

WILHILMINA WOOD)	
(Administratrix of the estate)	
of JOHN D. WHITE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	DATE ISSUED: _____
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Respondent)	DECISION and ORDER
)	on RECONSIDERATION

Appeal of the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

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

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer and the Director, Office of Workers' Compensation Programs (the Director), have filed timely motions for reconsideration of the Board's decision in this case, *Wood v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB No. 92-2532 (March 18, 1994). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has responded, indicating agreement with employer and the Director. We hereby grant the motions for reconsideration and the relief requested. Additionally, claimant's counsel petitions for an attorney's fee for work performed before the Board, and employer responds, objecting to the fee request.

In this case, decedent, who was exposed to injurious noise during the course of his employment with employer, underwent an audiometric evaluation which revealed a 58.4 percent binaural impairment, and he filed a claim for compensation under the Act. Both he and his widow died prior to the adjudication of the case. The administrative law judge awarded benefits, converting decedent's 58.4 percent binaural impairment to a 20 percent impairment of the whole person, pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23) (1988). Additionally, the administrative law judge awarded medical expenses and interest, and he ordered employer to pay benefits to the Special Fund pursuant to Section 8(d)(3), 33 U.S.C. §908(d)(3) (1988), as he determined that decedent died without statutory survivors. Decision and Order at 3-4.

The Board heard oral argument in this case on January 11, 1994. Thereafter, it issued its decision modifying the award of benefits to reflect an award under Section 8(c)(13), 33 U.S.C. §908(c)(13), instead of Section 8(c)(23), reversing the administrative law judge's award of decedent's accrued disability benefits to the Special Fund, and modifying the decision to reflect decedent's estate's entitlement to the accrued benefits. 33 U.S.C. §908(d) (1988); *Wood*, slip op. at 3, 9; *see also Clemon v. ADDSCO Industries, Inc.*, ___ BRBS ___, BRB No. 91-1801 (April 19, 1994). In their respective motions for reconsideration, employer and the Director seek clarification only of footnote 10 of the Board's decision.

The footnote in question states:

Because employer previously paid benefits to the Special Fund pursuant to the administrative law judge's Order, it contends the Special Fund is liable to decedent's estate for benefits. We agree with employer's contention, as it is reasonable, and it prevents a windfall recovery by the Special Fund and a double payment by employer.

Wood, slip op. at 9 n.10 (citation omitted). Specifically, employer and the Director contend that this footnote does not accurately portray the liability of either employer or the Special Fund. They agree that employer paid the Special Fund approximately \$840 in accordance with the administrative law judge's Order to pay benefits pursuant to Section 8(c)(23) and Section 8(d)(3); however, because decedent's work-related hearing loss is compensable under Section 8(c)(13) instead of Section

8(c)(23), his estate is now entitled to over \$23,000.¹ The Director argues that the Special Fund is liable to the estate only for the amount employer paid to the Special Fund and not for the entire award of benefits. Employer agrees that it is liable for the entire award, excluding the amount it paid to the Special Fund.² The parties correctly assert that the Board, in its footnote, did not account for the payment of benefits pursuant to Section 8(c)(13), and given the parties' agreement on this matter, we modify footnote 10 of the Board's decision to reflect employer's liability for benefits, payable to decedent's estate, in the amount of \$22,723.21, plus interest and penalties,³ and the Special Fund's liability for benefits, payable to decedent's estate, in the amount of \$843.53. *See generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233, 239 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*).

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board. Counsel seeks payment for 15.5 hours of services, at rates of \$125 per hour for work performed before September 1, 1993 and \$150 per hour for work performed thereafter, as well as expenses of \$26.50. Employer has filed objections to the petition.

Because claimant successfully appealed this case, her counsel is entitled to a fee reasonably commensurate with the necessary work performed before the Board. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992); 33 U.S.C. §928; 20 C.F.R. §802.203. Employer contends it is not liable for counsel's fee because it was not the "actual opposing party" in this case, as it agreed to pay benefits and the only question was whether it should pay decedent's estate or the Special Fund. Therefore, employer argues that no fee should be assessed against it; rather, a fee should be assessed against the Director or the Special Fund. Contrary to employer's argument, it opposed claimant's entitlement to benefits when it filed a brief before the Board supporting the administrative law judge's award to the Special Fund. Thus, it cannot be said that employer was not the "opposing party." Further, no section of the Act provides for an attorney's fee payable by the Special Fund. *Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994). Therefore, regardless of the Director's vigorous opposition to claimant's position and keen interest in the outcome of this case, employer is liable for counsel's fee for work performed before the Board.

¹Based on an average weekly wage of \$302.66 and a compensation rate of \$201.77, decedent's estate is entitled to a total of \$23,566.74 in disability benefits ($2/3 \times \$302.66 = \201.77 ; $\$201.77 \times 116.8 \text{ weeks} = \$23,566.74$). 33 U.S.C. §908(c)(13) (1988); *Wood*, slip op. at 3.

²In her response to the motions, claimant indicates that employer paid \$22,723.21 in compensation on April 1, 1994, which constitutes a portion of the amount to which decedent's estate is entitled, leaving a balance of \$843.53. Cl. Brief at Ex. A.

³Claimant indicates that, on April 1, 1994, employer issued checks to decedent's estate for \$4,828.62 in interest and \$2,344.57 in penalties. Cl. Brief at Ex. A.

Next, employer objects to the requested hourly rate of \$150 and the quarter-hour minimum billing method. In support of its objections, employer cites a decision rendered by an administrative law judge and an unpublished fee order rendered by the United States Court of Appeals for the Fifth Circuit.⁴ Initially, we reject employer's argument that the Board should base its fee award in this case upon an unpublished fee order of a court of appeals in a different case or on a decision of an administrative law judge in another case, 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); *see also Ford Aerospace & Communication Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979). With regard to the hourly rate, we note that counsel's fee request is based on hourly rates of \$125 for work performed before September 1993 and \$150 for work performed thereafter, and not, as employer states, solely on the flat rate of \$150 per hour. We conclude that counsel's requested hourly rates are reasonable. Further, we note that use of the quarter-hour minimum billing method complies with the applicable regulation, 20 C.F.R. §802.203, and we reject employer's objection to this billing method. *See generally Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 218 (1993) (Order on Reconsideration).

Finally, employer specifically objects to the charges for work performed on August 31, 1992 (.5 hour for preparation and filing the Notice of Appeal), September 18, 1992 (.25 hour for review of the Acknowledgment of Appeal), and January 9-10, 1994 (6 hours for preparation for oral argument). Although the notice and acknowledgment of appeal are relatively simple tasks, they are not clerical tasks, and we reject employer's assertion on this point. Completion, filing, and review of both the notice and acknowledgment of appeal require attorney involvement because both are necessary to continue the proceedings and permit Board review of an administrative law judge's decision. 20 C.F.R. §§802.204-802.210. Further, counsel's requested charges for both items comply with the fee petition requirements in the regulations. 20 C.F.R. §802.203. We also reject employer's objection regarding the time counsel requested for oral argument preparation. Given the novelty and complexity of the issues involved in this case, we consider six hours a reasonable amount of time to prepare for argument before the Board. Consequently, we approve the fee requested and hold that counsel is entitled to a total fee of \$2,270.25, representing 3.25 hours at a rate of \$125 per hour, 12.25 hours at a rate of \$150, and costs of \$26.50, payable by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

⁴*Ingalls Shipbuilding, Inc. v. Director, OWCP (Fairley)*, No. 89-4459 (5th Cir. July 25, 1990); *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (Sept. 5, 1991).

Accordingly, the motions for reconsideration and the relief requested are granted, and the Board's initial decision in this case is modified consistent with this opinion. 20 C.F.R. §802.409. In all other respects, the Board's decision is affirmed. Additionally, we award claimant's counsel an attorney's fee in the amount of \$2,270.25, payable directly to counsel by employer.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge