BRB No. 92-0229

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

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-2707) of Administrative Law Judge C. Richard Avery 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it 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 retiree, was exposed to workplace noise while employed at employer's facility. On November 25, 1986, claimant filed a claim for benefits under the Act based on a November 20, 1986, audiometric evaluation which revealed a 17.5 percent binaural hearing impairment. Employer, although notified of claimant's injury on this date, did not file a notice of controversion. On October 1, 1987, employer initiated voluntary payments of compensation to claimant for a 17.5 percent binaural impairment. On February 5, 1988, employer modified its voluntary payments to reflect the conversion of a 17.5 percent binaural impairment to a six percent whole person

impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988).

As of the time of the formal hearing on August 6, 1990, the parties were in agreement that claimant was entitled to compensation for a six percent whole person impairment pursuant to Section 8(c)(23)[1] based upon an average weekly wage of $302.66 and that employer was liable for medical expenses. *See* 33 U.S.C. §907. The only issues remaining for adjudication were claimant's entitlement to an assessment under Section 14(e), 33 U.S.C. §914(e), and employer's liability for attorney's fees. Relying on *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), the administrative law judge found the "excuse" granted by the district director to be invalid. As employer did not timely pay benefits or controvert the claim, the administrative law judge held employer liable for an additional assessment under Section 14(e), the exact amount of which was to be determined by the district director.

Claimant's counsel subsequently filed a fee petition for work performed at the administrative law judge level, requesting $3,687.50 for 29.5 hours of services at $125 per hour, plus expenses of $35.50. Employer filed objections to counsel's fee request. In his Supplemental Decision and Order, the administrative law judge, after addressing employer's specific objections, denied reimbursement for the requested expenses and awarded claimant's counsel a fee of $2,800, representing 28 hours of services at $100 per hour.

Employer, incorporating by reference the objections it raised below, appeals the attorney's fee awarded by the administrative law judge. Claimant responds, urging affirmance of the fee award.

On appeal, employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that there was no successful prosecution of the claim because it voluntarily paid claimant compensation for a six percent whole person impairment, the same amount of compensation ultimately found due by the administrative law judge. We disagree. Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the instant case, although employer ultimately did agree that claimant was entitled to compensation for a six percent whole person impairment and medical benefits prior to the hearing, employer continued to dispute claimant's entitlement to a Section 14(e) assessment. Thus, a controversy remained even after employer voluntarily paid compensation. As claimant was ultimately successful in establishing his right to a Section 14(e) assessment over employer's objections, this additional compensation is sufficient to support an award of an attorney's fee payable by employer pursuant to Section 28(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand).

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[1]No one challenges the award of compensation benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23). *Cf. Bath Iron Works Corp v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993)(all hearing loss is properly compensated under 33 U.S.C. §908(c)(13)).

Employer next contends that the lack of complexity of the instant case mandates a reduction in the amount of the attorney's fee awarded by the administrative law judge.[2] We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that the award of any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Thus, the complexity of the legal issues is but one factor to be considered when awarding an attorney's fee. *See* 20 C.F.R. §702.132; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge considered this specific objection in reducing counsel's requested hourly rate. We therefore reject employer's contention that the awarded fee must be further reduced on this basis.[3]

Employer further contends that the $100 hourly rate awarded to claimant's counsel is excessive, asserting that an hourly rate of $75 to $80 would be more reasonable. The administrative law judge determined that the hourly rate of $125 sought by claimant's counsel was excessive and awarded an hourly rate of $100, which he found to be fair and reasonable for the issues involved in the region where this case was tried. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the hourly rate awarded by the administrative law judge to counsel.[4] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer also objects to counsel's use of the quarter-hour minimum billing method. The United States Court of Appeals for the Fifth Circuit has recently held that its unpublished fee order rendered in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), is considered circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v.*

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[2]Employer also challenges the amount of the attorney's fee approved by the administrative law judge on the basis that the benefits received were nominal. Employer, however, failed to raise this contention in its objections to the fee petition which it filed with the administrative law judge; thus, we will not address this contention since it is raised for the first time on appeal. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

[3]Moreover, 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 (Sept. 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which the 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).

[4]We note that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, does not support employer's contention that the fee awarded in the instant case was unreasonable.

Director, OWCP [Biggs], No. 94-40066 (5th Cir. Jan. 12, 1995)(unpublished). In *Fairley*, the court held that, generally, attorneys may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for preparing a one-page letter. *See Fairley*, slip. op. at 2. In the instant case, the administrative law judge summarily found claimant's use of this billing method to be "permissible as well as acceptable." *See* Supplemental Decision and Order at 2. As the administrative law judge did not ascertain whether the individual tasks billed at the quarter-hour minimum warranted that amount of time in this case, we must remand the case for reconsideration of the fee award in light of the Fifth Circuit's decisions in *Fairley* and *Biggs*. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42, 44 (1995).

Finally, employer challenges the number of hours requested by counsel and approved by the administrative law judge. In this regard, employer contends that the time spent in certain discovery-related activities and in reviewing and preparing various legal documents was either unnecessary or excessive. In considering counsel's fee petition, the administrative law judge set forth employer's specific objections, reduced the number of hours requested for the hearing, and determined that the remaining time requested by claimant's counsel for services rendered was both reasonable and necessary. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). We note, however, that employer's objections to various entries as excessive may have merit in light of the decisions in *Fairley* and *Biggs*. On remand, the administrative law judge must reconsider the time approved for these services consistent with the decisions of the Fifth Circuit in *Fairley* and *Biggs*.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed in part and vacated in part, and the case is remanded for reconsideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge