L. A. POOLE	)	BRB Nos. 92-1259 and
	)	92-1259A
Claimant-Respondent	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	
	)	
	)	
OWEN PATTON	)	BRB No. 92-1261
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DATE ISSUED:_____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decisions and Orders Approving Compromise Settlement, the Decisions and Orders on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant Poole.

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

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decisions and Orders Approving Compromise Settlement and the Decisions and Orders on Motion for Reconsideration (90-LHC-1284 and 90-LHC-2724), and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (90-LHC-2724) of Administrative Law Judge A. A. Simpson, Jr. rendered on claims 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 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 Poole was a sheetmetal worker for employer from 1939 until his retirement in 1972, and during that time, he was exposed to noise. On February 27, 1989, Poole underwent an audiometric evaluation, the results of which revealed an 8.8 percent binaural impairment. Poole filed a claim for compensation. On June 25, 1991, employer and Poole filed a Petition to Approve Compromise Settlement with the administrative law judge.

Claimant Patton worked as a welder for employer from 1939 until his retirement in 1972, and during that time, he was exposed to noise. On October 30, 1986, Patton underwent an audiometric evaluation, the results of which revealed an 18.4 percent binaural impairment. Patton

[1]These cases have been consolidated for decision by a Board Order dated May 24, 1993.

filed a claim for compensation, and on June 28, 1991, employer and Patton filed a Petition to Approve Compromise Settlement.

In both instances, the administrative law judge approved the settlements, fully incorporating the parties' petitions. He determined that the settlements were in claimants' best interests and were not procured by duress. Decisions and Orders at 1. Further, he found that the agreed sums are adequate, and they:

> cover any and all compensation, disability, all penalties, interest and any other cost of every kind, including all back compensation benefits, if any, and all claims based on a loss of wage earning capacity, if any, arising from the injury heretofore described.

Decisions and Orders at 2.[2] Given his approval, the administrative law judge concluded that the settlements, "upon payment of the aforesaid amounts," discharge employer's liability for injuries arising from the hearing loss injuries, in accordance with Section 8(i), 33 U.S.C. §908(i) (1988). Decisions and Orders at 2-3. The Director moved for reconsideration, making specific challenges to the administrative law judge's phraseology, and contending that the agreement does not satisfy the requirements of the regulations, 20 C.F.R. §§702.241-702.243. The administrative law judge found the Director's motion to be without merit, and he declined to amend his original decisions, except that he reworded the paragraphs concerning medical benefits. Decisions and Orders on Recon. at 1-2. The Director appeals the approvals of the settlement agreements. Employer responds, urging affirmance. BRB Nos. 92-1259, 92-1261.

Following the issuance of each settlement approval, counsel for claimants submitted a request for an attorney's fee. In *Poole*, the administrative law judge awarded a fee of $1,338.13, plus expenses in the amount of $15.75, to be paid by employer. Poole Supp. Decision and Order at 2. In *Patton*, he awarded a fee of $1,099.38, plus expenses in the amount of $17, to be paid by employer. Patton Supp. Decision and Order at 2. Employer appeals the attorney's fee award in *Poole*, and claimant responds, urging affirmance. BRB No. 92-1259A.

Section 8(i)

The Director contends the settlements in these cases do not satisfy the requirements of Section 8(i) of the Act or Section 702.242 of the regulations. In particular, the Director argues that

[2]The administrative law judge approved employer's agreement to pay Poole $1,371.62 in compensation through March 19, 1991, plus $170.11 in interest, $19.79 in penalties, continuing bi-weekly payments of $12.10 for the duration of Poole's hearing loss disability, reasonable future medical expenses, and an attorney's fee to be determined later. Poole Decision and Order at 2. He approved employer's agreement to pay Patton $2,716.10 in compensation through February 12, 1991, plus $383.33 in interest, $62.97 in penalties, continuing bi-weekly payments of $24.22 for the duration of Patton's hearing loss disability, reasonable future medical expenses, and an attorney's fee to be determined later. Patton Decision and Order at 2.

the settlements merely list the disputed issues instead of outlining them and showing that there are *bona fide* disputes remaining, that neither application contains a current medical report detailing each claimant's medical condition, and that the administrative law judge failed to state why the settlements are adequate. Further, he contends that the settlements improperly provide for continuing installments of benefits instead of lump sum payments, and that certain phrases of the decisions preclude claims not yet in existence. The Director asks the Board to vacate the approvals and remand the cases for the entry of either compensation orders based on the stipulations or valid Section 8(i) settlements, or for litigation of the claims. For the reasons stated herein, we reject the Director's contentions.

Section 8(i) permits the parties of a disputed claim to compromise and settle their dispute, provided the employer and/or carrier therein are fully discharged of liability, and the administrative law judge approves the agreement. 33 U.S.C. §908(i)(1), (3) (1988). Sections 702.241 *et seq.* regulate settlements made under Section 8(i). 20 C.F.R. §§702.241-702.243. Section 702.242 specifically identifies the information necessary for a complete settlement application. Particularly, subsections (b)(2), (5) and (6), respectively, require the application to contain the reason for the settlement and the issues in dispute, a current medical report which describes the injury, the disability, and the medical treatment, and a statement explaining the adequacy of the settlement. 20 C.F.R. §702.242(b)(2), (5), (6).

Initially, the Director avers that a valid Section 8(i) settlement application must contain an outline of the disputed issues, showing there exists a *bona fide* dispute between the parties, and not merely a list of the issues. Employer responds, arguing that the Director's contention constitutes a matter of semantics, as the contested issues in a hearing loss case of this kind are self-explanatory. Although the Director raised this issue in his motion for reconsideration, the administrative law judge did not address it. Contrary to the Director's contention, the regulations do not require the parties to "outline" the issues in dispute. Particularly, Section 702.242(b)(2) of the regulations states:

(b) The settlement application shall contain the following: . . .

(2) The reason for the settlement, and the issues which are in dispute, if any.

20 C.F.R. §702.242(b)(2). In the present cases, employer and claimants agreed to the following:

3. Contested issues remain between the parties which include among other issues, nature and extent of disability, applicability of Section 14(e) penalties and average weekly wage.

4. The parties hereby stipulate that in an effort to resolve the disputed issues and in lieu of possible extended litigation, Employer shall pay and Claimant shall accept the following sums. . . .

Settlement Petitions at 1-2. The applications clearly comply with the requirement that they contain the issues in dispute and the reasons for the settlement; therefore, we reject the Director's first contention. 20 C.F.R. §702.242(b)(2).

Next, the Director contends the settlement applications do not contain current medical reports as required by Section 702.242(b)(5). Employer responds, arguing that the "filing audiograms," which are attached to each petition, are the only ones necessary to establish claimants' hearing losses, and that current medical reports would be meaningless in these cases, as claimants are retirees and their hearing losses did not progress once exposure to noise ceased. The administrative law judge agreed with employer, noting that claimants Patton and Poole are retired from the work force and are no longer exposed to industrial noise, and that employer would not be liable for any hearing loss in excess of that revealed by the filing audiograms. Decisions and Orders at 1. The Supreme Court of the United States has held that occupational hearing loss occurs simultaneously with exposure to excessive noise and that the injury is complete when the exposure ceases. *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 699-700, 26 BRBS 151, 154 (CRT) (1993). Because occupational hearing loss is an immediate injury which does not progress after exposure to noise ceases, and because the parties attached to their settlement applications medical reports, dated after each claimant's retirement, which indicate claimants each have suffered a loss of hearing, the Director's argument lacks merit. Consequently, we also reject this contention.

The Director also challenges the adequacy of the settlements and the provisions calling for continuing bi-weekly disability benefits instead of a lump sum payment. After a review of the settlement applications and the administrative law judge's approvals, we hold that the administrative law judge properly found that the settlements fully comply with the requirements of the Act and the regulations, and the administrative law judge did not err in finding them adequate.[3] *See Olsen v. General Engineering & Machine Works*, 25 BRBS 169, 171 (1991); 33 U.S.C. §908(i) (1988); 20 C.F.R. §702.242(b)(6). It is the function of the administrative law judge to make such determinations in the first instance. The Board may not reweigh the evidence or engage in factfinding, but is limited by its standard of review to inquiring as to whether the administrative law judge's findings are rational, supported by substantial evidence and in accordance with law. *See generally Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. June 12, 1981). Additionally, we note that neither the Act nor the regulations requires lump sum

[3]Paragraph 6 of both settlement applications states:

> This settlement is fair and reasonable, is in the Claimant's best interest, and is based upon Claimant's mature deliberation and the advice of his counsel. Further, the settlement amount is considered adequate and was not procured by duress.

Settlement Petitions at 3. The administrative law judge reviewed the stipulations and the medical reports and, in light thereof, agreed that the settlements were adequate and not procured by duress. Decisions and Orders at 1.

settlement payments. 33 U.S.C. §908(i) (1988).

Finally, the Director contends that two particular phrases used by the administrative law judge render these agreements invalid as they attempt to settle claims not yet in existence in violation of the provisions of Section 702.241(g), 20 C.F.R. §702.241(g). Section 8(i)(3) of the Act states: "A settlement approved under this section shall discharge the liability of the employer or carrier, or both." 33 U.S.C. §908(i)(3) (1988). Section 702.241(g) limits the settlements to the rights of those parties and those claims then in existence. 20 C.F.R. §702.241(g). On reconsideration, the administrative law judge unambiguously explained that his decisions are limited only to the hearing loss claims before him. As claimants are retirees, now in their late 70's or early 80's, and are unlikely to return to the work force, and as the administrative law judge specifically limited the settlements to the present claims, we reject this contention. *See Kelly v. Ingalls Shipbuilding, Inc.*, 27 BRBS 117 (1993); *Olsen*, 25 BRBS at 171. Consequently, we affirm the administrative law judge's approval of the Section 8(i) settlements presently before the Board.

Attorney's Fee

In *Poole*, claimant's counsel requested a total fee in the amount of $2,984.50, which includes 23.75 hours of services at a rate of $125 per hour and $15.75 in expenses.[4] Employer objected to the hourly rate, the quarter-hour minimum billing method, and to specific itemized entries. The administrative law judge reduced the hourly rate for attorney Lomax's services to $100, and for attorneys Dillon and Ainsworth he reduced the rates as follows: $80 per hour for work performed in 1989; $85 per hour for work performed in 1990; $95 per hour for work performed in 1991; and $100 per hour for work performed in 1992. Supp. Decision and Order at 1. The administrative law judge then cited the fee order in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, No. 89-4459 (5th Cir. July 25, 1990), and concluded "as a rule, no more than 1/8 of an hour should be required for reading routine communications and no more than 1/4 hour for writing a routine letter." Supp. Decision and Order at 2. Additionally, he reduced the time requested for numerous individual items. He awarded 14.25 hours of services for a total fee of $1,338.13, plus he allowed $15.75 in expenses.[5] *Id.* Employer appeals the fee award, incorporating its objections before the administrative law judge, and claimant responds, urging affirmance.

On appeal, employer maintains the fee awarded by the administrative law judge is excessive. Section 702.132 of the regulations requires an award of an attorney's fee to be commensurate with the necessary work done and to take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Watkins v. Ingalls Shipbuilding, Inc.*,

[4]Counsel originally filed a petition seeking a total fee of $4,187.50, but later amended it as the initial petition included services performed before the district director. *See* Petition and Amended Petition.

[5]The administrative law judge noted that all services were performed by attorneys Dillon and Ainsworth. Supp. Decision and Order at 2.

26 BRBS 179 (1993); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989); *Battle v. A.J. Ellis Construction Co.*, 16 BRBS 329 (1984); 20 C.F.R. §702.132. The administrative law judge reduced the hourly rate requested from $125 to $80-$100, and he reduced the hours requested by 9.5 hours, largely due to the lack of complexity and the routine nature of the case. Employer has not shown any abuse of discretion on the part of the administrative law judge in awarding a fee based on the approved hours and hourly rates. *See Watkins*, 26 BRBS at 181; 20 C.F.R. §702.132. Therefore, we reject employer's first contention.

Employer also asserts the doctrine of *de minimis non curat lex.* as a reason to support its argument that the fee awarded by the administrative law judge is excessive. Initially, we note that employer's argument relies on an unpublished Board decision which cannot serve as authority because unpublished decisions lack precedential value. *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n. 2 (1990). Therefore, we shall treat employer's challenge as a request to analyze the fee in light of the amount of benefits awarded. In this case, employer did not make any voluntary payments of compensation, and claimant Poole and employer agreed to settle the hearing loss claim for a lump sum payment of $1,371.62 for compensation through March 19, 1991, plus $170.11 in interest, plus $19.79 in penalties, plus continuing bi-weekly payments of $12.10 for the duration of the disability. Because this settlement does not constitute a *de minimis* award, nor can it be said that claimant was unsuccessful in any aspect of his claim, we reject employer's contention. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

Finally, employer contends it is not liable for any fees which accrued after March 19, 1991, the date it allegedly paid the settlement. Employer's contention is meritless. Despite employer's claim that it paid benefits "voluntarily" on that date, in this case, it paid benefits pursuant to a compromise between the parties. Such action does not constitute a voluntary payment of benefits under Section 28(b), 33 U.S.C. §928(b). Moreover, employer did not raise this issue before the administrative law judge and cannot raise it for the first time on appeal. *See Watkins*, 26 BRBS at 182; *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Therefore, we reject employer's contentions and affirm the attorney's fee award in *Poole*.[6]

Accordingly, the Decisions and Orders of the administrative law judge are affirmed.

[6]Employer also challenged counsel's use of the quarter-hour minimum billing method. This challenge is moot on appeal for two reasons. First, the Board has previously held that use of this method is reasonable and complies with the regulations. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); 20 C.F.R. §702.132. Second, neither counsel nor the administrative law judge restricted himself to the quarter-hour minimum, as counsel requested and the administrative law judge approved one-eighth-hour for some items. *See* Supp. Decision and Order at 2; Amended Petition.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge