

BRB Nos. 90-0194
and 90-0194A

DARRELL D. BULLOCK)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER
Cross-Petitioner)	EN BANC

On remand from the United States Court of Appeals for the Fifth Circuit.

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

Paul M. Franke, Jr. and Martin J. Nussbaum, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

This case is on remand from the United States Court of Appeals for the Fifth Circuit. In the proceedings below, claimant appealed, and employer cross-appealed, the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-3761) of Administrative Law Judge C. Richard Avery 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). An award of an attorney's fee 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).

To briefly recapitulate, claimant filed a claim for benefits under the Act for a work-related hearing loss based upon an audiometric evaluation which revealed a 5.6 percent impairment in his left ear and a zero percent impairment in his right ear. In his Decision and Order, the administrative law judge awarded claimant compensation pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B)(1988), for a .9 percent binaural hearing impairment. The administrative law judge

further determined that employer was liable for both a Section 14(e), 33 U.S.C. §914(e), assessment, and claimant's medical benefits under Section 7 of the Act, 33 U.S.C. §907. Lastly, the administrative law judge found that claimant's counsel was entitled to an attorney's fee for services rendered.

Claimant's counsel subsequently filed a fee petition for work performed at the administrative law judge level, requesting a fee for 23 hours of services rendered at \$125 per hour, plus \$26.25 in expenses, for a total fee of \$2,901.25. Employer thereafter submitted objections to counsel's fee request. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge considered employer's objections to the fee request, reduced the hourly rate sought by claimant's counsel to \$100, reduced the time requested for counsel's trial preparation and attendance at the formal hearing by 3 hours, and disallowed the expenses sought. The administrative law judge thus awarded claimant's counsel a fee of \$2,000, representing 20 hours of legal services performed at \$100 per hour.

In its decision, the Board affirmed the administrative law judge's award of permanent partial disability benefits to claimant for his binaural impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), for the reasons set forth in *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43 (1992)(*en banc*)(Smith and Dolder, JJ., dissenting). In addition, the Board affirmed the administrative law judge's award of an attorney's fee to claimant's counsel, holding, *inter alia*, that the administrative law judge acted within his discretion in viewing counsel's quarter-hour billing method as permissible. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., dissenting), *modified on recon. en banc*, 28 BRBS 102 (1994).¹

Employer thereafter appealed the Board's affirmance of the attorney's fee award to the United States Court of Appeals for the Fifth Circuit. In a consolidated decision, the Fifth Circuit held, pursuant to its previous holding in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990)(unpublished), that claimant's counsel's use of a minimum quarter-hour billing method was improper. The court thus vacated the administrative law judge's attorney's fee award and remanded the case for a recalculation of claimant's counsel's fee without quarter-hour minimum billing. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Bullock]*, No. 94-40236 (5th Cir. Jan. 12, 1995)(unpublished).²

¹Subsequent to the Board's issuance of its Decision and Order in this case, the Fifth Circuit issued its decision 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), in which the court held that claimants who suffer from a monaural impairment should be compensated under Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A)(1988). Subsequently, in a Decision and Order on Reconsideration, the Board modified its initial decision to reflect an award of permanent partial disability for a 5.6 percent monaural impairment pursuant to Section 8(c)(13)(A). *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994), *modifying on recon. en banc* 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., dissenting on other grounds).

²In its decision in this matter, the Fifth Circuit held that its unpublished fee order rendered in *Fairley* is considered circuit precedent which must be followed. Furthermore, since the issue was

not raised below, the court chose not to address the issue of whether the fees in *Bullock* and *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), had been properly tailored to the success achieved, pursuant to the principles of *Farrar v. Hobbs*, ___ U.S. ___, 113 S.Ct. 566 (1992), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The court did, however, address this issue in *Fairley*, the third case consolidated with *Bullock* and *Biggs*.

In the instant case, the administrative law judge summarily found counsel's use of this billing method to be "permissible as well as acceptable." *See* Supplemental Decision and Order at 2. In *Fairley*, however, the Fifth Circuit held that, generally, attorneys 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. As there are numerous entries contained in counsel's itemized fee petition for which the administrative law judge did not ascertain whether the individual tasks billed at the quarter-hour minimum warranted that amount of time in this case, we must remand the case for reconsideration of the fee award in light of the Fifth Circuit's decision in this matter.

Accordingly, the case is remanded to the administrative law judge for reconsideration consistent with the opinion of the Fifth Circuit.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge