

BRB Nos. 92-2128  
and 92-2128A

JESSE C. SMITH	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED:_____
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION AND ORDER

Appeals of the Decision and Order on Remand Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax), 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:

Claimant appeals the Decision and Order on Remand Awarding Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (88-LHC-3564) of Administrative Law Judge Ben H. Walley 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe 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 only be set aside if shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as a sheet metal worker for employer from 1941 to 1942, and from 1953 to 1980, where he was exposed to loud workplace noise. On April 10, 1987, claimant underwent an

audiometric examination under the supervision of James H. Wold, Ph.D., that revealed a binaural hearing loss of 10 percent. On April 28, 1987, claimant filed a claim for noise-induced occupational hearing loss benefits under the Act and provided employer with notice of his injury. On December 14, 1987, employer initiated voluntary payments for a 10 percent binaural hearing loss based on a compensation rate of \$201.77 per week, pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), of the Act. On February 26, 1988, however, employer modified its voluntary payments to reflect a 4 percent whole person impairment, and notified claimant that due to its alleged overpayment of benefits under Section 8(c)(13), no additional benefits were due until February 13, 1991.<sup>1</sup> Cl. Ex. 3. The case was referred to the Office of Administrative Law Judges for a formal hearing on July 11, 1988.

Prior to the hearing, both parties moved for summary judgment on the issue of whether compensation should be awarded to claimant, a retiree, under Section 8(c)(13) or Section 8(c)(23) of the Act. In his Order on Motion for Summary Judgment, the administrative law judge, relying on *Macleod v. Bethlehem Steel Corp*, 20 BRBS 234 (1988), found that claimant's hearing loss benefits should be calculated under Section 8(c)(13), granted claimant's motion for summary judgment, and awarded compensation for a 10 percent binaural hearing impairment consistent with the results of the April 10, 1987 audiogram. Claimant's attorney thereafter filed a fee petition for work performed at the administrative law judge level and employer filed objections. In a Supplemental Decision and Order Awarding Attorney's Fees dated May 1, 1989, the administrative law judge reduced and disallowed various itemized entries and awarded counsel a fee of \$650, representing 6.5 hours of services at \$100 per hour.

Employer appealed these decisions to the Board. The Board subsequently granted employer's motion to remand the case to the administrative law judge for further action in accordance with the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). *Smith v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-568/A (Sept. 11, 1991)(order). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e). The Board also vacated the administrative law judge's attorney's fee award, instructing him to reconsider the fee award in light of his decision on remand.

In his Decision and Order Awarding Benefits On Remand, the administrative law judge found that as claimant is a voluntary retiree, his hearing loss benefits should be calculated under Section 8(c)(23) consistent with the Fifth's Circuit's decision in *Fairley*. The administrative law judge determined that based on the agreed 10 percent binaural hearing loss, claimant's binaural impairment converts to a 4 percent impairment of the whole person under the American Medical Association *Guides to The Evaluation of Permanent Impairment*. The administrative law judge further found that inasmuch as employer failed to timely pay benefits or controvert the claim, claimant is entitled to a Section 14(e) penalty, the exact amount of which was to be determined by

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<sup>1</sup>Employer had paid claimant \$1,614.16 of the \$4,035.40 due for a 10 percent binaural impairment calculated pursuant to 33 U.S.C. §908(c)(13)(B) as of the time it modified its payments.

the district director. He also reaffirmed the \$650 fee award to claimant's counsel.

Claimant's counsel subsequently submitted a fee petition requesting \$579, representing 4.5 hours of attorney services at \$125 per hour plus \$16.50 in expenses, for work performed before the administrative law judge on remand. Employer submitted objections to counsel's fee request. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded counsel the full fee requested.

Claimant appeals the administrative law judge's Decision and Order On Remand; claimant indicates that he wishes to preserve his right to seek an award pursuant to Section 8(c)(13) inasmuch as the United States Court of Appeals for the First Circuit in *Bath Iron Works Corp. v. Director, OWCP [Brown]*, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), held that retirees' hearing loss awards are to be calculated pursuant to Section 8(c)(13), and the United States Supreme Court granted *certiorari* in *Brown* in order to resolve the split in authority between the First and Fifth Circuits. Although employer initially argued in its response brief that the Fifth's Circuit's decision in *Fairley* is controlling, in its appeal of the administrative law judge's fee award, discussed *infra*, employer concedes that the United States Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), is controlling.

In *Bath Iron Works*, 113 S.Ct. at 692, 26 BRBS at 151 (CRT), 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). Specifically, the Court stated that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries.

Consequently, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Inasmuch as the administrative law judge's finding that claimant has a 10 percent binaural hearing loss in unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits for this hearing loss pursuant to Section 8(c)(13)(B) of the Act.

In its appeal, employer challenges the fee awarded by the administrative law judge for the services performed on remand on various grounds, incorporating the arguments it made below into its appellate brief. Claimant responds, urging that the fee award be affirmed.

Employer contends that it is not liable for an attorney's fee under either Section 28(a) or 28(b) of the Act, 33 U.S.C. §928(a), (b). In the alternative, employer contends that if it is liable for a fee, it should be far less than that awarded by the administrative law judge. Pursuant to Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving

written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). 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 Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

We need not address employer's contentions regarding Section 28(a), inasmuch as this case is governed by Section 28(b). Employer argues on appeal that it is not liable for claimant's fee because it tendered compensation for a 10 percent binaural hearing loss, the amount due pursuant to *Bath Iron Works*, on December 14, 1987, prior to the case's referral to the administrative law judge. The record, however, indicates that although employer initially commenced voluntary payments of compensation for a 10 percent binaural hearing loss calculated pursuant to Section 8(c)(13) on December 14, 1987, employer subsequently modified its voluntary payments to reflect a 4 percent whole person impairment and suspended payments of compensation until February 1, 1991, in light of its alleged overpayment under Section 8(c)(13). As of the time that employer suspended compensation, it had paid claimant only \$1,614.16, less than half of the total compensation due claimant under Section 8(c)(13). As claimant was ultimately successful in establishing his right to compensation under Section 8(c)(13) and an assessment under Section 14(e), the administrative law judge's determination that employer is liable for claimant's attorney's fee is affirmed. Inasmuch as a controversy remained even after employer voluntarily paid or tendered compensation, and claimant was ultimately successful in obtaining additional compensation greater than that which employer agreed to pay, employer is liable for claimant's attorney's fees pursuant to Section 28(b).<sup>2</sup> *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand).

We also reject employer's contention that the amount of the fee award is excessive. Although employer argues that consideration of the quality of the representation provided, the complexity of the issues presented, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction in the \$562.50 fee awarded, we need not address these arguments which have been raised 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); *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 quality of the representation and the nature of the case in

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<sup>2</sup>Employer additionally challenges the amount of the attorney's fee approved by the administrative law judge on the grounds that under Section 28(b) the fee is limited solely to the difference between that voluntarily paid and that awarded, and that the award was nominal. Employer, however, failed to raise these objections before the administrative law judge; thus, we will not address its contentions as they are raised for the first time on appeal. *See Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(Decision on Recon.).

determining that the \$125 hourly rate requested was reasonable. While employer also argues that the \$125 hourly rate requested is excessive and that an hourly rate of \$80 to \$85 for claimant's senior counsel and \$70 to \$75 for the junior associates would be more appropriate, we note that employer has not established an abuse of discretion by the administrative law judge in this regard.<sup>3</sup> We therefore affirm the hourly rate awarded by the administrative law judge. *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); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Finally, we reject employer's contention that time spent on preparation of claimant's brief on remand, review of employer's brief on remand, and review of the administrative law judge's procedural order and decisions and orders are excessive.<sup>4</sup> In entering the fee award, after considering the totality of employer's objections, the administrative law judge found all of the itemized services claimed to be reasonable and necessary. Employer's unsupported 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.<sup>5</sup> *Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Decision and Order On Remand Awarding Benefits is modified to reflect claimant's entitlement to benefits pursuant to Section 8(c)(13). In all other respects, this Decision and Order is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees also is affirmed.

SO ORDERED.

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<sup>3</sup>Employer attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This article does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

<sup>4</sup>We reject employer's contention that the unpublished fee order of Administrative Law Judge Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (Sept. 5 1991), mandates a different result in this case as the determination of the amount of an attorney's fee is within the discretion of the administrative law judge awarding the fee. *See* 20 C.F.R. §702.132.

<sup>5</sup>Employer also challenges the propriety of claimant's counsel's practice of minimum quarter-hour billing, citing the fee order 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)(unpublished) as controlling authority. Although the Fifth Circuit recently held that its 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), we need not address this argument which employer is making for the first time on appeal. *See Hoda*, 28 BRBS at 197.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge