BRB Nos. 95-1319
and 95-1319A

MOSES JACKSON	)	
	)	
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-Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof), Mobile, Alabama, 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-Awarding Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (94-LHC-400) 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).[1] 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'Keeffe 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

[1]Inasmuch as claimant's appeal is consolidated with employer's appeal filed October 30, 1995, we conclude that the one year period for review provided by P.L. No. 104-134 runs from this date.

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 was employed as a painter for employer from July 6, 1976, to November 23, 1982, and he was exposed to industrial noise during this time. On June 16, 1992, claimant filed a claim against employer for a 3 percent monaural hearing loss, and he gave notice to employer on the same date. On June 24, 1992, employer filed a Notice of Controversion. On November 23, 1992, however, employer advised claimant that it was accepting the claim as compensable, and on December 3, 1992, employer paid claimant $237.03 for a .5 percent binaural hearing loss based upon an average weekly wage of $349.98 plus interest. The case was referred to the Office of Administrative Law Judges on November 10, 1993. On February 10, 1994, in light of the decision of the United States Court of Appeals for the Fifth Circuit in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993), *rev'g* 26 BRBS 43 (1992) (*en banc*) (Smith and Dolder, JJ., dissenting), employer paid claimant an additional $145.56 in disability compensation for a 3 percent monaural hearing loss based on an average weekly wage of $364.30. On March 1, 1994, employer paid additional interest of $6.70. On March 4, 1994, employer asked claimant's counsel in writing what additional benefits were being claimed. By correspondence dated March 17, 1994, counsel contended that employer had not acknowledged acceptance of the claim in writing, and had not agreed to provide medical benefits, which had been requested in the notice sent to employer on June 16, 1992. On March 21, 1994, employer responded that claimant's counsel's assertions were incorrect as it accepted the compensability of the claim on November 23, 1992, no prior request for authorization for the initial testing done at the University of South Alabama had been made, and no other claim for payment of medical benefits had been submitted. Prior to the scheduled hearing, the parties filed motions for summary judgement in which they agreed that the disability compensation which employer had voluntarily paid for a 3 percent monaural hearing loss based upon an average weekly wage of $364.30 was correct, and that the contested issues remaining were claimant's entitlement to an assessment under Section 14(e), 33 U.S.C. §914(e), interest, and employer's liability for medical benefits including the cost of the initial evaluation.

In his Decision and Order, the administrative law judge awarded claimant the agreed-upon disability compensation as well as past and future medical benefits, but denied claimant an assessment under Section 14(e). He further denied claimant's request that interest accrue as of November 23, 1982, the date of claimant's last exposure to injurious noise, finding that pursuant to Section 14(b) of the Act, 33 U.S.C. §914(b), employer did not have knowledge of claimant's injury until June 16, 1992, and that benefits did not accrue and were not due until this time. Subsequently, claimant's counsel sought an attorney's fee of $1,350, representing 9 hours at $150 per hour, for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of $1,062.50, representing 8.5 hours at an hourly rate of $125.

On appeal, claimant reiterates the argument made below that interest should accrue as of November 23, 1982, the date of claimant's last exposure to injurious noise, and not from when employer obtained knowledge of claimant's injury as was found by the administrative law judge. Employer responds, urging affirmance of the administrative law judge's Decision and Order. Employer also cross-appeals the administrative law judge's fee award, incorporating by reference the

arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

We initially reject claimant's contention that his entitlement to interest accrues from his date of last exposure to injurious noise in 1982. In *Renfroe v. Ingalls Shipbuilding, Inc.*, ___ BRBS ____, BRB Nos. 91-170/A (June 24, 1996) (*en banc*), the Board held that in a hearing loss case interest accrues on compensation from the date benefits become due under Section 14(b) of the Act, and accrues on all benefits due and unpaid from that date until they are paid. The Board held that an employer cannot wrongfully withhold or delay the payment of benefits until they are "due," and benefits do not become "due" under Section 14(b) until employer has knowledge of the injury, or notice of the injury pursuant to Section 12, 33 U.S.C. §912. *Renfroe*, slip op. at 7-9. Inasmuch as the instant case is controlled by *Renfroe*, and as employer received notice of claimant's injury on June 16, 1992, the administrative law judge properly held employer liable for interest on benefits accruing as of that date.[2]

Turning to employer's appeal of the fee award, we reject employer's arguments. Employer's objections to the number of hours and hourly rates awarded are without merit, as it has not shown that the administrative law judge abused his discretion in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Employer asserts that the time claimed after March 1, 1994, should be denied because on that date it paid claimant the disability compensation ultimately found due for a 3 percent monaural hearing loss, and counsel's efforts thereafter did not result in a gain in benefits. Although employer is correct that claimant's counsel's efforts to obtain a Section 14(e) assessment and additional interest thereafter were unsuccessful, as a result of counsel's continued efforts before the administrative law judge subsequent to March 1, 1994, claimant was ultimately awarded reasonable and necessary medical benefits. Moreover, many of the services counsel provided after March 1, 1994, related to the submission of the parties' opposing motions for summary decision. Thus, the administrative law judge's allowance of these entries, which can reasonably be viewed as services necessary to wind-up the case, was within his discretionary authority. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Employer also asserts that any fee awarded must be tailored to the degree of success obtained in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). In considering the fee petition in this case, the administrative law judge specifically recognized that the fee award should reflect the amount of benefits awarded, as well as other relevant factors. *See* 20 C.F.R. §702.132. He considered which amounts charged were excessive and found the time expended was

[2]We also reject claimant's contention that, pursuant to Section 20(b), 33 U.S.C. §920(b), employer presumptively knew of claimant's injury at the time it occurred, for the reasons stated in *Meardry v. International Paper Co.*, ____ BRBS ____, BRB Nos. 93-1693/A (Sept. 12, 1996). As claimant first underwent audiometric testing in 1992, employer could not have "knowledge" at any time prior to this date.

necessary in achieving the highest amount of compensation that claimant was entitled to receive. Employer's assertion that the hours claimed by counsel were excessive and unnecessary in light of the *de minimis* or nominal value of the claim is rejected.[3] The administrative law judge's finding that counsel's fee is not limited to an amount less than the compensation obtained accords with law. *See, e.g., Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). In addressing employer's objections in this regard, moreover, the administrative law judge considered the necessity of the amounts claimed in relation to the award, and he thereafter reduced the number of hours sought by .5 hours. In this case, as claimant's counsel's efforts before the administrative law judge resulted in claimant's obtaining $152.26 more in disability compensation and interest than that which employer had initially agreed to pay, as well as past and future medical benefits, and the administrative law judge specifically considered the amount of benefits awarded in relation to the fee requested in evaluating the fee petition, we reject employer's assertion that the awarded fee should be further reduced on this basis. *See generally Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89, 93 (1993)(Brown, J., dissenting).

Employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour is also rejected, as the administrative law judge considered this objection, and his award conforms to the criteria set forth in 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) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (table). Similarly, we reject employer's assertion that the fee awarded by the administrative law judge is excessive in light of the routine and uncomplicated nature of the case, as the administrative law judge specifically considered the lack of complexity of the case in determining both the applicable hourly rate and the overall reasonableness of the entries claimed. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989).

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); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the Decision and Order-Awarding Benefits is affirmed. The Supplemental Decision and Order of the administrative law judge is also affirmed.

SO ORDERED.

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[3]Although employer cites *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991) (unpublished), in support of its assertion that the fee awarded is excessive, the Board has held that unpublished cases should not be cited or relied on by the parties as they lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990). In addition, the Board's decision in *Cuevas* was based on the facts of that case and has no bearing on the fee award herein. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 236-237 (1993).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge