BRB No. 92-1971

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

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 (89-LHC-1826) 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 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, a retiree, was exposed to workplace noise while employed at employer's facility. On October 27, 1986, claimant filed a claim for benefits under the Act based on an October 14, 1986, audiological evaluation which revealed a 50.12 percent hearing impairment. A subsequent audiological evaluation on June 19, 1987, revealed that claimant had a 51.26 percent hearing impairment. On August 19, 1987, employer initiated voluntary payments of compensation to claimant for a 50.12 percent binaural impairment. On June 28, 1988, employer modified its voluntary payments to reflect the conversion of a 50.69 percent binaural impairment to an eighteen percent whole person impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C.

§908(c)(23)(1988). At this time, employer also accepted liability for medical benefits.

As of the time of the formal hearing on May 2, 1990, the parties were in agreement that claimant was entitled to compensation for an eighteen percent whole person impairment pursuant to Section 8(c)(23) based upon an average weekly wage of $302.66 and that employer was liable for medical expenses. *See* 33 U.S.C. §907. The only issues remaining for adjudication were claimant's entitlement to an assessment under Section 14(e), 33 U.S.C. §914(e), and employer's liability for attorney's fees. Relying on *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), the administrative law judge found the "excuse" granted by the district director to be invalid. As employer did not timely pay benefits or controvert the claim, the administrative law judge held employer liable for an additional assessment under Section 14(e), the exact amount of which was to be determined by the district director.

Claimant's counsel subsequently filed a fee petition for work performed at the administrative law judge level, requesting $3,426.25 for 26.75 hours of services at $125 per hour, plus expenses of $32.50. Employer filed objections to counsel's fee request. In his Supplemental Decision and Order, the administrative law judge, after addressing employer's specific objections, awarded claimant's counsel a fee of $2076.25, representing 18.875 hours of services at $110 per hour, plus the requested expenses.

On appeal, employer challenges the administrative law judge's award of an attorney's fee, incorporating by reference the objections it raised below into its appellate brief. Claimant responds, urging affirmance of the fee award.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that there was no successful prosecution of the claim because it voluntarily paid claimant compensation for an eighteen percent whole person impairment, the same amount of compensation ultimately stipulated to by the parties at the hearing. We disagree. Under 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, although employer did agree that claimant was entitled to compensation for an eighteen percent whole person impairment and medical benefits prior to the hearing, employer continued to dispute claimant's entitlement to a Section 14(e) assessment. Thus, a controversy remained even after employer voluntarily paid compensation. As claimant was successful in establishing his right to a Section 14(e) assessment over employer's objections, this additional compensation is sufficient to support an award of an attorney's fee payable by employer pursuant to Section 28(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand).

Employer next contends that the fee awarded is excessive, maintaining that the case was

routine and uncontested.[1] 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 any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Parrott v. Seattle Join Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, the administrative law judge considered these criteria prior to reducing the number of hours and the hourly rate sought by claimant's counsel. We therefore reject employer's contention that the awarded fee must be further reduced on this basis.

We also reject employer's contention that time for certain itemized entries awarded by the administrative law judge was either unnecessary or excessive.[2] The administrative law judge considered employer's objections, reduced the number of hours requested by 7.875, and found the remaining services to be reasonable and necessary. We decline to disturb this rational determination. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer further contends that the $110 hourly rate awarded to claimant's counsel is excessive, asserting that an hourly rate of $75 to $80 would be more reasonable. The administrative law judge determined that the hourly rate of $125 sought by claimant's counsel was excessive and awarded an hourly rate of $110, which he found to be fair and reasonable for the issues involved in the region where this case was tried. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the hourly rate awarded by the administrative law judge to counsel. *See Maddon*, 23 BRBS at 55.

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

SO ORDERED.

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[1]Employer also challenges the amount of the attorney's fee approved by the administrative law judge on the basis that the benefits received were nominal. Additionally, employer argues that, under Section 28(b) of the Act, 33 U.S.C. §928(b), any fee awarded to claimant's counsel should be based solely upon the difference between the amount of benefits voluntarily paid to claimant and the amount ultimately awarded by the administrative law judge. Employer, however, failed to raise these contentions in its objections to the fee petition which it filed with the administrative law judge; thus, we will not address these contentions since they are raised for the first time on appeal. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

[2]We further reject employer's suggestion that the administrative law judge should have based his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (Sept. 5, 1991), for the reasons stated in *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994). 33 U.S.C. §928(c).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge