BRB Nos. 91-231
and 91-231A

WILLIE M. SMITH	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth and John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Awarding Benefits, and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-1568) of Administrative Law Judge Quentin P. McColgin 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 findings of fact and conclusions of law of the administrative law judge which 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). The amount of an attorney's fee award is discretionary and may be set aside only if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

Claimant, a painter for employer, has been exposed to loud noise in the course of his employment. Claimant sought benefits under the Act for a work-related hearing loss. On January 14, 1987, claimant was tested by Dr. McClelland, who concluded that claimant sustained a 31.6 percent binaural impairment. On February 23, 1987, claimant filed a claim under the Act for noise-induced hearing loss, notifying employer of his injury on the same day. On April 10, 1987, employer filed its notice of controversion. On November 18, 1987, claimant was instructed by employer to obtain a second medical opinion at employer's facility. The resulting audiogram recorded a 31.9 percent binaural impairment. A third medical opinion was obtained at employer's request on December 8, 1987. Dr. Stanfield concluded that claimant sustained a 20 percent work-related binaural impairment. On March 16, 1989, employer filed a Notice of Final Payment, which stated that it had voluntarily paid claimant compensation for a 25.8 percent binaural hearing loss at an average weekly wage of $442.75, plus interest. See 33 U.S.C. §908(c)(13)(B)(1988). Claimant sought a formal hearing under the Act to resolve the disputed issues of extent of disability, average weekly wage, entitlement to a Section 14(e) penalty, 33 U.S.C. §914(e), and the award of an attorney's fee.

In his Decision and Order - Awarding Benefits, the administrative law judge found that employer's in-house audiogram was probative evidence regarding the extent of claimant's impairment. He next determined that claimant sustained a 27.8 percent binaural hearing impairment by averaging the results of the three audiograms of record. The administrative law judge further found that claimant's average weekly wage is $578.45, rather than the average weekly wage of $442.75 used by employer when it voluntarily paid claimant compensation for a 25.8 percent binaural hearing loss. Finally, the administrative law judge declined to address claimant's contention that he was entitled to a Section 14(e) assessment, concluding that, pursuant to Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), aff'g in pert. part Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184 (1989)(en banc), the disposition of the disputed Section 14(e) issue is within the exclusive province of the Board to resolve. In his Supplemental Decision and Order Awarding Attorney Fees the administrative law judge reduced the requested fee of $3,406.25 for 27.25 hours at the rate of $125 per hour, and awarded claimant's counsel $1887.50, which represents 18.875 hours at $100 per hour, plus expenses of $71.

On appeal, claimant contends that the administrative law judge erred by failing to find employer liable for a Section 14(e) assessment. Employer cross-appeals, asserting that the administrative law judge erred by giving probative weight to its in-house audiogram because it does not conform to the requirements of Section 702.441 of the regulations, 20 C.F.R. §702.441.

Claimant responds, urging affirmance of the administrative law judge's finding regarding the extent of his impairment. Lastly, employer appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, incorporating the objections it made below into its appellate brief. Claimant responds, seeking affirmance of the fee awarded.

The first issue presented by these appeals is whether employer is liable for a Section 14(e) assessment. Section 14(e) provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director after a showing that, owing to conditions over which employer had no control, such installment could not be paid within the period prescribed for the payment.[1] 33 U.S.C. §914(e). Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

In the instant case, claimant contends that the disposition of the Section 14(e) issue is controlled by the Board's decision in Fairley, 22 BRBS at 184, and that the administrative law judge erred in stating he had no authority to resolve this issue.[2] We agree. For the reasons set forth in Fairley, 22 BRBS at 191-192, Ingalls Shipbuilding, 898 F.2d at 1095, 23 BRBS at 67-68 ((CRT), and Benn v. Ingalls Shipbuilding, Inc., 25 BRBS 37 (1991), aff'd sub nom. Ingalls Shipbuilding v. Director, OWCP, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992), we hold that claimant is entitled to a Section 14(e) penalty.

While remand to the administrative law judge is appropriate where factual findings are necessary to determine employer's liability for a Section 14(e) assessment, in this case there are no factual disputes. The administrative law judge accepted the parties' stipulations that employer was advised of claimant's hearing loss on February 23, 1987, and that employer filed a notice of controversion on April 10, 1987. We hold, as a matter of law, that claimant is therefore entitled to a Section 14(e)

[1]Pursuant to Section 702.105, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

[2]Contrary to the administrative law judge's statement, it was within his authority to resolve the Section 14(e) issue consistent with applicable law.

assessment, to be imposed on compensation due and unpaid from February 23, 1987, until employer controverted the claim on April 10, 1987.

In its cross-appeal, employer contends that the administrative law judge erred in utilizing its in-house audiogram when determining the degree of claimant's hearing impairment. Specifically, employer asserts that the November 18, 1987, audiogram does not meet the requirements of Section 702.441 of the regulations, 20 C.F.R. §702.441, as it is not accompanied by a narrative report and there is no indication that the calculations contained therein are made in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (3d ed. 1988)(the AMA Guides). See 33 U.S.C. §908(c)(13)(C) (1988). Thus, employer contends that its audiometric test should not be entitled to any probative weight. We disagree.

In addressing the weight to be accorded the November 18, 1987 audiogram, the administrative law judge agreed with employer that that audiometric test did not meet the presumptive evidence standard set forth in Section 702.441(b) of the regulations, due to the absence of an accompanying report by a qualified professional.[3] Decision and Order at 3-4. The administrative law judge concluded, however, that employer's in-house audiogram was probative of the extent of claimant's impairment because: (1) it was offered by a party opponent; (2) the results were not

[3]Section 702.441 of the regulations, 20 C.F.R. §702.441, corresponds to Section 8(c)(13)(C) of the Act, which provides that an audiogram is presumptive evidence of the amount of the hearing loss on the date it was performed only if it was administered by a licensed professional, the audiogram and report were provided to the employee at the time it was administered, and no contrary audiogram made at that time is produced. 33 U.S.C. §908(c)(13)(C) (1988). The regulation states, inter alia, that an audiogram shall be presumptive evidence of the amount of hearing loss sustained by claimant if the following conditions are met: (1) the audiogram was administered by a licensed or certified audiologist, physician or technician; (2) the employee was provided with a copy of the audiogram and the accompanying report within thirty days from the time that the audiogram was administered; (3) no one has provided a contrary audiogram of equal probative value within thirty days of the subject audiogram where the claimant continues to be exposed to excessive noise levels, or within six months if such exposure ceases; (4) the audiometer used must be calibrated according to current American National Standard Specifications; and (5) the extent of the claimant's hearing loss must be measured according to the most current revised edition of the AMA Guides. See 20 C.F.R. §702.441(b)(1)-(3), (d).

appreciably divergent from the results of the other accepted audiograms; (3) employer considered the in-house audiogram sufficiently reliable to form a position with respect to claimant's claim; and (4) the audiogram was administered pursuant to Section 1910.95(g)(3) of the regulations, 29 C.F.R §1910.95(g)(3), promulgated under the Occupational Safety and Health Act.[4] See Decision and Order at 3-4.

The administrative law judge determined claimant's binaural hearing impairment by averaging the result of employer's in-house audiogram with the results of audiometric tests performed on January 14, 1987 and December 8, 1987. Thus, contrary to employer's assertion, the administrative law judge did not regard employer's in-house audiogram as presumptive evidence of the extent of claimant's binaural impairment; rather, the administrative law judge acted within his discretion to assign probative weight to the November 18, 1987 audiogram. See generally Norwood v. Ingalls Shipbuilding, Inc., 26 BRBS 66 (1992)(Stage, C.J., dissenting on other grounds); Dubar v. Bath Iron Works Corp., 25 BRBS 5 (1991). Accordingly, we affirm the administrative law judge's decision to use the November 18, 1987, audiometric test result in combination with the test results obtained on January 14, 1987, and December 8, 1987, to determine the degree of claimant's binaural impairment as it is rational. Id.

Employer also appeals the administrative law judge's award of an attorney's fee to claimant's counsel, maintaining it is not liable for a fee because it voluntarily paid benefits. We reject this contention. Employer is liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b), as the administrative law judge awarded claimant greater benefits than employer voluntarily paid. See generally Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

Employer next contends that the attorney's fee of $1,887.50 and the hourly rate of $100 awarded by the administrative law judge are excessive given the size of claimant's compensation award and the lack of complex issues. It also contends that the attorney's fee should be limited to the difference between the additional amount awarded and the amount already paid by employer pursuant to Section 28(b). We reject employer's contentions. Section 702.132 of the regulations, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably

[4]Section 702.441(d), 20 C.F.R. §702.441(d), of the regulations states, in relevant part, that "[a]udiometer testing procedures required by hearing conservation programs pursuant to the Occupational Safety and Health Act of 1970 should be followed (as described at 29 C.F.R., Section 1910.95 and appendices)."

commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Construction Co., 16 BRBS 329 (1984). The amount of benefits obtained is merely one relevant factor when awarding an attorney's fee, and the Board has held that the administrative law judge need not limit the attorney's fee to the amount of compensation gained, because to do so would drive competent counsel from the field.[5] Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), aff'd on recon. en banc, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds); Battle, 16 BRBS at 329. In this case, the administrative law judge addressed employer's objection that the requested hourly rate of $125 was too high in light of the lack of complex issues. He found that an hourly rate of $100 is reasonable given the nature of the case, the experience of the attorneys, and the quality of their representation. As employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of $100, we affirm the administrative law judge's finding.[6] See Snowden, 25 BRBS at 252; see also LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc., 10 BRBS 317 (1979).

We also reject employer's contention concerning the quarter-hour minimum billing method used by the administrative law judge. The Board has held that use of the quarter-hour minimum billing

[5]Moreover, we reject as inapplicable to the instant case employer's reliance on Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983), and George Hyman Construction Co. v. Brooks, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). In the instant case, the administrative law judge awarded claimant benefits for a greater degree of impairment and at a higher average weekly wage than employer voluntarily paid claimant. Claimant's success, therefore, was neither partial nor limited as employer suggests. Moreover, as a result of this decision, claimant has obtained a Section 14(e) penalty.

[6]We also reject employer's reliance on the fee award of Administrative Law Judge A. A. Simpson, Jr., in Cox v. Ingalls Shipbuilding, Inc., No. 88-LHC-3335 (Sept. 5, 1991), in which Judge Simpson reduced various entries as duplicative of the work performed in other cases, and awarded different hourly rates to claimant's attorneys based on their status as either a senior partner or relatively new associate. We note that the amount of an attorney's fee award lies within the discretion of the body awarding the fee and that the decision of an administrative law judge regarding the amount of a fee is not binding precedent on a different administrative law judge in a different case.

method is permissible, as this method is reasonable and complies with the applicable regulation, 20 C.F.R. §702.132.[7] Snowden, 25 BRBS at 252; Neeley v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 138 (1986).

Employer also makes specific contentions regarding various itemized entries in counsel's fee petition. Because employer has failed to show an abuse of discretion by the administrative law judge in awarding time for these services, having specifically considered employer's objections and reducing some entries, we reject its contentions. See generally Snowden, 25 BRBS at 245; Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). We therefore reject all of employer's contentions on appeal and affirm the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees.

Accordingly, the administrative law judge's Decision and Order is modified to reflect employer's liability for an assessment pursuant to Section 14(e) of the Act. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7]We reject employer's contention that the fee order of the United States Court of Appeals for the Fifth Circuit in Ingalls Shipbuilding, Inc. v. Director, OWCP, No. 89-4459 (5th Cir. July 25, 1990)(unpublished), mandates a different result in this case. In that fee order, the court declined to award fees for work before its based on a quarter-hour-minimum billing method. The determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. See 20 C.F.R. §702.132.