THOMAS C. BOULER	)	BRB No. 90-1753
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	
THOMAS C. BOULER	)	BRB No. 92-1560
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Supplemental Decision and Order Awarding Attorney Fees and Decision and Order on Remand of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

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

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

Michael S. Hertzig (J. Davitt McAteer, Acting 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-3708) 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). BRB No. 92-1560/S. We must affirm the findings of fact and conclusions of law of the administrative law judge which 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). 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 law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act for a monaural hearing loss. The administrative law judge averaged the results of three audiometric examinations, all of which revealed a measurable impairment in the left ear and a zero percent impairment in the right ear, and awarded claimant benefits for a 28.03 percent monaural impairment pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A).

Employer appealed this decision, contending claimant should be awarded benefits for a binaural impairment. BRB No. 90-1753. The Board agreed, citing its decision in *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 173 (1991) (*en banc*) (Smith and Dolder, JJ., dissenting), *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992)(table) and remanded the case for the entry of an award for a binaural impairment calculated pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988). *Bouler v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1753 (Oct. 28, 1991).

The Director, Office of Workers' Compensation Program (the Director), filed a motion for reconsideration on this decision. The Director noted that the Board's decision in *Garner* was on appeal to the United States Court of Appeals for the Fourth Circuit and requested that her motion be held in abeyance pending the Fourth Circuit's decision. By Order dated May 1, 1992, the Board denied the motion for abeyance, noting that the Fourth Circuit had issued its decision *Garner,* 955 F.2d 41 (4th Cir. 1992)(table). The Board stated that the Director's brief in support of her motion for reconsideration was due within 30 days of her receipt of the Order. No brief was received, and the case was remanded to the administrative law judge. On remand, the administrative law judge awarded claimant benefits for a 4.3 percent binaural impairment consistent with the Board's

decision.[1] 33 U.S.C. §908(c)(13)(B). Claimant appealed this decision, which the Board acknowledged as BRB No. 92-1560S. Claimant has not filed a Petition for Review and brief in this appeal, but has requested action on the Director's motion for reconsideration, which if granted, will render his appeal on the merits moot. Claimant also states that the administrative law judge acted prematurely in issuing his decision on remand while the Director's motion was pending.

We need not decide whether the Director's motion for reconsideration is still pending before the Board or whether the administrative law judge properly issued his decision on remand. It is clear that the disposition of the merits of this case is controlled by the decision of the United States Court of Appeals for the Fifth Circuit in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT)(5th Cir. 1993). In *Tanner*, the Fifth Circuit, in agreement with the unpublished decision of the Fourth Circuit in *Garner*, held that where claimant has a measurable impairment in only one ear, his compensation should be calculated on a monaural basis pursuant to Section 8(c)(13)(A). *See also Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27 (CRT)(4th Cir. 1994)*; Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT)(2d Cir. 1993). We therefore vacate the administrative law judge's Decision and Order on Remand and the Board's prior decision, and we modify the award to reflect claimant's entitlement to benefits for a 28.03 percent monaural impairment as awarded by the administrative law judge in his first decision.

We now turn our attention to claimant's appeal of the administrative law judge's fee award in this case. BRB No. 92-1560. Claimant's counsel sought a fee of $3,411, representing 26.75 hours at an hourly rate of $125, plus expenses of $67.25. The administrative law judge awarded counsel a fee and expenses of $1,422.25. On appeal, claimant contests the disallowance of 3.5 hours for work performed on September 20, 1988. Employer responds, urging affirmance of the fee award.

Claimant contends the administrative law judge erred in disallowing 3.5 hours for work performed on September 20, 1988, averring that the administrative law judge abused his discretion in disallowing this time based on an affidavit supplied by employer to the effect that claimant's attorney previously had billed employer for 26.5 hours on the day in question. Claimant asserts an inability to challenge the accuracy of the affidavit because the prior attorney's fee petitions are not identified and because there is no way to determine the amounts awarded therefor or whether the use of a minimum billing method may have affected the total hours requested on a certain day. He asks the Board to modify the award and allow the 3.5 hours, or in the alternative, award the reduced time the administrative law

[1]Employer advised the administrative law judge that the Director's motion was still pending before the Board.

judge stated he would have granted if the affidavit had not been presented. We reject claimant's contentions.

For the date in question, claimant requested 3.5 hours for review of the file and to prepare and file discovery documents. Employer attached the sworn affidavit of an employee of F.A. Richard & Associates, the administrator of employer's Longshore and Harbor Workers' Compensation program, to show that prior to the petition at issue in this case claimant's counsel had billed employer 26.5 hours for work performed on September 20, 1988 in connection with other cases. The administrative law judge found:

> With respect to times claimed by Mr. Lomax, I am disallowing all time claimed on September 20, 1988 in view of the uncontroverted affidavit attached to Employer's objection which affidavit reflects that Mr. Lomax has already charged 26.5 hours for time on that date. If I were to have allowed any times for the subject date, I would have allowed 1 hour for review of file and 1/4 hour each with respect to the motions and notices, being duplicate items of discovery filed in other cases.

Supp. Decision and Order at 4. Thus, in addition to the affidavit, the administrative law judge also cited the repetitious nature of the discovery documents as a reason for disallowing the time claimed on September 20, 1988. We conclude that the administrative law judge's reliance on the affidavit does not constitute an abuse of discretion, and his explanation for disallowing the time on that day is rational. Therefore, we affirm the awarded attorney's fee. *See generally Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella*, 12 BRBS at 272.

Accordingly, the award of benefits is modified to reflect claimant's entitlement to an award for a 28.03 percent monaural impairment. The Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge