BRB Nos. 91-1036
and 91-1036A

WILLIAM B. KUTTNER	)	
	)	
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 Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

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

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits, and employer cross-appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-3224), of Administrative Law Judge Richard D. Mills 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

*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).

(1965); 33 U.S.C. §921(b)(3). An attorney's fee determination 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was employed by employer, primarily as a pipefitter, from 1972 to 1979, 1985 to 1988, and approximately two weeks in 1990, during which time he was exposed to injurious noise levels. On January 21, 1987, claimant underwent an audiometric examination which revealed an 11.9 percent binaural hearing impairment; in his audiological report, Dr. McClelland indicated that claimant should undergo annual evaluations to monitor his hearing. Cl. Ex. 2. On March 18, 1987, claimant filed a claim under the Act for a work-related hearing loss; on April 16, 1987, employer filed its notice of controversion. On December 4, 1987, employer voluntarily commenced payment of compensation to claimant based on a 9.09 percent binaural hearing impairment at a rate of $284.40 per week. On October 27, 1989, claimant underwent a second audiometric examination which revealed a 6.6 percent binaural hearing impairment; the audiologist who administered this examination, Ms. Towell, subsequently recommended that claimant undergo annual hearing evaluations. Emp. Ex. 4. In July 1990, claimant reapplied for employment at employer's shipyard. As part of the hiring process, claimant was required to undergo an in-house hearing examination. After taking this test, claimant was instructed by employer to obtain an independent evaluation of his hearing. Claimant did so, at his own expense, on July 2, 1990; this examination, conducted by Dr. Lamppin, revealed a 10.3 percent binaural hearing loss. Cl. Ex. 25; Emp. Ex. 16.

At the formal hearing, the results of claimant's three audiological examinations were submitted into evidence. In his Decision and Order, the administrative law judge averaged the results of these three audiograms and determined that claimant was entitled to permanent partial disability compensation for a 9.3 percent binaural hearing impairment under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13); thus, the administrative law judge awarded claimant benefits for a 9.3 percent binaural hearing impairment for 18.6 weeks at a rate of $290 per week. Next, the administrative law judge determined that claimant was not entitled to reimbursement for the expense of his July 2, 1990 hearing examination under Section 7 of the Act, 33 U.S.C. §907, as the administrative law judge found that this was a routine examination required of all prospective employees and was not related to claimant's injury. Finally, the administrative law judge found that claimant's counsel was entitled to an attorney's fee for services rendered.

Claimant's counsel subsequently submitted to the administrative law judge an attorney's fee petition requesting a fee of $2843.75, representing 22.75 hours of services rendered at an hourly rate of $125, and $13.50 in expenses. Employer thereafter filed objections to the fee petition. In his Supplemental Decision and Order, the administrative law judge, addressing employer's specific objections to the fee requested, reduced the number of hours sought to 19.625 and the hourly rate requested to $110, and thereafter awarded claimant's counsel an attorney's fee of $2,158.75, and $13.50 in expenses.

On appeal, claimant contends that the administrative law judge erred in determining that he was not entitled to reimbursement for his July 2, 1990 audiological examination pursuant to Section

7(a) of the Act, 33 U.S.C. §907(a). Employer has not responded to this appeal. In its cross-appeal, employer challenges the attorney's fee awarded to claimant's counsel by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's award of an attorney's fee.

The first issue presented by these appeals is whether the administrative law judge erred in determining that claimant's July 2, 1990 audiological examination was not reimbursable by employer pursuant to Section 7(a) of the Act. In support of his contention of error, claimant asserts that (1) as a handicapped worker, this medical attendance was necessary in order to secure employment, (2) the administrative law judge's finding was not based on substantial evidence, as there was no evidence that employer required all prospective employees to undergo a hearing test at their own expense, and (3) since claimant was advised by the physicians of record to undergo annual hearing evaluations, the July 2, 1990 examination was a reasonable expense related to his work-related hearing loss. We agree. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary, *see* 20 C.F.R. §702.402, and the claimant must establish that the medical expenses are related to the injury. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *see generally Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992).

In the instant case, it is uncontroverted that, following claimant's January 1987 and October 1989 audiological examinations, it was recommended that claimant undergo annual hearing evaluations in order to monitor his hearing impairment. Cl. Ex. 2; Emp. Ex. 4. Thereafter, at the request of employer, claimant underwent an evaluation at his own expense in order to secure employment.[1] *See* Emp. Ex. 16; Cl's Dep. at 41, 49. The cost of this subsequent examination was $100. Cl. Ex. 26. Contrary to the administrative law judge's finding, the record is devoid of evidence that employer requires all prospective employees to undergo independent hearing evaluations at their own expense. Furthermore, we note that the July 2, 1990 evaluation, which was requested by employer, was submitted into evidence by both claimant, in support of his claim for benefits under the Act, and employer, and that the administrative law judge utilized the results of this evaluation in calculating claimant's binaural hearing loss. *See* Cl. Ex. 25; Emp. Ex. 16. Based upon the uncontroverted evidence before us that claimant had on two previous occasions been instructed to undergo annual hearing evaluations, as well as the administrative law judge's decision to utilize the results of this evaluation when calculating the degree of claimant's hearing impairment, we hold that claimant has established that his July 2, 1990 hearing examination was reasonable, necessary and related to his work-related hearing loss. *See*, *e.g.*, *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). We therefore reverse the administrative law judge's finding that claimant is not entitled to

[1]Claimant was not informed of the results of this examination; rather, the resulting audiological report was forwarded to employer, who thereafter submitted it into evidence. *See* Emp. Ex. 16; Cl. Ex. 25; Cl's Depo. at 41. This report additionally recommends that claimant's hearing should be monitored. *See* Emp. Ex. 16; Cl. Ex. 25.

reimbursement for the cost of his July 2, 1990 hearing examination pursuant to Section 7,[2] and modify the instant decision to reflect employer's liability for the $100 cost of this examination.[3]

In its cross-appeal, employer initially contends that it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), since it accepted liability for the claim and voluntarily began paying permanent partial disability benefits on December 4, 1987, well within 30 days of the district director's notice of the claim to employer on November 25, 1987. Alternatively, employer argues that, under Section 28(b) of the Act, 33 U.S.C. §928(b), the fee awarded to claimant's counsel by the administrative law judge is excessive since any fee to claimant's counsel should be based on the difference between the amount employer voluntarily paid to claimant and the amount awarded by the administrative law judge.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Pursuant to Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). *See, e.g., Tait v. Ingalls Shipbuilding*, Inc., 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we need not address employer's argument with respect to liability under Section 28(a), inasmuch as employer is liable for the fee pursuant to Section 28(b). Claimant's counsel has successfully established claimant's entitlement to reimbursement for his July 2, 1990 audiological examination, an issue contested by employer below; additionally, the administrative law judge awarded claimant permanent partial disability benefits greater than those voluntarily paid by employer. Employer is thus liable for claimant's attorney's fee, since counsel succeeded in obtaining additional benefits for claimant while this case was pending before the Office of Administrative Law Judges. *See* 33 U.S.C. §928(b). We therefore affirm the administrative law judge's finding that employer is liable for an attorney's fee award in this case. *See generally Tait*, 24 BRBS at 59.

We also reject employer's argument that the fee award should be limited by the amount of additional compensation obtained by claimant. Although the amount of benefits awarded to the claimant is a valid consideration in granting attorney's fees, *see, e.g., Muscella*, 12 BRBS at 272, 20 C.F.R. §702.132, the Board has held that the amount of an attorney's fee is not limited by the amount of compensation gained, since to do so would drive competent counsel from the field. *See Battle v.*

[2]As it is uncontroverted that claimant underwent this examination at employer's request, the requirements of Section 7(d) regarding authorization are not at issue.

[3] We additionally note that, pursuant to Section 28(d) of the Act, 33 U.S.C. §928(d), claimant would be entitled to reimbursement for the expense of this report as a cost of prosecuting his claim. *See Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984).

A.J. Ellis Construction Co., 16 BRBS 329 (1984). Moreover, in considering employer's liability, the administrative law judge noted that the issues of the correct average weekly wage and entitlement to future medicals were not resolved until the morning of the hearing.

Employer also contends that the routine nature of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. Section 702.132 provides that any attorney's fee approved 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 the 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). The administrative law judge in this case considered this factor in reducing the hourly rate from $125 to $110. Similarly, we reject employer's contention that the fee awarded is excessive. The administrative law judge considered employer's objections to counsel's requested fee, reduced the number of hours sought by counsel from 22.75 to 19.625, and found the remaining time sought to be reasonable. We decline to disturb this rational determination. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Lastly, employer contends that the hourly rate of $110 awarded by the administrative law judge is excessive. In awarding counsel a fee, the administrative law judge determined that the hourly rate of $110 was more appropriate than the $125 requested by claimant's counsel. We affirm this rate, and hold that employer has provided no support for his allegation that the hourly rate awarded is unreasonable. *See Maddon*, 23 BRBS at 55; *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, the administrative law judge's determination that claimant is not entitled to reimbursement for the cost of his July 2, 1990 audiological examination is reversed, and his Decision and Order is modified to reflect employer's liability for the cost of that evaluation. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge