BRB No. 90-2030
and 90-2030A

ALFRED L. HUDSON	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Supplemental Decision and Order Awarding Attorney Fees, and Decision and Order Denying Motion for Reconsideration of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon and Rebecca J. Ainsworth, (Maples and Lomax), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and claimant cross-appeals the Supplemental Decision and Order Awarding Attorney Fees and the Decision and Order Denying Motion for Reconsideration (88-LHC-2401) of Administrative Law Judge A.A. Simpson, 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). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant, on November 18, 1987, filed a claim for benefits under the Act for a work-related hearing loss and notified employer of his injury. Cl. Ex. 4. Previously, on October 23, 1987, an audiometric evaluation performed by Dr. Wold revealed a 5.9 percent binaural impairment. Cl. Ex. 2. On May 11 and 14, 1987, Assistant District Director[1] Robert H. Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, controversions and making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of a claim by the district director's office. Emp. Ex. 3. On January 5, 1988, employer filed its notice of controversion. Emp. Ex. 2. A second audiometric examination performed on January 26, 1988, yielded results interpreted by Drs. Gilchrist and McDill as indicative of a 2.2 percent binaural impairment. Emp. Ex. 4.

In his Decision and Order, the administrative law judge averaged the results of the two audiometric evaluations and determined that claimant has a 4.05 percent binaural impairment, and that claimant's hearing loss should be compensated pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). The administrative law judge also found the "excuse" granted by the district director to be invalid, and thus determined that employer was liable for an assessment pursuant to Section 14(e) of the Act. Next, the administrative law judge ordered employer to pay claimant's medical expenses and interest on all compensation due claimant. Lastly, the administrative law judge ordered claimant's counsel to file an amended attorney's fee petition specifically delineating the times expended by the various attorneys representing claimant.

Thereafter, claimant's counsel submitted an amended fee petition to the administrative law judge, requesting an attorney's fee for 12.88 hours of services rendered at an hourly rate of $150, plus $39.75 in costs. Employer subsequently filed objections to the fee petition. In a Supplemental Decision and Order, the administrative law judge initially reduced the hourly rate sought for services performed in 1989 and 1990 to $80 and $85 respectively. Next, citing *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218, *aff'g on recon.* 27 BRBS 45 (1993)(Order on Recon.), the administrative law judge determined that claimant's counsel's fee petition, in which counsel acknowledged using a "unit" or "increment" billing method, was incompatible with the applicable regulation at 20 C.F.R. §702.132; thus, the administrative law judge disallowed all time sought by claimant's counsel except for the services obviously rendered by an attorney, specifically the time spent on depositions and the formal hearing. Accordingly, the administrative law judge awarded claimant's counsel an attorney's fee of $200, representing 2.5 hours of services rendered at an hourly rate of $80, and $39.75 in expenses. Alternatively, the administrative law judge stated that had the fee petition met the application requirements of 20 C.F.R. §702.132, he would have reduced claimant's counsel's fee to $727.50, representing 7.5 hours of services rendered in 1989, 1.5 hours of services rendered in 1990, and $39.75 in expenses. Claimant's motion for reconsideration of the fee award was subsequently denied by the administrative law judge.

[1]Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

On appeal, employer contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Claimant responds, urging affirmance of the administrative law judge's award of a Section 14(e) assessment.[2] In his cross-appeal, claimant challenges the attorney's fee awarded by the administrative law judge. Employer responds, urging affirmance of the administrative law judge's Supplemental Decision and Order and Decision and Order on Reconsideration.

In its appeal, employer contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Specifically, employer asserts that the administrative law judge erred in finding that the "excuse" granted by the district director is invalid. Employer further contends that the instant case is distinguishable from *Ingalls v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), because the excuse was granted prior to the date claimant notified employer of his injury rather than retroactively. Additionally, employer contends that even if it had not been excused, the concept of "replacement income" is not applicable in this case, so the Section 14(e) penalty should not apply.

The precise arguments raised by employer regarding the excuse granted by the district director, the inapplicability of *Fairley, supra*, and the concept of "replacement income" have been rejected by both the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *see also Ingalls Shipbuilding, Inc.*, 898 F.2d at 1095, 23 BRBS at 67 (CRT). We therefore reject these specific allegations of error raised by employer, and affirm the administrative law judge's finding that employer is liable for a Section 14(e) assessment.

In his cross-appeal, claimant challenges the amount of the attorney's fee awarded by the administrative law judge. 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 initially contends that the administrative law judge erred in relying on the Board's decision in *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218, *aff'g on recon* 27 BRBS 45 (1993)(Order on Recon.) since, he asserts, the Board in that case completely misinterpreted the addendum attached to claimant's fee petition. Accordingly, in the instant case, counsel asserts that the administrative law judge erred in failing to reconsider the fee petition without regard to the addendum attached to that petition. We disagree. In *Pullin*, the Board held that, given counsel's admission that the practice of "unit" or "increment" billing is not related to actual work done on a particular date, or to the performance or talents of a specific person, such billing is incompatible with

[2]We deny claimant's motion to strike portions of employer's arguments concerning Section 14(e); claimant's argument in the motion will be considered as part of his response to employer's appeal.

the regulatory provisions at 20 C.F.R. §802.203(d), which provide that a complete fee application must contain a statement of the extent and character of the necessary work done, the professional status and billing rate of each person performing said work, the number of hours, in quarter-hour increments, devoted by each person to the work, and the date on which the work was performed. *See Pullin*, 27 BRBS at 219-220. Thus, in *Pullin*, the Board declined to hold employer liable for an entry on claimant's counsel's fee petition which was an example of this billing method.

In the instant case, the administrative law judge initially noted that counsel, in an addendum attached to her amended fee petition, admitted that the fee petition did not represent that "any lawyer was actually engaged in the particular activity enumerated" in the petition, that the charges listed in the petition "represent . . . a fair and reasonable charge for the task performed" in a joint effort among the attorney, paralegal and support staff, and that, thus, the charges set forth in the fee petition represented "unit billing" or "increment billing." *See* Amended Fee Petition at 4-6 (emphasis in original). After subsequently determining that *Pullin* contained an identical scenario as that set forth in the instant case, and noting the similarity between the regulations addressing fee petitions filed for work performed before the administrative law judge and the Board, the administrative law judge concluded that the Board's analysis in *Pullin* was applicable to the instant case; thus, the administrative law judge denied all of the time requested by claimant's counsel, with the exception of those times which the administrative law judge found had been obviously spent by an attorney, specifically 1.5 hours sought for a deposition and 1 hour sought for attendance at the formal hearing.

We hold that the administrative law judge committed no reversible error in relying upon *Pullin* and in ultimately denying 10.38 hours of services sought by claimant's counsel, based upon counsel's failure to file a proper fee petition. It is well established that an attorney's fee award cannot be made by an administrative law judge without the filing of an application which conforms to the requirements of 20 C.F.R. §702.132. Section 702.132(a) provides that a fee application shall be supported by a complete statement of the extent and character of the necessary work done, the professional status and billing rate of each person performing the work, and the number of hours of each person devoted to the work. 20 C.F.R. §702.132(a). The regulation is unambiguous as to the requirements of a complete fee petition, and it is clear that counsel's admitted use of "unit" or "increment" billing is incompatible with Section 702.132 of the regulations. We therefore affirm the administrative law judge's decision not to award a fee for time which was not obviously performed by an attorney and which was set forth in counsel's fee petition in a "unit" or "increment" billing method.

Lastly, we deny claimant's counsel's request that the Board vacate the administrative law judge's fee award and remand the case for reconsideration of counsel's requested fee. Specifically, counsel contends that the administrative law judge erred in failing to allow her the opportunity to address the administrative law judge's concerns regarding the fee petition. We disagree. It is claimant's counsel's responsibility to file an application which conforms to the requirements of the regulations. *See* 20 C.F.R. §702.132. In the instant case, we note that counsel, following the formal hearing, filed a fee petition which did not conform to the regulations; thereafter, in his Decision and Order, the administrative law judge ordered counsel to file an amended fee petition which complied

with 20 C.F.R. §702.132. Counsel subsequently filed the fee petition at issue in this appeal, which the administrative law judge once again determined did not conform to the applicable regulation. Thus, counsel was given an opportunity to file a fee petition which conformed to the regulations. Based on the facts of this case, we cannot say that the administrative law judge's decision to rule on the validity of counsel's amended fee petition was arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Muscella*, 12 BRBS at 272. We therefore affirm the administrative law judge's decision to address counsel's request for a fee.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Supplemental Decision and Order Awarding Attorney Fees, and Decision and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge