case sometime in 1980 prior to claimant's transfer to employer's painting shop.

In a supplemental brief, employer and Commercial Union respond that in the event the Board determines that *Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 25 BRBS 30 (CRT)(1st Cir. 1991), is persuasive and that occupational hearing loss benefits for retirees are to be calculated under 8(c)(13), it agrees with the Director that claimant's average weekly wage should be

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[3]He therefore determined that employer is liable for compensation for 37.85 percent of 200 weeks or 75.7 weeks and the Special Fund is liable for 1.9 percent of 200 weeks or 3.8 weeks.

[4]Employer also asserts that it is entitled to a credit for the benefits previously paid pursuant to the administrative law judge's Decision and Order, that the Special Fund should reimburse employer/carrier to the extent of its overpayment and that the Special Fund should receive a credit against future liability for its previous payments to claimant and to the employer.

determined as of the time of his last injurious exposure in 1980. Employer avers that because the record does not contain any evidence as to claimant's average weekly wage in 1980, the case should be remanded for the administrative law judge to make a determination on this issue or permit the parties to stipulate to such a wage.

The United States Supreme Court's recent decision in *Bath Iron Works Corp. v. Director, OWCP,* U.S. , 113 S.Ct. 692 (1993), *aff'g* 942 F.2d 811, 25 BRBS 30 (CRT)(1st Cir. 1991), is dispositive of the Section 8(c)(13) and average weekly wage issues raised in this case. In *Bath Iron Works*, the Supreme Court held that hearing loss claims, whether for current workers or retirees, are claims for a scheduled injury and must be compensated under Section 8(c)(13) rather than Section 8(c)(23). Accepting the argument made by Director in the present case, the Court reasoned that in hearing loss cases, the injury occurs simultaneously with the exposure to excessive noise, and therefore hearing loss is an occupational disease which does immediately result in disability. Since Sections 10(i) and 10(d)(2) thus do not apply, Section 8(c)(23) is also inapplicable to hearing loss injuries. Moreover, in occupational hearing loss cases, the average weekly wage used to calculate the award of benefits under the Act is the wage that claimant was receiving as of the date of his last injurious exposure. *Bath Iron Works*, 113 S. Ct. at 699.

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, we affirm the administrative law judge's determination that claimant is entitled to an award of benefits for his 39.74 percent binaural hearing loss pursuant to Section 8(13)(B). As the award of benefits must be calculated based on claimant's average weekly wage at the time of his last injurious exposure in 1980, a figure which is not in the record, we vacate the administrative law judge's finding that the applicable average weekly wage is $450.80, claimant's average weekly wage in the 52 weeks prior to his retirement. The case is remanded for the administrative law judge to determine claimant's average weekly wage at the time of his last injurious exposure to noise and to allow him to reopen the record if necessary. *See* 20 C.F.R. §702.338.

Employer's contention that the administrative law judge should have awarded Section 8(f) relief based solely on the increase in the amount of binaural hearing loss caused by the work-related hearing loss in claimant's left ear is rejected. Section 8(f) provides that a portion of employer's liability for permanent partial disability will shift to the Special Fund if employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability is manifest to employer; and 3) the pre-existing disability combines with the subsequent injury to result in a materially and substantially greater degree of permanent disability. *See Fucci v. General Dynamics Corp.*, 23 BRBS 164 (1990)(Brown, J., concurring and dissenting).

In the present case, employer concedes that claimant is entitled to compensation for his entire binaural hearing loss pursuant to the rule that employer is liable for the entire resultant disability if an injury aggravates, accelerates or combines with an underlying condition. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Nonetheless, however,

it contends that its liability should be limited under Section 8(f) to the increase in binaural hearing loss attributable to the occupationally-related loss of hearing in claimant's left ear, arguing that the 1984 Amendments to Section 8(f) were enacted to limit employer's liability to the extent of claimant's hearing loss attributable to the employment.[5] Initially, we note that, contrary to employer's assertions, the administrative law judge did not conclude that claimant's hearing loss in his right ear was not occupationally-related. Rather, he found that Dr. Haughwout was unable to rule out noise exposure as a contributing factor in claimant's loss of hearing in his right ear.

We agree with the Director, moreover, that even if a portion of claimant's right ear hearing loss was not an occupational loss, employer's assertion that it is entitled to shift liability for the non-work-related loss must be rejected. In enacting the 1984 Amendments to Section 8(f) of the Act, Congress specifically indicated that it did not wish to disturb the acceptance of "any theory of injury aggravation by which an entire injury may be compensable." H. R. REP. NO. 1027, 98th Cong., 2d. Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2778. Under Section 8(f), as amended, employer's liability in hearing loss cases is limited to the lesser of 104 weeks or the extent of hearing loss attributable to the subsequent injury. *See Machado v. General Dynamics Corp.*, 22 BRBS 176, 182 (1990). In awarding employer Section 8(f) relief in this case, the administrative law judge determined that claimant had a pre-existing binaural hearing loss of 1.9 percent based on the results of an audiogram performed by employer on August 9, 1973. This loss was aggravated by claimant's employment, resulting in his subsequent 39.75 percent binaural hearing loss.

Employer offers no other audiogram which states a degree of impairment sufficient to constitute a pre-existing permanent partial disability. In order to do so, an audiogram must state a measurable impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment (3d ed. 1988). See Fucci*, 23 BRBS at 164. Employer asserts that the degree of non-occupational loss should be factored out of the 1985 and 1988 audiograms found reliable in this case, and that a Section 8(f) apportionment should be made on this basis. As Director states, these audiograms are the bases for the current award and thus cannot establish a pre-existing permanent partial disability. Since the administrative law judge's finding that claimant had an overall pre-existing 1.9 percent binaural hearing loss based on the August 9, 1975 audiogram is not challenged on appeal, we affirm the administrative law judge's finding that employer is to pay claimant compensation for 75.7 (37.5 percent of 200) weeks and the Special Fund is to pay claimant for the remaining 3.8 (1.9 percent of 200) weeks of compensation due.

Accordingly, the administrative law judge's average weekly wage finding is vacated, and the

[5]Employer requests that the case be remanded for the administrative law judge to make an appropriate determination as to the extent of claimant's binaural hearing loss attributable to employment. In the alternative, employer contends that given the administrative law judge's finding below that claimant's hearing loss in the right ear was not occupationally related, the Board could calculate the extent of claimant's work-related binaural hearing loss based on the average of claimant's binaural hearing loss attributable to the loss of hearing in his left ear in the 1985 and 1988 audiograms, 18.75 percent and 29.6 percent respectively, which is 24.175 percent. Employer therefore suggests that its liability should be limited to 24.175 percent of claimant's total 39.75 binaural hearing loss and that the Special Fund should be liable for the remaining 15.575 percent.

case is remanded for further consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge