

BRB No. 92-0918

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

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

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

Paul M. Franke (Franke, Rainey & Salloum), Gulfport, Mississippi, for the 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's Fee (89-LHC-2926) 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). 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 law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was exposed to loud noise while working as a rust machine operator for employer from 1971 to 1983. A March 11, 1987, audiogram was interpreted by Dr. James H. Wold as indicating a 15.3 percent binaural hearing loss. Cl. Ex. 2. Claimant filed a claim for occupational hearing loss benefits under the Act based on the results of this audiogram on April 21, 1987, and provided employer with notice of his injury. Cl. Exs. 3, 4. On May 4, 1987, employer filed its Form LS-207, Notice of Controversion. Emp. Ex. 2. A subsequent audiometric evaluation performed on March 9, 1989, by Dr. Gordon Stanfield indicated a 1.5 percent binaural hearing impairment. No voluntary payments of compensation were made and on June 22, 1989, the case was referred to the Office of Administrative Law Judges for a formal hearing.

In his Decision and Order, the administrative law judge, averaging the results of the two audiograms, awarded claimant compensation for an 8.43 percent binaural hearing loss pursuant to 33 U.S.C. §908(c)(13)(B) based upon an average weekly wage of \$234.06. The administrative law judge also awarded claimant interest and past and future medical benefits.<sup>1</sup>

Thereafter, claimant's attorney filed a fee petition for work performed before the administrative law judge, in which he requested \$3,656, representing 29 hours of services at \$125 per hour, plus \$31 in expenses. Employer filed objections and claimant replied to employer's objections. In a Supplemental Decision and Order Awarding Attorney's Fee dated December 4, 1991, the administrative law judge disallowed 5.37 of the 29 hours claimed in the fee petition, and reduced the \$125 hourly rate requested to \$100 for the non-trial work performed. Accordingly, he awarded claimant's counsel a fee of \$2,437.75, representing 21.88 hours at \$100 per hour, 1.75 hours at \$125 per hour, and the \$31 in requested expenses.<sup>2</sup> Employer appeals the administrative law judge's fee award on various grounds, incorporating the objections it made below into its appellate brief. Claimant responds, urging affirmance.

Employer initially contends that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the fee award. We decline to address these arguments which have been raised by employer 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 in pertinent 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 Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). We note, however, that the administrative law judge did consider the factors cited by employer in rendering the fee award in this case. While employer also argues that the hourly rates awarded by the administrative law judge are excessive and that an hourly rate of \$75 to \$80 would be more appropriate, employer's challenge to the hourly rate determination must fail; employer has not established an abuse of discretion committed by the administrative law judge in this regard.<sup>3</sup> See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *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).

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<sup>1</sup>Employer accepted liability for claimant's medical benefits immediately prior to the hearing.

<sup>2</sup>The administrative law judge awarded counsel a one-hour fee for time spent in defending the fee petition which had been requested in claimant's reply brief.

<sup>3</sup>We note that employer has attached a copy of an article from a Mississippi Defense Lawyers association newsletter to its objections. This article, which merely indicates that fees for defense attorneys in the area range widely, does not support employer's contention that the fee requested in the instant case is unreasonable.

Employer also objects to counsel's minimum quarter-hour billing method. The administrative law judge summarily dismissed employer's objection in this regard on the rationale that the unpublished opinion 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), is of no precedential value. The Fifth Circuit, however, recently held that the 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 held that attorneys generally may not charge more than one-eighth hour for review of a one-page letter and one-quarter hour for preparation of a one-page letter. Counsel's fee petition in the present case generally conforms to these guidelines. The one-quarter hour entry claimed on August 8, 1989, for receipt and review of the Notice of Appearance of the Office of Workers' Compensation Programs, however, is excessive under the aforementioned criteria.<sup>4</sup> Accordingly, we modify the administrative law judge's fee award to reflect the reduction of this entry from one-quarter to one-eighth of an hour consistent with *Biggs* and *Fairley*.

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<sup>4</sup>The administrative law judge properly allowed one-quarter hour for writing letters, as the Fifth Circuit has stated that this is a reasonable amount of time for a one-page letter. *See Fairley*, slip. op. at 2. He also properly allowed the .25 hours requested on December 15, 1989, June 6, 1990, July 17, 1990, July 25, 1990, and March 4, 1991, as these entries involved the review of multi-page documents.

Employer also contends that the time spent in certain discovery-related activity, in trial preparation, and in reviewing and preparing various legal documents was either unnecessary, excessive, or clerical in nature.<sup>5</sup> 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 5.37 of the total hours claimed and found the remaining itemized services to be reasonable and necessary. With the exception of the reduction in the quarter-hour entry previously discussed, we decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is modified to reflect the reduction of the itemized entry on August 8, 1989, from one-quarter to one-eighth of an hour. Counsel is therefore entitled to a fee of \$2,424.75, representing 21.75 hours at \$100 per hour, 1.75 hours at \$125 per hour, plus \$31 in expenses. In all other respects, this decision is affirmed.<sup>6</sup>

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>5</sup>We reject employer's reliance on the fee award of Administrative Law Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (September 5, 1991) in which Judge Simpson reduced various entries as duplicative of the work performed in other cases, and awarded differently hourly rates to claimant's attorneys based on their status as either a senior partner or relatively new associate. The amount of the attorney's fee award lies within the discretion of the body awarding the fee, and the decision of an administrative law judge regarding the amount of a fee is not binding precedent on another body in a different case.

<sup>6</sup>Claimant's contention that employer is liable for interest on the attorney's fee award under *Guidry v. Booker Drilling Co. (Grace Offshore Co.)*, 901 F.2d 485, 23 BRBS 82 (CRT)(5th Cir. 1990), is rejected for the reasons stated in *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 65 (1991)(Decision on Remand). *See also Hobbs v. Stan Flowers Co. Inc.*, 18 BRBS 65 (1986), *aff'd sub nom. Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987).