

BRB Nos. 91-170
and 91-170A

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

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, 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.

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (89-LHC-1828) of Administrative Law Judge C. Richard Avery 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). An award of an attorney's fee is discretionary and may be set

*Sitting as a temporary Board member by designation pursuant to the Longshore and

Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988). 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, on February 23, 1987, filed a claim for benefits under the Act for a work-related hearing loss. Previously, on January 28, 1987, claimant had undergone an audiometric examination which revealed a .9 percent binaural impairment. On April 13, 1987, employer filed a notice of controversion. At the formal hearing, the parties stipulated that claimant, a retiree, was entitled to compensation at a rate of \$201.77 per week.

In his Decision and Order, the administrative law judge, relying on *Ingalls Shipbuilding Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in part and rev'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*), determined that any award of compensation to claimant for a loss of hearing should be made pursuant to Section 8(c)(23) of the Act. Converting the .9 percent binaural impairment revealed on the January 1987 audiogram to a zero percent whole person impairment under the *AMA Guides*, the administrative law judge concluded that claimant was entitled to no compensation pursuant to Section 8(c)(23). Next, the administrative law judge found the excuse granted by the district director to be invalid, and thus determined that employer is liable for an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e); however, as claimant was entitled to no compensation, the administrative law judge concluded that no assessment was due.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$2,562.50, representing 20.5 hours of services performed before the administrative law judge at \$125 per hour, and \$40.25 in costs. Employer subsequently filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, addressing employer's objections to the fee requested, disallowed 2 of the 20.5 hours requested by counsel, reduced the hourly rate sought to \$110, and disallowed the costs requested. The administrative law judge therefore awarded claimant's counsel a fee of \$2,035.00, representing 18.5 hours of services performed at \$110.00 per hour.

On appeal, claimant contends that the administrative law judge erred in concluding that any award of compensation due claimant for his work-related loss of hearing should be made pursuant to Section 8(c)(23) of the Act. In its cross-appeal, employer challenges the attorney's fee awarded by the administrative law judge.

The United States Supreme Court's recent decision in *Bath Iron Works Corp. v. Director OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), is dispositive of the issue presented by claimant in this case. In *Bath Iron Works*, the Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13). Specifically, the Court stated that a worker who sustains a work-related

hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23), 33 U.S.C. §908(c)(23), only applies to retirees with such occupational diseases, Section 8(c)(23) is inapplicable to hearing loss injuries.

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Since the administrative law judge's finding that claimant suffered a .9 percent binaural hearing loss under the *AMA Guides* based on the January 28, 1987, audiogram is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits in the amount of \$201.77 per week for 1.8 weeks (0.9 percent of 200 weeks) pursuant to Section 8(c)(13) of the Act.

Next, for the reasons set forth in *Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992), we affirm the administrative law judge's finding that employer is liable for a Section 14(e), 33 U.S.C. §914(e), assessment.

In its cross-appeal, employer challenges the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, contending that the administrative law judge erred in not considering the nominal value of the claim, in not further reducing the requested hours and the hourly fee, and in viewing counsel's billing method as permissible.

Employer initially urges the Board to reverse the administrative law judge's award of a fee, noting that claimant received no compensation as a result of his counsel's services. We reject this contention since, pursuant to our decision in this case, claimant's attorney's services have resulted in a successful prosecution of the four issues controverted by employer at the formal hearing, *i.e.*, nature and extent of claimant's disability, the applicable subsection under which compensation is to be awarded, the applicability of Section 14(e), and liability for fees; thus, employer is liable for claimant's attorney's fees performed at the administrative law judge level. See 33 U.S.C. §928(a).

In the alternative, employer contends that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded by the administrative law judge. We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, 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). Thus, 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).

Moreover, we reject employer's contentions regarding the number of hours requested by counsel and approved by the administrative law judge. The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. See, e.g., *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). In the instant case, the administrative law judge considered employer's objections and reduced by 2 hours the time sought by claimant's counsel. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion by merely reducing the number of hours requested by counsel; we, therefore, decline to reduce further or disallow the hours approved by the administrative law judge. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Next, employer objects to the awarded hourly rate of \$110. The administrative law judge reduced the hourly rate of \$125 sought by claimant's counsel to \$110, stating that the lower rate is a fair and reasonable fee in the region where this case was tried. We affirm this awarded rate, as employer has not shown that the administrative law judge's finding is arbitrary, capricious, or an abuse of discretion. See *Maddon*, 23 BRBS at 55; see generally *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Lastly, we reject employer's assertion that the administrative law judge abused his discretion in viewing counsel's billing method as permissible. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

¹We reject employer's contention that the fee order of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, No. 89-4459 (5th Cir. July 25, 1990)(unpub.) mandates a different result in this case. The determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. See 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Decision and Order denying benefits under Section 8(c)(23) is vacated, and the decision is modified to award claimant compensation for a .9 percent binaural hearing loss pursuant to Section 8(c)(13) plus a Section 14(e) penalty in accordance with this opinion. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge