BRB No. 91-298

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

Appeal of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul B. Howell and Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-341) of Administrative Law Judge Ben H. Walley rendered on a claim filed pursuant to 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 if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer from 1943 to 1977; thereafter, claimant worked for approximately seven maritime employers as a longshoreman until his retirement. On October 15, 1986, claimant underwent an audiometric examination which revealed a 16.9 percent binaural hearing impairment. CX 2. Based upon this audiogram, on November 19, 1986, claimant notified employer of his injury and filed a claim against employer for compensation for a hearing loss on the same day. Thereafter, on June 15, 1987, claimant underwent a second audiometric examination which revealed a 15.63 percent binaural hearing impairment. CX 9; EX 6.

A hearing was held on September 13, 1989, wherein the parties disputed causation, extent of

disability, employer's liability for medical benefits, the subsection under which claimant would be entitled to receive compensation benefits, and the Section 14(e), 33 U.S.C. §914(e), penalty. Employer additionally attempted to escape liability by arguing that it was not the responsible employer. In his Decision and Order, the administrative law judge discussed claimant's testimony regarding his exposure to noise levels during his employment with various employers subsequent to 1977 and found that employer was the last employer to expose claimant to high levels of industrial noise; therefore, the administrative law judge, after determining that claimant has a 16.27 percent binaural hearing impairment based upon the average of the two audiometric evaluations, found that employer is responsible for disability benefits for a 6 percent impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). The administrative law judge further found that employer is liable for medical benefits in connection with claimant's hearing loss, and for payment of a Section 14(e) penalty. Decision and Order at 6.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of $3,220.50, representing 25.25 hours of services performed before the administrative law judge at $125 per hour, and $64.25 in costs. Employer subsequently filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge, addressing employer's objections to the fee requested, disallowed 7.25 of the 25.25 hours requested by counsel and reduced the hourly rate sought to $100 for claimant's lead counsel and $90 for claimant's associate counsel. The administrative law judge therefore awarded counsel a fee of $1,787.25, representing 10.5 hours of services performed by claimant's lead counsel at $100 per hour, and 7.5 hours of services performed by claimant's associate counsel at $90 per hour, plus $64.25 in expenses.

On appeal, employer challenges the administrative law judge's finding that it is the responsible employer and the amount of the attorney's fee awarded to claimant's counsel by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's decision that employer is the responsible employer.

In the instant case, the administrative law judge implicitly invoked the Section 20(a), 33 U.S.C. §920(a), presumption. To rebut the presumption, employer must present facts to show that exposure to injurious noise did not cause claimant's hearing loss. Employer also may escape liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *see also Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied* 429 U.S. 820 (1976). Herein, employer attempted to establish that claimant was exposed to injurious noise levels while working for various maritime employers subsequent to the termination of his employment with employer in 1977.

The responsible employer rule is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the employer responsible for a claimant's disability benefits is the last covered employer to expose the claimant to injurious stimuli

prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease. *Id.*, 225 F.2d at 137; *Lins*, 26 BRBS at 62; *Susoeff*, 19 BRBS at 149. In the instant case, the responsible employer is the last maritime employer to expose claimant to injurious noise stimuli prior to his date of awareness, the earliest possible date of which is the date of the first audiogram, October 15, 1986. Employer asserts that it is not the responsible employer because it is undisputed that claimant's work for subsequent employers was maritime employment, and that claimant testified as to the level of noise exposure experienced while working for those subsequent employers.

During extensive examination by employer's counsel at the formal hearing, claimant admitted that there was some noise in his work area while working for employers subsequent to 1977. Claimant further testified, however, that the noise levels experienced subsequent to his employment with employer did not compare to the noise levels he experienced while working for employer. *See* Hearing Transcript at 16-27. In addition to his hearing testimony regarding his employment subsequent to 1977, claimant testified via deposition as to the level of industrial noise encountered during his thirty-two years of employment with employer; specifically, claimant stated that he was exposed to noise from chipping guns, scaling guns, and grinders eight hours a day, five days a week, throughout his thirty-two years of employment with employer. *See* Claimant's deposition at 32-33. After setting forth claimant's testimony, the administrative law judge concluded that claimant was last exposed to high levels of industrial noise while working for employer and that his hearing loss thus arose in the course and scope of that employment. Decision and Order at 6. It is well-established that all adjudicative and factfinding functions reside in the administrative law judge. *See Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990). Thus, an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). The administrative law judge's finding based upon claimant's testimony, that claimant was last exposed to high levels of industrial noise while employed by employer, is rational and supported by substantial evidence. Employer here did not meet its burden of proving that claimant was exposed to injurious levels of noise in subsequent maritime employment. *See Avondale Shipyards*, 977 F.2d at 191-192, 26 BRBS at 114-115 (CRT). Accordingly, the administrative law judge's finding that employer is the responsible employer is affirmed.

Employer additionally appeals the administrative law judge's award of an attorney's fee to claimant's counsel. 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. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Employer initially contends that the administrative law judge erred in awarding claimant's counsel an attorney's fee since the administrative law judge's Decision and Order awarding benefits could be overturned on appeal. We disagree. It is well-established that an administrative law judge, in order to further the goal of administrative efficiency, may render an attorney's fee determination when he issues his decision, since any such award does not become effective and thus is not enforceable until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248

(1987). We hold, therefore, that the administrative law judge committed no error in considering claimant's counsel's fee petition while the case was on appeal to the Board.

In the alternative, employer contends that if it is responsible for claimant's attorney's fee, the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded by the administrative law judge. 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. Section 702.132 provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, 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 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 the instant case, the administrative law judge specifically noted the applicable regulation when addressing claimant's counsel's fee request; we, therefore, reject employer's unsupported contention that the award must be reduced on this basis.

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 each of employer's objections and reduced the 13.5 hours sought for document preparation and review to 6.75 hours; additionally, the administrative law judge reduced the time sought for preparation and attendance at the formal hearing from 4.5 to 3.5 hours.[1] 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 hours requested for these services; thus, we decline to reduce further or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral*, 13 BRBS at 97.

Lastly, employer contends that the $100 hourly rate awarded to claimant's lead counsel and the $90 hourly rate awarded to claimant's associate counsel, is excessive, asserting that hourly rates of $75 to $80, and $60 to $65 are more appropriate. The administrative law judge determined that the hourly rate of $125 sought by claimant's counsel was excessive, and thereafter awarded claimant's lead counsel an hourly rate of $100, and claimant's associate counsel an hourly rate of $90, based on relevant factors set forth in the applicable regulation and the differences in the experience between the lead and associate counsel. We hold that the hourly rates awarded by the administrative law judge are reasonable, and we note that employer's mere assertion that the awarded rates do not conform to the reasonable and customary charges in the area is insufficient to

[1]Contrary to employer's assertion on appeal, and claimant's itemized fee petition, our review of the record reveals that the documents prepared and filed on October 28, 1988 and June 27, 1989, are not identical. Specifically, the record indicates that claimant, on October 28, 1988, filed a Motion to Compel and various Notices of Deposition, while on June 21, 1989, claimant filed various discovery documents.

meet employer's burden of proving that the awarded rate is excessive. *See Maddon*, 23 BRBS at 55; *see generally 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).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge