

BRB No. 91-1936

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

Appeal of the Supplemental Decision and Order - Awarding Attorney Fees and the Decision on Motion for Reconsideration and Awarding Additional Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Paul M. Franke, 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 Supplemental Decision and Order - Awarding Attorney Fees and the Decision on Motion for Reconsideration and Awarding Additional Attorney Fees (89-LHC-1668) 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 sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered on April 22, 1987, which revealed a 3.7 percent binaural impairment. Thereafter, employer voluntarily paid permanent partial disability compensation for a 3.7 percent binaural impairment on February 9, 1988. The case was referred to the Office of Administrative Law Judges for a formal hearing on February 28, 1989.

After a formal hearing, at which time employer contested the issue of its liability for penalties under Section 14(e) of the Act, 33 U.S.C. §914(e), the administrative law judge accepted the parties' stipulation that claimant suffers from a work-related 3.7 percent binaural impairment, and

further found that employer was liable for an assessment under Section 14(e). Employer appealed this decision to the Board. In a Decision and Order issued on June 28, 1991, the Board affirmed the administrative law judge's finding that claimant was entitled to a Section 14(e) assessment. *Sentell v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1724 (June 28, 1991)(unpublished). An appeal of this decision was dismissed by the United States Court of Appeals for the Fifth Circuit.

In connection with this claim, claimant's counsel sought an attorney's fee of \$2,419.75, representing 19.13 hours at \$125 per hour plus \$28.50 in expenses, for work performed before the administrative law judge. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$1,763, representing 17.63 hours at an hourly rate of \$100. In an order denying employer's motion for reconsideration, the administrative law judge awarded counsel an additional \$300, representing 3 hours of work performed defending the motion for reconsideration at an hourly rate of \$100. Employer appeals the administrative law judge's fee awards, incorporating the objections it made below into its appellate brief. Claimant responds, urging affirmance of the fee awards.

Employer initially contends that under Section 28(b) of the Act, 33 U.S.C. §928(b), it should not be liable for an attorney's fee since there was no successful prosecution of the hearing loss claim. Alternatively, employer argues that the fee awarded to claimant's counsel should be based solely upon the difference between the amount of voluntary benefits initially paid to claimant and the amount ultimately awarded by the administrative law judge. Pursuant to 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, employer voluntarily paid claimant permanent partial disability compensation based on a binaural impairment of 3.7 percent. At the hearing, employer contested the issue of whether claimant was entitled to an assessment under Section 14(e) of the Act. Pursuant to the Board's affirmance of the administrative law judge's decision, claimant was ultimately awarded additional compensation under Section 14(e). Employer is thus liable for claimant's attorney's fees for services performed at the administrative law judge level pursuant to Section 28(b), since claimant's counsel succeeded in obtaining additional benefits for claimant.<sup>1</sup>

Employer also 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 employer controverted the issue of Section 14(e) penalties before the administrative law judge. We, therefore,

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<sup>1</sup>Employer's contentions which were not raised below will not be addressed for the first time on appeal. *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 mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

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 further objects to counsel's method of billing in minimum increments of one-quarter hour. The administrative law judge found this billing method permissible in this case. Consistent with the decisions of 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) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished), we reduce the entry on June 19, 1989 from one-quarter hour to one-eighth of an hour. After considering employer's remaining objections to the number of hours awarded by the administrative law judge, we reject employer's contentions as it has not been shown 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).

Accordingly, the Supplemental Decision and Order - Awarding Attorney Fees of the administrative law judge is modified as stated herein. In all other respects, the Supplemental Decision and Order - Awarding Attorney Fees and the Decision on Motion for Reconsideration and Awarding Additional Attorney Fees of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge