

BRB Nos. 91-345,
91-345A and 92-1349

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

Appeal of the Decision and Order - Awarding Benefits and Supplemental Decision and Order - Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor and the Compensation Order - Award of Attorney's Fee of N. Sandra Ramsey, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

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

Before: STAGE, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Awarding Benefits, and employer appeals the Supplemental Decision and Order - Awarding Attorney's Fee (89-LHC-2649) of Administrative Appeals Judge James W. Kerr, Jr. and the Compensation Order - Award of Attorney's Fee (OWCP No. 6-110167) of District Director N. Sandra Ramsey 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).¹ We must affirm the findings of fact and conclusions of law of the

¹These appeals are consolidated for purposes of our decision. 20 C.F.R. §802.104(a).

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). 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. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

In 1965, claimant sustained a traumatic injury to his right ear in the course of his employment with employer as a welder. On July 10, 1987, he underwent audiometric testing by Dr. Wold, which recorded a 100 percent hearing loss in his right ear and a 13.1 percent noise-induced left ear hearing loss, as calculated pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). CX 2. Based on Dr. Wold's report, claimant filed a claim for benefits under the Act for a 27.1 percent binaural hearing loss. *See* 33 U.S.C. §908(c)(13)(B); CX 2, 6. Previously, in May 1987, the district director² excused employer from filing notices, responses or controversions, and from making payments in regard to hearing loss claims, including this one, until 28 days following service of a claim by the district director. EX 3. On December 29, 1987, employer filed its notice of controversion. EX 2.

At the formal hearing, employer proffered the report of Dr. Lamppin. Based on the results of an audiogram administered on August 21, 1989, he stated that claimant has a noise-induced hearing loss in the left ear, with a zero percent impairment under the AMA *Guides*, and a 100 percent right ear impairment, which corresponds to a 16.7 percent binaural impairment under the AMA *Guides*. EX 4. The administrative law judge found that claimant was not entitled to compensation for the hearing loss in his right ear because it was not noise-induced, but that claimant was entitled to benefits for the noise-induced hearing loss in his left ear. He awarded claimant benefits for a monaural left ear hearing loss of 6.55 percent by averaging the impairment ratings of Drs. Lamppin and Wold. *See* 33 U.S.C. §908(c)(13)(A)(1988). Employer also was assessed a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), for its failure to either timely pay benefits or controvert the claim for compensation.

In a Supplemental Decision and Order - Awarding Attorney's Fee, the administrative law judge reduced claimant's counsel's requested fee from \$4,137.13 to \$2,715.25, which represents 22.5 hours at \$100 per hour and 2.5 hours of trial time at \$125 per hour, plus \$152.75 for expenses. In her Compensation Order - Award of Attorney's Fee, the district director awarded claimant's counsel a fee of \$975, representing 9.75 hours of attorney time at \$100 per hour. Employer was ordered to pay \$537.50 of the fee and claimant was ordered to pay the remaining \$437.50, which represented attorney time prior to employer's receipt of formal notice of the claim. *See* 33 U.S.C. §928(a).

In BRB No. 91-345, claimant contends that under the aggravation rule he is entitled to benefits for the full extent of his binaural hearing loss. Employer responds urging affirmance of the administrative law judge's award. In BRB No. 91-345A, employer cross-appeals and challenges the administrative law judge's assessment of a Section 14(e) penalty. Employer also appeals the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fee. Claimant

²Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

responds, urging affirmance of the award of a Section 14(e) penalty and the attorney's fee. In BRB No. 92-1349, employer appeals the district director's award of an attorney's fee of \$975, of which \$537.50 was found payable by employer. Claimant responds, seeking affirmance of the awarded fee.

Addressing first claimant's appeal of the administrative law judge's Decision and Order, we agree that the administrative law judge erred in limiting claimant's award to the impairment demonstrated by the noise-induced left ear hearing loss alone. Claimant is entitled to compensation for the combination of his pre-existing 100 percent right ear impairment and his left ear work-related noise-induced impairment pursuant to the aggravation rule.³ See *Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 193 (1980); see also *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 201-202 (1986); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327 (4th Cir. 1982). Since the administrative law judge reasonably relied on the average of the results recorded by the two audiograms of record, we modify his award of benefits to provide compensation under Section 8(c)(13)(B) for a 22.1 percent binaural hearing loss, which is the average of the 27.5 percent binaural hearing loss recorded by Dr. Wold, and the 16.7 percent binaural loss found by Dr. Lamppin. See *Primc*, 12 BRBS at 193; see also *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992).

In its cross-appeal, employer contends that the administrative law judge erred in holding it liable for a Section 14(e) penalty. Employer contends that the district director acted within his discretion in granting the excuse, and that this case is distinguishable from *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), *aff'd in part, part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1098, 23 BRBS 61 (CRT)(5th Cir. 1990), in that, in this case, employer detrimentally relied on the excuse. Alternatively, employer contends that the concept of "replacement income" is not applicable in hearing loss cases, and that, therefore, the Section 14(e) penalty should not be applied.

Section 14(e) of the Act provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing by employer that, owing to conditions over which it had no control, such installment could not be paid within the period prescribed for the payment. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the 14th day after employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

We reject employer's contentions regarding the applicability of Section 14(e) for the reasons

³We note employer's response that the claim for compensation sought benefits only for noise-induced hearing loss. Claimant, however, clearly sought compensation for a binaural hearing loss at the formal hearing, and his written claim sought compensation for the combined impairment in both ears.

stated 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); *see also Ingalls Shipbuilding*, 898 F.2d at 1095, 23 BRBS at 67 (CRT). Moreover, we note that since we have modified claimant's entitlement to compensation to an award for a 22.1 percent binaural impairment, the Section 14(e) penalty is applicable to compensation due and unpaid from July 10, 1987, the stipulated date of injury, until December 16, 1987, when employer filed its notice of controversion. *See Browder v. Dillingham Ship Repair*, 25 BRBS 88 (1991), *aff'g on recon.* 24 BRBS 216 (1991).

Employer also appeals the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fees, and in BRB No. 92-1349, it appeals the district director's Compensation Order - Award of Attorney's Fee. In these appeals employer incorporates the objections it made below, and reiterates its objections to the amount of the attorney's fee awards, the hourly rates awarded and claimant's counsel's method of minimum increment billing. Employer also objects to the administrative law judge's allowing two hours of the requested three hours for work related to discovery on July 11, 1989, and for one-half hour, reduced by the administrative law judge from the requested one hour, to prepare a motion for a protective order on December 20, 1989. Finally, employer argues that, pursuant to the district director's findings, she erred by holding employer liable for \$537.50 of claimant's counsel's fee award of \$975. Employer contends that, based on the district director's findings, it is responsible for \$525 of the fee award.

We reject employer's contention that the amount awarded and the hourly rate utilized by the administrative law judge and district director are excessive in light of the benefits obtained. Initially, we note that employer did not voluntarily pay benefits to claimant in this case. The administrative law judge awarded claimant benefits for a 6.55 percent monaural impairment, which runs for 3.41 weeks, and a Section 14(e) penalty. As a result of this decision, claimant will receive benefits for a 22.1 percent binaural impairment, which runs for 44.2 weeks, in addition to an increased Section 14(e) penalty. Employer has failed to show that the attorney's fees awarded by the administrative law judge and the district director are unreasonable in light of the amount of benefits awarded. *See generally Thompson v. Lockheed Shipbuilding & Constructions Co.*, 21 BRBS 94 (1988). We also reject employer's contention that the hourly rates awarded are excessive. The administrative law judge reduced counsel's requested hourly rate from \$125 to \$100 for non-trial work, and we hold that employer has provided no support for his allegations of excessiveness. Employer has therefore not met its burden of showing that the hourly rates awarded are unreasonable.⁴ *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1985).

⁴We also reject employer's reliance on the fee award of Administrative Law Judge A. A. Simpson, Jr., in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (Sept. 5, 1991), in which Judge Simpson reduced various entries as duplicative of the work performed in other cases, and awarded differently hourly rates to claimant's attorneys based on their status as either a senior partner or relatively new associate. We note that the amount of an attorney's fee award lies within the discretion of the body awarding the fee and that the decision of an administrative law judge regarding the amount of a fee is not binding precedent on a different administrative law judge or district director in a different case.

We also reject employer's contentions regarding the compensability of the discovery work performed by claimant. The administrative law judge considered these objections and found that the work was necessary to establish entitlement.⁵ *See generally 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). We also reject employer's contention concerning the quarter-hour minimum billing method used by the administrative law judge and the sixth of an hour minimum billing method used by the district director. The Board has held that use of the quarter-hour minimum billing method is not an abuse of discretion, as this method is reasonable and complies with the applicable regulation, 20 C.F.R. §702.132. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). Accordingly, we also find no error in the minimum billing method approved by the district director.⁶

Finally, we agree with employer that the district director erred in assessing employer \$537.50 of the total fee award of \$975. The district director properly found that employer was not responsible for attorney time expended prior to December 16, 1989, when employer first received formal notice of the claim. *See Watkins v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB Nos. 90-1034/A (Feb. 9, 1993); 33 U.S.C. §928(a). Based on this finding and the Petition for Approval of Attorney's Fee, we hold that employer is liable to claimant's attorney for 5.25 hours of attorney time at \$100 an hour, and claimant is responsible for payment of 4.5 hours of attorney time at \$100 per hour. Accordingly, we so modify the district director's Compensation Order - Award of Attorney's Fee.⁷

Accordingly, the administrative law judge's Decision and Order is modified to award claimant benefits for a 22.1 percent binaural impairment pursuant to Section 8(c)(13)(B), and a Section 14(e) penalty consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Supplemental Decision and Order is affirmed. The district director's Compensation Order -Award of Attorney's Fee is modified to reflect employer's liability for a fee of \$525 and claimant's liability for \$450. In all other respects, the district director's fee award is affirmed.

⁵In its objections made at the administrative law judge and district director levels, employer also challenged various other entries for which a fee was requested by claimant's counsel. We note that the administrative law judge specifically ruled on each of the challenged entries, and we decline to disturb his determinations on appeal. Furthermore, employer has failed to demonstrate any error by the district director, who found that the time requested for the challenged entries was reasonable.

⁶We 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) (unpublished), mandates a different result in this case. In that fee order, the court declined to award fees for work before it that were based on a quarter-hour minimum billing method. 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.

⁷Claimant's counsel requests a fee for 1 hour of attorney time expended to respond to employer's appeals of the attorney's fee awards. The Board will consider counsel's request after it receives a properly submitted attorney's fee petition. 20 C.F.R. §802.203

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge