BRB No. 89-5034

LOUIS P. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
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 and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Martin J. Nussbaum, Jr. and 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 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-3192) 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 if they 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 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

In his decision in this case, the administrative law judge granted claimant's motion for summary judgment and found that claimant, a retiree, suffered a noise-induced binaural hearing loss

of 22.95 percent and that claimant's benefits should be calculated 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), of the Act. Thereafter, employer filed a motion for reconsideration with the administrative law judge. By Order dated October 25, 1989, the administrative law judge denied employer's motion for reconsideration.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $781.25, representing 6.25 hours of services rendered at a rate of $125 per hour, and $12.25 in expenses. Employer filed objections to the requested fee. In a Supplemental Decision and Order - Awarding Attorney's Fees, the administrative law judge, after specifically addressing employer's objections, reduced the hourly rate sought by claimant's counsel to $100, approved the number of hours requested, and awarded claimant's counsel an attorney's fee of $625, plus the requested expenses.

On appeal, employer challenges the administrative law judge's decision to award claimant benefits pursuant to Section 8(c)(13). In a supplemental appeal, employer challenges the fee awarded to claimant's counsel by the administrative law judge.

Employer initially contends that, as claimant was a retiree at the time of injury, any award of compensation to claimant for a loss of hearing should be made pursuant to Section 8(c)(23), rather than Section 8(c)(13), of the Act. We disagree. In the time since employer filed its brief on appeal, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, _ U.S. __, 113 S.Ct. 629, 26 BRBS 151 (CRT)(1993). In *Bath Iron Works*, the Court 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 the reasons set forth in *Bath Iron Works*, we reject employer's contention that the award of compensation for claimant's hearing loss should be made pursuant to Section 8(c)(23), and we affirm the administrative law judge's award of benefits under Section 8(c)(13) of the Act.

Next, we note that claimant, in his response brief, contends that he is entitled to a Section 14(e), 33 U.S.C. §914(e), penalty. The issue of entitlement to a Section 14(e) assessment may be raised by the parties at any time and has been raised by the Board *sua sponte* where a properly filed appeal regarding claimant's entitlement is before the Board. *See, e.g., Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981). In the instant case, no formal record was developed before the administrative law judge; thus, the record does not contain claimant's notice of injury, a notice of controversion, or a payment of benefits form, and it is unknown whether an informal conference was held. Additionally, as the administrative law judge resolved the claim by granting claimant's motion for summary judgment, he had no need to make specific findings of fact. Absent these findings, we are unable to resolve the issue of employer's liability for a Section 14(e) penalty. Therefore, we remand this case for the administrative law judge to consider whether the facts require the imposition of a Section 14(e) penalty, and if so, to determine the proper period of assessment.[1]

[1]In light of our disposition of this issue, claimant's Motion to Strike is rendered moot.

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); *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); *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993).

In challenging the attorney's fee awarded to claimant's counsel by the administrative law judge, employer contends that the fee awarded is excessive, maintaining that the instant case was routine, uncontested, and not complex. The administrative law judge considered the routine and uncomplicated nature of the instant case in reducing counsel's requested hourly rate from $125 to $100. Moreover, contrary to employer's contention, this was not an uncontested case as the section under which compensation benefits should be awarded was controverted.[2] We, therefore, reject employer's contention that the awarded fee must be further reduced on this criterion because 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 $100. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *see generally Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc.*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds).

Employer additionally challenges the number of hours requested by claimant's counsel and approved by the administrative law judge. In considering counsel's fee petition, the administrative law judge specifically determined that the time requested by claimant's counsel for services rendered was both reasonable and proper. 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 reduce or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Lastly, employer objects to counsel's minimum quarter-hour 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. 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 and one-quarter hour for preparing a one-page letter. *See Fairley*, slip op. at 2. The one-quarter hour charges on April 8, 1989, and on April 14, 1989, are excessive under this criteria, and we reduce the entries to one-eighth hour each. The remaining entries awarded by the administrative law judge conform to

[2]Employer cites the ruling in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), that where an attorney achieves only limited success in a claim filed under the Act, he may not be entitled to a fee for all hours expended on the case. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the case at bar, however, claimant's attorney did not achieve only partial success, but, rather, ultimately was successful in resolving the sole issue of what section compensation benefits should be awarded in claimant's favor.

the Fifth Circuit's guidelines.

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 affirmed. The case is remanded for the administrative law judge to make the findings of fact necessary for determining whether employer is liable for a Section 14(e) penalty, and if so, the appropriate period to which the penalty attaches. The administrative law judge's Supplemental Decision and Order - Awarding Attorney Fees is modified to disallow a fee for one-quarter hour, and is otherwise affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge