

BRB No. 92-1333

ALBERT R. NICHOLSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of 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 claimant.

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-2576) 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). 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant filed a claim for his work-related hearing loss in 1987, and employer controverted the claim. Cl. Exs. 4-5, 8-9; Emp. Exs. 2-3; Jt. Ex. 1. At the hearing, the parties stipulated that employer accepted liability for medical benefits, and the remaining issues were the extent of claimant's disability and employer's liability for an attorney's fee. Jt. Ex. 1. The administrative law judge determined that claimant is entitled to 2.9 weeks of benefits for a 5.6 percent monaural impairment to the right ear, pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A) (1988). Consequently, he ordered employer to pay disability benefits, all medical expenses related to claimant's hearing loss, including the cost of the initial audiometric evaluation, and interest. Decision and Order at 5-6. In light of his award, he determined that employer also is liable for an attorney's

fee. *Id.* at 6.

Subsequently, claimant's counsel filed a petition for an attorney's fee of \$3,156.25, representing 25.25 hours of services at a rate of \$125 per hour, plus \$25.75 in expenses. The administrative law judge agreed with employer that a rate of \$125 per hour is excessive, and he reduced the hourly rate to \$110. He also reduced the time approved by 5.375 hours. Supp. Decision and Order at 2-3. Accordingly, he held employer liable for an attorney's fee in the amount of \$2,186.25, plus expenses. *Id.* at 3. Employer appeals the fee award, incorporating the arguments it raised below, and claimant responds, urging affirmance.

Initially, employer contends the fee award should be reduced because counsel's efforts before the administrative law judge resulted in only a nominal award. Additionally, employer asserts that the doctrine of *de minimis non curat lex*. applies to this case. We decline to address these arguments as employer failed to raise these issues before the administrative law judge and cannot raise them now for the first time on appeal.<sup>1</sup> *Ross v. Ingalls Shipbuilding, Inc.*, \_\_\_ BRBS \_\_\_, BRB No. 92-2247 (Feb. 22, 1995); *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 pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting).

Next, employer argues that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, 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). While the complexity of the issues should be considered by the administrative law judge, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In this case, the administrative law judge agreed with employer's objection that the requested hourly rate of \$125 was too high in light of the lack of complex issues, and he awarded an hourly rate of \$110. We reject employer's argument on appeal that the fee should be further reduced based on this criterion. Employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of \$110, and we affirm the administrative law judge's finding.<sup>2</sup> *Ross*, slip op. at 3; *Watkins v. Ingalls Shipbuilding, Inc.*, 26

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<sup>1</sup>Employer's argument regarding the doctrine of *de minimis non curat lex*. relies on an unpublished Board decision which cannot serve as authority because unpublished decisions lack precedential value. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n. 2 (1990).

<sup>2</sup>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);

BRBS 179 (1992), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993); *LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979).

Employer also objects to counsel's use of the quarter-hour minimum billing method. A review of counsel's petition reveals that he did not limit himself to the quarter-hour minimum billing method. Moreover, the administrative law judge reduced entries for time spent reviewing letters on three different dates from one-quarter hour to one-eighth hour in compliance with the unpublished fee order rendered by 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).<sup>3</sup> See also *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished); *Ross*, slip op. at 3. Therefore, these entries need not be further reduced.

Finally, employer makes specific contentions regarding time allowed for review of the file, medical reports, and orders, for preparation, filing and review of discovery documents, for trial preparation, and for preparation and attendance at a deposition. The administrative law judge agreed with many of the objections and reduced the time requested by 5.375 hours. Because employer has failed to show an abuse of discretion by the administrative law judge in awarding time for these services, having specifically considered employer's objections, we reject these item-specific contentions and decline to further reduce the administrative law judge's award. See generally *Watkins*, 26 BRBS at 182; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

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*Ross*, slip op. at 3 n.4; *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

<sup>3</sup>The Fifth Circuit recently held that its unpublished fee order rendered in *Fairley* is considered circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished). In *Fairley*, the court held that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for preparing a one-page letter. *Fairley*, slip op. at 2.

Accordingly, the administrative law judge's Supplemental Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge