

BRB Nos. 91-464  
and 91-464A

|                              |   |                    |
|------------------------------|---|--------------------|
| ROBERT D. MURRAH             | ) |                    |
|                              | ) |                    |
| Claimant-Respondent          | ) |                    |
| Cross-Respondent             | ) |                    |
| v.                           | ) |                    |
|                              | ) |                    |
| INGALLS SHIPBUILDING,        | ) | DATE ISSUED:       |
| INCORPORATED                 | ) |                    |
|                              | ) |                    |
| Self-Insured                 | ) |                    |
| Employer-Respondent          | ) |                    |
| Cross-Petitioner             | ) |                    |
|                              | ) |                    |
| DIRECTOR, OFFICE OF WORKERS' | ) |                    |
| COMPENSATION PROGRAMS,       | ) |                    |
| UNITED STATES DEPARTMENT     | ) |                    |
| OF LABOR                     | ) |                    |
|                              | ) |                    |
| Petitioner                   | ) | DECISION and ORDER |

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

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

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

\*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).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits, and employer cross-appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-617) of Administrative Law Judge Quentin P. McColgin 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).

On March 30, 1988, claimant, a retiree, filed a claim for benefits under the Act for a work-related hearing loss and notified employer of his injury. Previously, on February 24, 1988, claimant underwent an audiometric examination conducted by Dr. Wold which revealed an 18.1 percent binaural impairment. Employer filed a Notice of Controversion (Form LS-207) on April 12, 1988. Claimant underwent a second audiometric evaluation conducted by Dr. Stanfield on July 14, 1988, which revealed a 17.19 percent binaural impairment. On October 13, 1988, employer voluntarily paid compensation based on an average weekly wage of \$308.48, having converted a 17.65 percent binaural impairment to a six percent impairment of the whole person. The claim was referred to the Office of Administrative Law Judges for a formal hearing on November 22, 1988.

At the formal hearing conducted on September 20, 1989, the parties stipulated that claimant suffered a work-related hearing loss and that the applicable average weekly wage for compensation purposes was \$308.48. The unresolved issues presented at the hearing were whether claimant's compensation should be awarded pursuant to 33 U.S.C. §908(c)(13) or 33 U.S.C. §908(c)(23), the nature and extent of claimant's disability, employer's liability for medical benefits, interest, and attorney fees.

In his Decision and Order, the administrative law judge determined that claimant's hearing loss should be compensated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). The administrative law judge found that a binaural hearing impairment ranging from 16 percent to 18.8 percent converts to a 6 percent impairment of the whole person; since the measurements from both audiograms administered to claimant fell within that range, the administrative law judge noted that he need not accept one audiogram over the other. The administrative law judge accordingly found claimant entitled to compensation for a six percent impairment of the whole person pursuant to Section 8(c)(23), based on the average weekly wage of \$308.48 stipulated to by the parties. Next, the administrative law judge, having determined that employer had refused to accept responsibility for the provision of hearing aids or to reimburse claimant for Dr. Wold's initial audiological examination, ordered employer to provide these medical benefits pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a). Lastly, the administrative law judge determined that, as claimant's counsel had been successful in securing for claimant medical benefits which were previously refused, counsel had established his entitlement to an attorney's fee, the amount of which was to be determined in a supplemental order.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$3,469, representing 27.5 hours of services rendered at an hourly rate of \$125, and \$31.50 in expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order, the administrative law judge considered employer's specific objections to the fee request, reduced the number of hours sought to 18.625, reduced the hourly rate sought to \$100, and thereafter awarded claimant's counsel an attorney's fee of \$1,862.50, and \$31.50 in expenses.

On appeal, the Director contends that the administrative law judge erred in failing to provide a date on which claimant's benefits should commence. The Director further argues that the administrative law judge's Decision and Order sets forth no information as to whether the stipulated compensation rate is the correct rate in accordance with *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). In its cross-appeal, employer challenges the attorney's fee awarded by the administrative law judge to claimant's counsel, incorporating into its appeal brief those objections which it filed with the administrative law judge.

The Director initially contends that the instant case must be remanded for a determination as to the date claimant's benefits should commence; specifically, the Director argues that the date claimant's compensation should begin is the date of claimant's retirement, since "if the onset date is found to be after retirement, the claimant will not receive any compensation for a period which he definitely did have an employment-related hearing impairment." Director's Brief at 3. Since the parties filed their briefs on appeal in the instant case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which is dispositive of the issue raised by the Director. In *Bath Iron Works*, the Court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure to excessive noise, the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. *See Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Based on this analysis, the Court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), and 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), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23).

Pursuant to the Supreme Court's decision in *Bath Iron Works* that the relevant time of injury for calculating a retiree's hearing loss benefits is the date of his last exposure to injurious noise levels, we hold that claimant's benefits must commence on the date of his last exposure to injurious noise levels while working for employer. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). In the instant case, the administrative law judge made no findings as to the date of claimant's last exposure to injurious noise levels.<sup>1</sup> Accordingly, we vacate the administrative law judge's award of

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<sup>1</sup>We note that the claim for compensation alleges exposure to repeated noise during claimant's employment with employer from 1951 to 1980, noting that claimant is retired.

benefits and remand the case for the administrative law judge to determine, in accordance with the holding of *Bath Iron Works*, the onset date for the commencement of claimant's benefits.

In *Moore*, the Board held that as the Supreme Court's decision in *Bath Iron Works* is dispositive of the Director's appeal of the issue of the onset date for claimant's award, it would be incongruous to commence a Section 8(c)(23) award on the date of claimant's last exposure with employer and ignore the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13) of the Act. Thus, although no party on appeal has explicitly challenged the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23), in accordance with the holding of *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23), and we modify that award to reflect that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(13). We note, however, that the administrative law judge did not make a finding as to claimant's precise percentage of binaural hearing loss; on remand, therefore, the administrative law judge must make such a determination pursuant to Section 8(c)(13) of the Act.

The Director additionally contends that the administrative law judge's Decision and Order is unclear as to whether the stipulated average weekly wage is in accordance with *Ingalls Shipbuilding*. In his Decision and Order, the administrative law judge accepted the parties' stipulation that the applicable average weekly wage for calculating claimant's compensation is \$308.48. As neither claimant nor employer has appealed the administrative law judge's decision to accept their stipulation, we hold that the administrative law judge committed no reversible error in accepting that stipulation and using the average weekly wage of \$308.48 to calculate claimant's compensation rate. *See Bath Iron Works*, 113 S.Ct. at 698 n.12, 26 BRBS at 153 n.12 (CRT). On remand, in view of the change in law, the administrative law judge may exercise his discretion to permit the parties to reopen this issue.

Lastly, we address employer's appeal of the administrative law judge's award of an attorney's fee. An award of an attorney's fee 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).

Employer initially contends that, since it tendered benefits to claimant prior to the transfer of the claim to the Office of Administrative Law Judges, it is not liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Employer further argues that, under Section 28(b) of the Act, 33 U.S.C. §928(b), the fee awarded to claimant's counsel should be based solely upon the difference between the amount of voluntary benefits initially paid to claimant and the amount ultimately 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,<sup>2</sup> 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 the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, 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 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 the case at bar is governed by Section 28(b). Specifically, we note that although employer made voluntary payments of compensation to claimant based on a six percent impairment of the whole person, our decision modifies the administrative law judge's Decision and Order to reflect that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(13) of the Act, based on claimant's binaural hearing impairment. Thus, claimant, with the assistance of counsel, has ultimately succeeded in establishing entitlement to compensation payments considerably higher than those voluntarily tendered by employer.<sup>3</sup> Moreover, as claimant's attorney was successful before the administrative law judge in establishing claimant's entitlement to medical benefits which employer had previously declined to provide, counsel is entitled to a fee for necessary services performed in obtaining this successful result. *See Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting).

Inasmuch as claimant has ultimately prevailed on every issue presented to the administrative law judge, he was totally successful in prosecuting his claim. *See Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting). Thus, we reject employer's contention that the fee

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<sup>2</sup>Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

<sup>3</sup>We note that claimant's lack of success at the administrative law judge level in obtaining an award for his binaural hearing loss under Section 8(c)(13) was due to the law applicable in the Fifth Circuit at the time, rather than a failure by claimant in submitting evidence to prove his claim. Claimant's ultimate success in obtaining benefits under Section 8(c)(13) renders his attorney entitled to a fee for services performed before the administrative law judge. *See generally Hogan v. International Terminal Operating Company, Inc.*, 13 BRBS 734 (1981).

award should be based solely on the difference between the amount of benefits tendered by employer and the amount of benefits ultimately awarded.<sup>4</sup> *See Moody*, 27 BRBS at 173; *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).

Employer further contends that the lack of complexity of the instant case does not warrant 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. *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 pursuant to 20 C.F.R. §702.132, 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 considered this specific objection in reducing counsel's requested hourly rate from \$125 to \$100; we therefore reject employer's contention that the awarded fee must be reduced on this basis.

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge. In considering counsel's fee petition, the administrative law judge set forth each objection made by employer below and thereafter reduced the number of hours requested by 8.875. 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 by counsel; 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 v. General Dynamics Corp.*, 13 BRBS 97 (1981).

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<sup>4</sup>Employer cites the ruling in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), that where an attorney achieves only limited success in a claim filed under the Act, he may not be entitled to a fee for all hours expended on the case. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the case at bar, however, claimant's attorney did not achieve only partial success, but, rather, ultimately was successful in resolving the controverted issues of which subsection to utilize in awarding claimant's benefits, liability for medicals, interest, and an attorney's fee in claimant's favor. *See Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting).

We further hold that the administrative law judge acted within his discretion in reducing counsel's minimum charge from one-quarter hour to one-eighth hour.<sup>5</sup> *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).

Lastly, we reject employer's assertion that the awarded hourly rate of \$100 is excessive. The administrative law judge determined that the hourly rate of \$125 sought by claimant's counsel was excessive, and thereafter awarded claimant's counsel an hourly rate of \$100, finding that rate to be reasonable based on the nature of the case, the experience of counsel, and the quality of the representation. As employer's assertion that the awarded rate does not conform to the reasonable and customary charges in the area is insufficient to meet its burden of proving that the rate is excessive, we affirm the rate awarded by the administrative law judge to counsel. *See Maddon*, 23 BRBS at 55; *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23) is vacated and modified to reflect claimant's entitlement to an award pursuant to Section 8(c)(13), and the case is remanded to the administrative law judge for determination of the onset date for the commencement of claimant's benefits and for a determination of the extent of claimant's binaural hearing impairment. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge

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<sup>5</sup>We 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*, Nos. 89-4459, 89-4468, 89-4469 (5th Cir. July 25, 1990)(unpublished), 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.