

BRB Nos. 91-1179
and 91-1179A

CARL JOHN THOMAS)	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order - Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits and employer appeals the Supplemental Decision and Order - Awarding Attorney's Fee (89-LHC-2933) of Administrative Law Judge James W. Kerr, Jr., 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).

Claimant worked as a painter at employer's facility from 1958 until he retired in 1975 where he was exposed to loud workplace noise. A June 21, 1988, audiometric examination administered by James H. Wold, Ph.D. revealed a 0 percent right ear loss, a 9.3 percent left ear loss or a binaural impairment of 1.5 percent. Cx. 2. On July 27, 1988, claimant filed a claim for occupational hearing loss benefits under the Act based on the June 21, 1988, audiogram and provided employer with notice of his injury. Cxs. 4, 5. Employer filed its notice of controversion on August 8, 1988. Cx. 7. The case was referred to the Office of Administrative Law Judges for a formal hearing on June 23, 1989. A second audiogram administered on August 28, 1989, was interpreted by Gordan L. Stanfield, Ph.D, as indicating a 5 percent binaural hearing loss. Cx. 19.

At the formal hearing, the parties stipulated that claimant is a retiree, that claimant suffered a work-related hearing loss, that the date of injury was June 21, 1988, and that the applicable average weekly wage for compensation purposes was \$308.48. In his Decision and Order, the administrative law judge, averaging the results of the two record audiograms, found that claimant has a 3.25 percent binaural impairment, and that as he is a retiree, his hearing loss should be compensated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). Thus, the administrative law judge converted claimant's 3.25 percent binaural impairment to a 1 percent impairment of the whole person and determined that the award of benefits was to commence as of June 21, 1988, the stipulated date of injury. He also held employer liable for claimant's medical expenses and awarded interest on all compensation due.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting \$3,452.62, representing 27.25 hours of legal services at an hourly rate of \$125, and \$46.37 in expenses. Employer filed objections and claimant replied to those objections. In a Supplemental Decision and Order - Awarding Attorney's Fee, the administrative law judge, considering employer's specific objections, disallowed 6 of the 27.25 hours requested in the fee petition and reduced the hourly rate sought to \$100 for the non-trial work performed. Determining that counsel was entitled to the additional one hour requested in claimant's reply brief for defending the fee petition, the administrative law judge awarded claimant's counsel a fee of \$2,315.12, representing 20.5 hours of legal services at the hourly rate of \$100, 1.75 hours of trial services at the rate of \$125 per hour, plus the \$46.37 in requested expenses.

On appeal, the Director contends that the administrative law judge erred in commencing claimant's award of permanent partial disability compensation as of June 21, 1988, the date of the filing audiogram. The Director further argues that the administrative law judge's Decision and Order sets forth no information as to whether the stipulated average weekly wage is the correct rate in accordance with *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). Employer responds, urging that the administrative law judge's findings regarding the commencement date for the award of benefits be affirmed. In its cross-appeal, employer challenges the attorney's fee awarded by the administrative law judge on various grounds, incorporating the objections it raised below into its appellate brief. Claimant has not responded to

these appeals.

The Director initially contends that the instant case must be remanded for a determination as to the date claimant's benefits should commence; specifically, the Director argues that the date claimant's compensation should begin is the date of claimant's retirement. In the time since the parties filed their briefs on appeal in the instant case, 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), which is dispositive of the issue raised by the Director. In *Bath Iron Works*, the Court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. *See Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Based on this analysis, the Court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), and 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), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23).

Pursuant to the Supreme Court's decision in *Bath Iron Works*, that the relevant time of injury for calculating a retiree's hearing loss benefits is the date of his last exposure to injurious noise levels, we hold that claimant's benefits must commence on the date of his last exposure to injurious noise levels while working for employer. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). In the instant case, the administrative law judge made no findings as to the date of claimant's last exposure to injurious noise levels. Accordingly, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to determine, in accordance with the holding of *Bath Iron Works*, the onset date for the commencement of claimant's benefits.

In *Moore*, 27 BRBS at 79, the Board also held that as the Supreme Court's decision in *Bath Iron Works* is dispositive of the issue of the onset date for claimant's award, it would be incongruous to commence a Section 8(c)(23) award on the date of claimant's last exposure with employer and ignore the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13) of the Act. Thus, although no party on appeal has challenged the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23), in accordance with the holding of *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23), and we modify that award to reflect that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(13) of the Act for a 3.25 percent binaural hearing loss, consistent with the factual findings he previously made.

The Director additionally contends that the administrative law judge's Decision and Order is unclear as to whether the stipulated average weekly wage is in accordance with the Fifth Circuit's decision in *Ingalls Shipbuilding*, 898 F.2d at 1088, 23 BRBS at 61 (CRT). In his Decision and

Order, the administrative law judge accepted the parties' stipulation that the applicable average weekly wage for calculating claimant's compensation is \$308.48. As neither claimant nor employer has appealed the administrative law judge's decision to accept their stipulation, we hold that the administrative law judge committed no reversible error in accepting that stipulation and using the average weekly wage of \$308.48 to calculate claimant's compensation rate. *See Bath Iron Works*, 113 S.Ct. at 698 n.12, 26 BRBS at 153 n.12 (CRT). On remand, in view of the change in law, the administrative law judge may exercise his discretion to permit the parties to reopen this issue.

Lastly, we address employer's appeal of the administrative law judge's award of an attorney's fee. An award of an attorney's fee 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).

Employer initially argues that the fee awarded by the administrative law judge is excessive and should be reduced in light of the lack of complexity of the case, the quality of the representation provided, and the minimal benefits obtained. We decline to address these arguments, however, as they have been raised by employer for the first time on appeal. *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, 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 reconsideration); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Employer also asserts that the \$100 hourly rate awarded by the administrative law judge is excessive and suggests that a rate of \$70 to \$75 for the junior associates and \$80 to \$85 for claimant's lead attorney would be more appropriate. We disagree. Employer's assertions are insufficient to meet its burden of establishing that the hourly rate awarded is unreasonable.¹ *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

¹Employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

Additionally, we reject employer's contention that the time spent in certain discovery-related activity, in trial preparation, and in preparing and reviewing various correspondence and legal documents was either unnecessary, excessive, or clerical in nature.² After evaluating claimant's fee request in light of the regulatory criteria of 20 C.F.R. §702.132 and employer's objections, the administrative law judge disallowed 6 hours, and found the remaining itemized services claimed to be 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; thus, we decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Finally, employer objects to counsel's use of the minimum quarter-hour billing method. Employer argued below that counsel's use of minimum quarter-hour billing was inappropriate, citing the United States Court of Appeals for the Fifth Circuit's unpublished fee order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), as supporting authority. The administrative law judge, however, summarily dismissed employer's objection on the rationale that unpublished decisions are of no precedential value. In the time since the administrative law judge issued his fee award in this case, however, the Fifth Circuit, within whose appellate jurisdiction this case arises, has indicated that its unpublished fee order in *Fairley* is considered to be 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 stated 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. Because the administrative law judge dismissed employer's objection and did not ascertain whether the individual tasks billed in quarter-hour increments warranted the amount of time claimed, we vacate the fee award and remand the case for the administrative law judge to reconsider the fee award in light of *Fairley* and *Biggs*. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

²We 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, in accordance with the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability compensation pursuant to Section 8(c)(23) is vacated, and the award is modified to reflect claimant's entitlement to benefits for a 3.2 percent binaural impairment pursuant to Section 8(c)(13). The case is remanded to the administrative law judge for determination of the onset date for the commencement of claimant's benefits. The administrative law judge's fee award also is vacated, and the case is remanded for reconsideration of the fee consistent with this opinion; the hourly rate awarded is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge