

HENRY A. ROSS)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:_____
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-3183) 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant filed a claim for his work-related hearing loss in 1987, and employer controverted the claim. Cl. Exs. 4-5, 8-9; Emp. Exs. 3-4; Jt. Ex. 1. In March 1988, prior to the transfer of the case to the Office of Administrative Law Judges, employer voluntarily paid claimant permanent partial disability benefits for a 2.39 percent binaural impairment based on an average weekly wage of \$458.42. Emp. Ex. 6. At the hearing, the parties stipulated that employer accepted liability for medical benefits and agreed to a higher average weekly wage, \$491.85, and that the remaining issues were the extent of claimant's disability and employer's liability for an attorney's fee. Jt. Ex. 1. The administrative law judge determined that claimant is entitled to 7.5 weeks of benefits for a 3.75

percent binaural impairment, pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13) (1988).¹ Decision and Order at 5. Consequently, he ordered employer to pay disability benefits, all medical expenses related to claimant's hearing loss, including the cost of the initial audiometric evaluation, and interest. *Id.* at 5-6. In light of his award, he determined that employer also is liable for an attorney's fee. *Id.* at 6.

Subsequently, claimant's counsel filed a petition for an attorney's fee of \$3,718.75, representing 29.75 hours of services at a rate of \$125 per hour, plus \$34.75 in expenses. After consideration of employer's objections, the administrative law judge agreed with employer that a rate of \$125 per hour is excessive, and he reduced the hourly rate to \$110. He also reduced the time approved by 9.25 hours. Supp. Decision and Order at 2-3. Accordingly, he held employer liable for an attorney's fee in the amount of \$2,255, plus expenses. *Id.* at 3. Employer appeals the fee award, incorporating by reference the arguments it raised below. Claimant has not responded.

¹The administrative law judge averaged the results of the two audiometric evaluations to reach his conclusion that claimant has a 3.75 percent binaural impairment. Decision and Order at 5; Cl. Ex. 2; Emp. Ex. 5.

Employer contends that any fee to which counsel is entitled should be limited, under Section 28(b), 33 U.S.C. §928(b), to the difference between the amount voluntarily paid and the amount awarded by the administrative law judge. It also argues that the amount of the fee awarded should be reduced because counsel's efforts before the administrative law judge resulted in only a nominal award, and, consequently, claimant was only partially successful.² We decline to address these contentions as employer did not raise these arguments before the administrative law judge and is not permitted to raise them now for the first time on appeal.³ *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]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished); *Hoda v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB Nos. 88-3187/A (Aug. 12, 1994) (McGranery, J., dissenting) (Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993).

Next, employer contends that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). While the complexity of the issues should be considered by the administrative law judge, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In this case, the administrative law judge agreed with employer's objection that the requested hourly rate of \$125 was too high in light of the lack of complex issues, and he awarded an hourly rate of \$110. We reject employer's argument on appeal that the fee should be further reduced based on this criterion because employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of \$110.⁴

²The administrative law judge's award results in an increase in disability benefits of approximately \$1,000. *See* Decision and Order at 2, 5.

³Moreover, we note that the Board has consistently rejected employer's contentions that the amount of the fee awarded under Section 28(b) must be limited to the difference between the amount of benefits awarded and the amount previously tendered. *See, e.g., Hoda v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB Nos. 88-3187/A (Aug. 12, 1994) (McGranery, J., dissenting) (Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993).

⁴Additionally, we reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (September 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

Watkins, 26 BRBS at 181; *LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979).

Employer also objects to counsel's use of the quarter-hour minimum billing method. Although counsel submitted a petition using this method of billing, the administrative law judge reduced entries for time spent reviewing letters on nine different dates from one-quarter hour to one-eighth hour in compliance with the unpublished fee order rendered by 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).⁵ See also *Ingalls Shipbuilding, Inc. v. Director (OWCP) [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished). Therefore, these entries need not be further reduced.

⁵The administrative law judge allowed one-quarter hour for writing letters, and the Fifth Circuit has stated that this is a reasonable amount of time for a one-page letter. See *Fairley*, slip op. at 2.

Finally, employer makes specific contentions regarding the time allowed for review of the file, correspondence and orders, for preparation, filing and review of discovery documents, and for preparation and attendance at a deposition and at the hearing. The administrative law judge agreed with many of the objections and reduced the requested fee by 9.25 hours. Because employer has failed to show an abuse of discretion by the administrative law judge in awarding time for these services, having specifically considered employer's objections, we reject these item-specific contentions and decline to further reduce the administrative law judge's award. *See generally Watkins*, 26 BRBS at 182; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge