BRB No. 92-1791

ALLEN KENNETH MIDDLETON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order on Remand, the Decision and Order on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order On Remand, the Decision and Order on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-127) of Administrative Law Judge Ben H. Walley rendered 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). The amount of an attorney's fee award is discretionary and will not be set aside unless 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).

This is the second time that this case has come before the Board. Claimant, a pipefitter, worked for employer for three days in February and March 1972 where he was exposed to loud noise. Subsequent to working for employer, claimant held several non-maritime construction jobs which also involved exposure to noise. Based on a February 27, 1987, audiogram which revealed an 8.1 percent binaural hearing loss, claimant sought compensation and medical benefits under the Act from employer. *See* 33 U.S.C. §§907, 908(c)(13). In his Decision and Order Denying Benefits, the administrative law judge found that claimant invoked the Section 20(a) presumption with regard to causation, but that employer rebutted it. After considering the evidence as a whole, the administrative law judge concluded, based primarily on the credentials and opinion of employer's medical expert, Dr. Lamppin, that claimant's condition was not causally related to the exposure he received while working for employer. Dr. Lamppin had opined that claimant had an 8.4 binaural hearing loss and that the audiogram demonstrated a high frequency hearing loss compatible with noise-induced hearing loss "if the man is exposed to sufficient noise for a sufficient period of time." In his opinion, it was not probable that eight days of noise exposure would cause this type of loss, as it must be based on long-term exposure to intense noise.[1] Claimant appealed the denial of benefits, arguing that Dr. Lamppin's opinion did not provide substantial evidence to support the administrative law judge's decision.

In its initial Decision and Order, the Board held that the administrative law judge correctly determined that claimant introduced sufficient evidence to invoke the Section 20(a) presumption, inasmuch as he demonstrated that he sustained an 8.1 percent binaural noise-induced hearing loss and employer had conceded that claimant was exposed to hazardous noise levels while working for employer. *Middleton v. Ingalls Shipbuilding, Inc.*, BRB No. 89-2846 (June 26, 1991) (unpublished). The Board determined, however, that as Dr. Lamppin recognized that claimant's audiogram demonstrated a high frequency hearing loss compatible with noise exposure and Dr. Lamppin did not state that the exposure claimant received while working for employer played no part in his impairment, his opinion was insufficient to establish rebuttal, contrary to the administrative law judge's determination. Accordingly, the Board held that claimant established a work-related injury.

The Board also held that while the administrative law judge correctly recognized that Dr. Lamppin indicated that it was not probable that the degree of hearing loss exhibited on the February 1987 audiogram was caused by his employment with employer, the fact that claimant's condition was not actually due to the exposure he received with employer did not relieve employer of liability, as exposure to injurious stimuli is all that is required for an employer to be held liable as the responsible employer under *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). While recognizing that a potentially liable employer could escape liability consistent with *Cardillo* by establishing that claimant received subsequent injurious exposure while working for a subsequent covered employer, the Board determined that this option was unavailable to employer in this case because it had stipulated that it was claimant's last maritime employer. Therefore, employer was responsible for payment of claimant's benefits. Accordingly, the

[1]Apparently Dr. Lamppin based his opinion on the erroneous assumption that claimant worked for employer for eight, rather than three days.

Board vacated the administrative law judge's denial of benefits and remanded for consideration of all remaining issues.

Following the Board's decision, the parties entered into a Joint Stipulation of Facts. Among the stipulations, the parties agreed that the Board's order mandates that the administrative law judge find that claimant is entitled to compensation benefits from employer for an 8.1 percent binaural hearing loss. Employer nevertheless noted its disagreement with the Board's holding on this issue and reserved its right to appeal. The administrative law judge adopted the parties' stipulation as the basis for his Decision and Order on Remand, and accordingly awarded claimant compensation benefits under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), for an 8.1 percent binaural hearing impairment, based on a stipulated average weekly wage of $773.21, for 16.2 weeks beginning on February 27, 1987. On May 11, 1992, the administrative law judge issued a Decision and Order which, in part, granted employer's motion for reconsideration.[2]

On appeal, employer initially contends that the administrative law judge erred in holding it liable for claimant's hearing loss benefits as the record mandates the finding that claimant's employment with employer is not the cause of his hearing impairment. Employer maintains that claimant failed to establish a *prima facie* case for invoking the Section 20(a) presumption, as he introduced no evidence sufficient to establish that the noise level at employer's facility during the brief time he worked there was injurious or that the exposure he received during his three days of employment would be sufficient to contribute to any permanent hearing impairment. Employer also argues that the Board erred in its initial Decision and Order in concluding that the fact that claimant's condition was not actually caused by the exposure he received while working for employer does not relieve employer of liability. Claimant responds, urging affirmance.

We reject employer's arguments. The issues of causation and employer's status as the responsible employer were fully considered and resolved by the Board in the prior appeal of this case by claimant. Our prior determination that employer is liable for claimant's work-related hearing loss is the law of the case; we decline to address these argument again. *See*

[2]In the "Order" portion of the Decision and Order on Remand, the administrative law judge erroneously stated that claimant's compensation rate was $773.21, whereas this was the stipulated average weekly wage. This error was raised by employer in its reconsideration motion and was corrected by the administrative law judge in his Decision and Order on Motion for Reconsideration.

Bruce v. Bath Iron Works Corp., 25 BRBS 157 (1991); *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).[3]

Employer also appeals the fee award made by the administrative law judge, incorporating the objections it made below into its brief on appeal. Claimant responds, urging affirmance. Claimant's attorney submitted a fee petition, requesting $4,087.50 for 27.25 hours of services at $150 per hour and $75 in expenses. Employer filed objections and claimant's attorney responded to the objections. In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge stated that employer's objections were "specific and persuasive," but not convincing, and approved all the hours requested. The administrative law judge further determined that the $150 hourly rate claimed was reasonable given the high level of skill required to prepare for and to present the issues in this case, and the different burdens placed upon plaintiff and defense attorneys.[4] Accordingly, the administrative law judge approved the full $4,087.50 requested, as well as the $75 in costs.

On appeal, employer initially contends that the fee award made by the administrative law judge is premature, arguing that there has been no successful prosecution of the claim, inasmuch as claimant's entitlement to hearing loss benefits is an issue currently on appeal. We disagree. It is well established that to further the goal of administrative efficiency an administrative law judge may render an attorney's fee determination when he issues his decision; such an award, however, does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). We hold, therefore, that the administrative law judge committed no error in considering claimant's counsel's fee petition while the case was pending on appeal before the Board.

We also reject employer's argument that the fee awarded by the administrative law judge is excessive. Although employer maintains that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the fee award, we decline to address these arguments which have been raised by employer for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and

[3]Citing *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991), employer argues that it cannot be held liable for claimant's benefits because the 1987 audiogram cannot be "projected back" 15 years, to the year when claimant last worked for employer to establish that he had any hearing loss at the time. Contrary to employer's assertions, however, *Bruce* does not preclude an administrative law judge from relying on a later audiogram to establish the extent of claimant's hearing loss at an earlier time; it merely recognizes that the decision not to do so on the facts in that case was within the administrative law judge's discretion.

[4]The administrative law judge made this observation in response to employer's attachment of a copy of an article from a Mississippi Defense Lawyers Association newsletter which indicates that fees for **defense** attorneys in the area range widely.

dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). We note, however, that the administrative law judge did consider the nature of the case and the quality of representation in determining that the $150 hourly rate was reasonable and appropriate. While employer also argues that the $150 hourly rate awarded is excessive and that an hourly rate of $90 to $100 would be more appropriate, employer has not established an abuse of discretion by the administrative law judge in this regard. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *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).[5]

Finally, we reject employer's contention that time spent on certain discovery-related activity, trial preparation, and in preparing and reviewing various correspondence and legal and medical documents was either unnecessary or excessive. The administrative law judge considered employer's objections, but determined that all the services rendered by claimant's counsel were reasonable and necessary. We decline to disturb this rational determination. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).[6]

Accordingly, the administrative law judge's Decision and Order on Remand, the Decision and Order on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

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[5]We reject employer's reliance on the fee award of Administrative Law Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (September 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. The amount of the attorney's fee award lies within the discretion of the body awarding the fee, and the decision of an administrative law judge regarding the amount of a fee is not binding precedent on another body in a different case.

[6]Employer argues that the fee order of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished), mandates a different result in this case. Although the United States Court of Appeals for the Fifth Circuit recently held that its unpublished fee order in *Fairley* is considered to be circuit precedent which must be followed, we need not address this argument which employer is making for the first time on appeal. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (unpublished). We note, however, that the one-half hour charges contested by employer on April 3, 1989, August 11, 1989, February 21, 26, and 27, 1992, and May 1, 1992, are not inconsistent with *Fairley*. While the court held in *Fairley* that attorneys generally may not charge more than one-eighth hour for reading a one-page letter, and one quarter-hour for writing a one-page letter, the entries challenged by employer either involve review of a multi-page document, the performance of services not addressed in *Fairley*, or the performance of more than one service.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge