BRB No. 89-570

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

Appeal of the Decision and Order Granting Claimant's Motion for Summary Judgment and Denying Employer's Motion for Summary Judgment and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Motion for Summary Judgment and Denying Employer's Motion for Summary Judgment and the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-3207) of Administrative Law Judge Richard D. Mills 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 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 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was exposed to loud noise while working in employer's shipyard as a welder from 1940 until 1975, when he retired. An audiogram administered on May 2, 1987 was interpreted by Dr. James H. Wold as indicating a 26.8 percent binaural hearing impairment. On May 28, 1987, claimant filed a claim for hearing loss benefits under the Act based on the results of the May 2, 1987 audiogram, and provided employer with notice of his injury. Thereafter, on August 6, 1987, claimant underwent another audiometric examination which revealed a 15.21 percent binaural hearing loss. On December 23, 1987, employer initiated voluntary payment of compensation for a 15.21 percent binaural hearing loss based on an average weekly wage of $302.66. Claimant, however, continued to assert his entitlement to compensation for a 26.8 percent binaural hearing impairment and the case was referred to the Office of Administrative Law Judges for a formal hearing on August 12, 1988.

Prior to the hearing, however, both parties moved for summary judgment on the issue of whether claimant's hearing loss benefits should be calculated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), or Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). In a Decision and Order Granting Claimant's Motion for Summary Judgment and Denying Employer's Motion for Summary Judgment dated December 30, 1988, the administrative law judge, relying on the Board's Decision in *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988), found that claimant's benefits should be calculated under Section 8(c)(13). Accordingly, he granted claimant's motion for summary judgment and awarded claimant compensation for a 21.005 percent binaural hearing loss consistent with the parties' agreement to split the difference between the results of the two audiograms.

Thereafter, claimant's attorney filed a fee petition for work performed before the administrative law judge, in which he requested $687.50, representing 5.5 hours of services at $125 per hour, plus $10.75 in expenses. Employer filed objections to the fee petition, and claimant replied to employer's objections. In a Supplemental Decision and Order Awarding Attorney Fees dated February 16, 1990, the administrative law judge, addressing employer's objections, reduced the hourly rate sought to $100, but determined that the fee request was otherwise reasonable. Accordingly, he awarded claimant's counsel a fee of $550, representing 5.5 hours of services at $100 per hour, in addition to the $10.75 in requested expenses.

On appeal, employer argues that the administrative law judge erred in awarding claimant compensation pursuant to Section 8(c)(13) rather than Section 8(c)(23) of the Act. Claimant agrees, stating that the United States Court of Appeals for the Fifth Circuit's decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*), is determinative of this issue. Claimant further responds that the administrative law judge erred in failing to hold employer liable for an assessment under 33 U.S.C. §914(e). In a supplemental appeal, employer contests the fee award made by the administrative law judge on various grounds, incorporating the objections it made below into its appellate brief.

In the time since the parties filed their briefs on appeal, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP,* U.S. , 113 S.Ct. 692, 26 BRBS

151 (CRT)(1993). In *Bath Iron Works*, the Court, taking a position contrary to that of the Fifth Circuit in *Ingalls Shipbuilding*, held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) rather than Section 8(c)(23) of the Act. Thus, for reasons set forth in *Bath Iron Works*, we reject the parties' contention that the award of compensation for claimant's hearing loss should be made pursuant to Section 8(c)(23), and affirm the administrative law judge's determination that claimant is entitled to compensation pursuant to Section 8(c)(13) of the Act.[1]

We agree with claimant, however, that he is entitled to a Section 14(e) assessment on the facts presented in this case.[2] Disposition of the Section 14(e) issue is controlled by the Board's decision in *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). In *Fairley*, 22 BRBS at 184, the Board determined, *inter alia*, that the May 14, 1987, excuse granted by the district director in the relevant group of cases was invalid. The Fifth Circuit affirmed the Board's holding that the district director abused his discretion in excusing employer from filing notices of controversions. Thus, because employer did not timely pay benefits or controvert the claim in this case, we hold, for the reasons set forth in *Ingalls Shipbuilding* and *Fairley*, that claimant is entitled to a Section 14(e) assessment as a matter of law. *See also Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT)(5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991).

While remand to the administrative law judge is appropriate where factual findings are necessary for determining employer's liability for a Section 14(e) assessment, in the instant case there are no factual disputes. Our review of the record reveals that employer received notice of claimant's hearing loss claim on May 28, 1987, that no notice or controversion was filed and no informal conference was held, and that employer commenced voluntary payment of compensation on December 23, 1987, based on a lower percentage of impairment than that ultimately awarded by the administrative law judge. Where, as here, employer fails to file a notice of controversion and no informal conference is held, employer's liability under Section 14(e) terminates as of the date the claim is referred to Office of Administrative Law Judges because the referral of the claim for a formal hearing puts the Department of Labor on notice of the facts that a proper controversion would have revealed. *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17, 20-21 (1992); *see also National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979). In the present case, however, the period of claimant's entitlement only ran for 42 (21.005 percent of 200) weeks from claimant's May 2, 1987, date of injury. Because the period of his entitlement expired prior to the August 12, 1988, referral date, the Section 14(e) penalty attaches to the entire award of benefits in this case, although once employer commenced voluntary payments on December 23, 1987, the

[1]In view of this disposition, employer's motion to remand is rendered moot.

[2]Although claimant's Section 14(e) argument is raised in a response brief, it will be addressed as Section 14(e) assessments are mandatory and may be raised at any time. *See, e.g. McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981).

penalty is calculated based solely on the difference between the amount claimant was entitled to receive and the amount employer voluntarily paid. *Browder v. Dillingham Ship Repair*, 24 BRBS 216 (1991), *aff'd on recon.*, 25 BRBS 88 (1991); 33 U.S.C. §914(b), (d), (e).

Turning to employer's supplemental appeal of the administrative law judge's attorney's fee award, employer initially contends that it should not be held liable for claimant's attorney's fee since it accepted liability for the claim and commenced voluntary payments of compensation to claimant on December 23, 1987. Alternatively, employer argues that, under Section 28(b) of the Act, 33 U.S.C. §928(b), any fee awarded to claimant's counsel should be based solely upon the difference between the amount of benefits voluntarily paid to claimant and the amount ultimately awarded by the administrative law judge. Finally, employer contends that the 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 $550 fee awarded. We need not address these arguments, however, as they 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 dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pert. 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).

Employer further contends that the $100 hourly rate awarded to claimant's counsel does not conform to reasonable and customary charges in the area and that an hourly rate of $80 to $85 for claimant's lead counsel and $70 to $75 for claimant's associate counsel would be more appropriate. We disagree. Employer's unsupported assertions are insufficient to meet its burden of establishing that the hourly rate awarded was unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer also contests the number of hours requested by counsel and approved by the administrative law judge, contending that time spent in certain discovery-related activity was either unnecessary or excessive.[3] In entering the fee award, the administrative law judge considered the totality of employer's objections, reduced the hourly rate to $100, and found all of the itemized entries claimed to be reasonable and necessary. We decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon,* 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Finally, employer objects to counsel's minimum quarter-hour billing method. Claimant's counsel utilized this method of billing in his fee petition and the administrative law judge specifically found this method of billing to be permissible, as well as acceptable, on the facts presented in this case. The United States Court of Appeals for the Fifth Circuit recently held that its unpublished fee order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley],* No. 89-4459 (5th Cir. July 25, 1990), which employer cites on appeal, is considered circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995) (unpublished). In *Fairley,* the court held that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter or one-quarter hour for preparing a one-page letter. *See Fairley, slip op.* at 2. The administrative law judge's finding that minimum quarter-hour billing is appropriate is erroneous in light of *Fairley* and *Biggs*. This error is harmless, however, on the facts presented because the administrative law judge specifically determined that the one-quarter hour claimed for review of Employer's Objection to Discovery or Alternatively for Protective Order was warranted, and the only other quarter-hour entry claimed, involving review of the administrative law judge's Decision and Order on January 2, 1989, is not inconsistent with *Fairley*.

[3]Additionally, we reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (September 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Motion for Summary Judgment and Denying Employer's Motion for Summary Judgment is modified to reflect employer's liability for a Section 14(e) assessment consistent with this opinion but is otherwise affirmed. The Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge