

BRB No. 89-1194

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

Appeal of the Order Granting Motion for Summary Decision and Remand and the Supplemental Decision and Order Granting Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

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

Paul M. Franke, Jr., and 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 Order Granting Motion for Summary Decision and Remand and the Supplemental Decision and Order Granting Attorney's Fees (88-LHC-3427) 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 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 as a shipfitter at employer's shipyard from 1954 to 1974. An audiogram performed on May 28, 1987, was interpreted by Dr. James H. Wold as indicating a 42.1 percent binaural hearing loss. On September 30, 1987, claimant filed a claim for occupational hearing loss benefits under the Act based on the results of the May 20, 1987, audiogram and provided employer with notice of his injury. On December 31, 1987, employer filed its Form LS-207, Notice of Controversion. On September 2, 1988, the case was referred to the Office of Administrative Law Judges for a formal hearing.

Prior to the hearing, however, both parties filed motions for summary judgment on the issue of whether claimant's hearing loss benefits should be calculated under 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 an Order Granting Motion for Summary Decision and Remand, 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 remanded the case to the district director for disposition of the remaining issues.¹

Thereafter, claimant's attorney filed a fee petition for work performed before the administrative law judge, in which he requested \$1,285.50, representing 8.5 hours of services at \$150 per hour, plus \$10.50 in expenses. In a Supplemental Decision and Order Granting Attorney's Fees, the administrative law judge, noting that employer did not file any objections to the fee petition, 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 \$860.50 for 8.5 hours of services at \$100 per hour, plus the \$10.50 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 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.

¹The district director issued an Order dated January 4, 1990, stating that claimant is entitled to compensation for a 42.1 percent binaural hearing impairment consistent with the filing audiogram.

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 Section 8(c)(23), of the Act. Thus, for the 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 under Section 8(c)(13) of the Act.

We agree with claimant however, that he is entitled to an assessment pursuant to Section 14(e).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 part, 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 on September 30, 1987, but did not pay benefits or controvert the claim until December 31, 1987. Thus, as a matter of law, on the facts presented claimant is entitled to a Section 14(e) assessment on all compensation due and unpaid from May 29, 1987, the stipulated date of injury, until December 31, 1987, the date of employer's controversion. See *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45, *aff'd on recon.*, 27 BRBS 218 (1993).

Turning to employer's supplemental appeal of the administrative law judge's attorney's fee award, employer initially contends that it is not liable for an attorney's fee because the basis for the fee, claimant's success regarding the applicable provision for calculating the award, is certain to be reversed on appeal in light of the Fifth Circuit's

²Although claimant's Section 14(e), 33 U.S.C. §914(e), argument is raised in a response brief the assessment of a Section 14(e) penalty is mandatory, and may be raised as an issue at any time. *Canty v. S.E.L. Maduro*, 26 BRBS 147, 153 (1992); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 168 (1989); *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981).

decision in *Ingalls Shipbuilding*, 898 F.2d at 1088, 23 BRBS at 61 (CRT). In the alternative, 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 fee awarded. Employer also objects to the \$100 hourly rate awarded, and to counsel's minimum quarter-hour billing method. Claimant responds, urging affirmance of the administrative law judge's attorney's fee award.

Because we affirm the administrative law judge's award of benefits pursuant to Section 8(c)(13), we reject employer's contention that it is not liable for claimant's attorney's fee. Furthermore, we need not address employer's arguments relating to the fee award inasmuch as employer failed to object to the fee petition while the case was before the administrative law judge. See *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 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). Accordingly, the fee award made by the administrative law judge is affirmed.³

Accordingly, the administrative law judge's Order Granting Motion for Summary Decision and Remand is modified to reflect employer's liability for a Section 14(e) assessment consistent with this opinion but is, in all other respects, affirmed. The administrative law judge's Supplemental Decision and Order Granting Attorney's Fees is also affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

³Claimant's contention that employer is liable for interest on the attorney's fee award under *Guidry v. Booker Drilling Co. (Grace Offshore Co.)*, 901 F.2d 485, 23 BRBS 82 (CRT)(5th Cir. 1990), is rejected for the reasons stated in *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 65 (1991)(decision on remand). See also *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987).

NANCY S. DOLDER
Administrative Appeals Judge