

BRB No. 92-2085

ALFRED L. SIMMONS)	
)	
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 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's Fee (88-LHC-3289) 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act for a work-related hearing loss in 1987. The administrative law judge resolved the contested issues by finding that claimant sustained a work-related binaural hearing loss and by awarding claimant medical benefits and compensation for a two percent binaural impairment. *See* 33 U.S.C. §908(c)(13). Thereafter, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of \$2,793, representing 21.75 hours of services at a rate of \$125 per hour, plus expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order, the administrative law judge considered employer's specific objections to the fee request, reduced the number of hours sought to 17, approved an hourly rate of \$100 for non-trial legal services and \$125 for trial time, and awarded claimant's counsel an

attorney's fee of \$1,840, representing 14.5 hours of non-trial legal services rendered at a rate of \$100 per hour, 2.5 hours of trial time rendered at a rate of \$125 per hour, and \$77.50 in expenses.

On appeal, employer challenges the administrative law judge's award of an attorney's fee.¹ Claimant responds, urging affirmance.

Employer contends that the lack of complexity of the instant case mandates a reduction in the amount of the attorney's fee awarded by the administrative law judge.² We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that the award of any attorney's fee 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 Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Thus, the complexity of the legal issues is but one factor to be considered when awarding an attorney's fee. *See* 20 C.F.R. §702.132; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge specifically set forth and considered the criteria contained in Section 702.132 of the regulations when addressing counsel's fee request. We, therefore, reject employer's contention that the awarded fee must be further reduced on this basis.

Employer next asserts that the hourly rates awarded to claimant's counsel by the administrative law judge are excessive.³ The administrative law judge determined that the hourly rate of \$125 sought by claimant's counsel for non-trial work was excessive, and awarded counsel an hourly rate of \$100 for that time; however, the administrative law judge did approve counsel's requested hourly rate of \$125 for trial time. As employer's mere assertion that the awarded rates do 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 rates are excessive, we affirm the hourly rates awarded by the administrative law judge to counsel.⁴ *See Welch v. Penzoil Co.*, 23 BRBS 395

¹On appeal, employer incorporates by reference the objections it raised before the administrative law judge.

²We decline to address employer's contention that the awarded fee should be reduced because the amount of benefits awarded in this case was nominal, since employer did not raise this argument before the administrative law judge and is not permitted to raise it now for the first time on appeal. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (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).

³We note that employer additionally contends that the counsel's fee should be reduced since the case was "a routine and uncontested hearing loss claim." Contrary to this assertion, employer controverted the issues of causation, the nature and extent of claimant's disability, and employer's liability for claimant's medical expenses and attorney's fee.

⁴We 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*,

(1990); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer next objects to counsel's use of the minimum one-quarter hour billing method. Claimant's counsel utilized this method in his fee petition, and the administrative law judge specifically found this method of billing to be an acceptable practice in longshore claims. The United States Court of Appeals for the Fifth Circuit has recently held that its unpublished fee order 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 majority of entries in this case conform to these guidelines. However, we find excessive, pursuant to *Fairley*, three one-quarter hour entries requested for review of letters on June 13, 1989, July 13, 1989, and on May 22, 1990. Accordingly, we modify the administrative law judge's fee award to reflect the reduction of the June 13, 1989, July 13, 1989, and May 22, 1990, entries from one-quarter to one-eighth of an hour each.

Finally, employer challenges the number of hours requested by counsel and approved by the administrative law judge. In this regard, employer contends that the time spent in certain discovery-related activity and in reviewing and preparing various legal documents was either unnecessary, excessive or clerical in nature. In considering counsel's fee petition, the administrative law judge addressed employer's specific objections, disallowed 4.75 hours sought by counsel, and determined that the remaining time requested by claimant's counsel was both necessary and reasonable. We decline to further reduce or disallow the hours approved by the administrative law judge, as employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in determining that the itemized services were necessary. See *Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is modified to reflect the reduction of three one-quarter hour entries to one-eighth of an hour. Counsel is therefore entitled to a fee of \$1,802.50, representing 14.125 hours of non-trial legal services rendered at a rate of \$100 per hour, 2.5 hours of trial time rendered at a rate of \$125 per hour, and \$77.50 in expenses. In all other respects, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge