NONNIE L. McDONALD	)	BRB No. 91-1503
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
NONNIE L. McDONALD	)	BRB No. 92-362
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
	)	
NONNIE L. McDONALD	)	BRB No. 92-2225
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

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

Mississippi, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order - Awarding Attorney's Fees (89-LHC-2947) of Administrative Law Judge James W. Kerr, Jr., and the Compensation Order (Case No. 6-110032) of N. Sandra Kitchin, District Director, rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended,[1] 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; 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).

Claimant was exposed to workplace noise at employer's facility during the course of her employment. On July 25, 1987, claimant underwent an audiological evaluation which revealed a 3.7 percent monaural impairment in her left ear and a zero percent loss in her right ear, converting to a .6 percent binaural impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d Ed. 1988) (AMA *Guides).* Cl. Ex. 2. Claimant filed a claim for a 3.7 percent monaural noise-induced work-related hearing loss on August 17, 1987, and provided employer with notice of her injury that same day. On September 4, 1987, employer filed its LS-202, First Report of Injury, form. Employer filed its LS-207, Notice of Controversion, on December 29, 1987. Emp. Ex. 2. On December 14, 1987, the district director provided employer with formal notice of the claim. A second audiometric evaluation performed on January 12, 1989, revealed a minimal loss of hearing in both ears with no calculated impairment under the AMA *Guides*. Emp.

[1]By order issued December 2, 1992, the Board consolidated employer's appeal of the Compensation Order Award of the district director, BRB No. 92-362, with employer's appeal of the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fee, BRB No. 92-2225, for purposes of decision. We hereby consolidate these appeals with employer's appeal of the administrative law judge's Decision and Order - Awarding Benefits, BRB No. 91-1503, for purpose of decision. 20 C.F.R. §802.104.

*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).

Ex. 4.

Previously, on May 14, 1987, Assistant District Director Robert Bergeron had advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, controversions and making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of a claim by the district director's office. An LS-208 form filed by employer indicates that on May 12, 1989, employer voluntarily paid claimant $172.44 in compensation for a .3 percent binaural hearing loss based upon an average weekly wage of $431.10 plus $24.64 interest. Cl. Exs. 5, 6. On June 22, 1989, the case was referred to the Office of Administrative Law Judges for a formal hearing.

The administrative law judge awarded claimant compensation for a 1.85 percent monaural hearing loss under Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A), based upon the average of the two audiograms. Relying on *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc), aff'd in pert. part, Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), the administrative law judge further determined that the "excuse" granted by the district director was invalid and that, as employer did not timely pay benefits or controvert the claim, it was liable for an additional assessment of compensation under Section 14(e), 33 U.S.C. §914(e).

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's attorney submitted a petition seeking approval of attorney's fees for services rendered at the district director level between November 28, 1986, and August 2, 1991, requesting $988.75 for 9.75 hours of legal services at $100 per hour plus $13.75 in expenses. Employer filed objections. The district director approved the $100 hourly rate requested, but reduced the number of hours allowed to 7 and disallowed the expenses requested. She stated that claimant was liable for fees incurred prior to December 14, 1987, the date the district director formally notified employer of the claim, but reasoned that given the minimal amount of claimant's award, it would be inequitable to assess any fee against claimant, as it would deprive her of any compensation for her injury. Accordingly, the district director approved $700 in legal fees payable by employer to claimant's attorney, representing 7 hours of services performed after December 14, 1987, at $100 per hour.[2]

[2]The district director thus essentially disallowed the 2.75 hours requested prior to the December 14, 1987, formal notice of claim to employer.

Claimant's attorney also filed an attorney's fee petition for work done at the administrative law judge level, requesting $3,881.25 representing 30.5 hours of services at $125 per hour plus $65.75 in expenses. Employer filed objections. The administrative law judge reduced the hourly rate from $125 to $100, but allowed $125 per hour for the hearing and disallowed some of the time requested. Accordingly, he awarded claimant's counsel $2,515.75, representing 21.375 hours of services at $100 per hour, 2.5 hours at $125 per hour, and $65.75 in expenses.

On appeal, employer contends that the administrative law judge erred in awarding claimant compensation based on a monaural impairment. Employer also argues that it should not be held liable for a Section 14(e) penalty. BRB No. 91-1503. Claimant responds, urging that both the administrative law judge's award of compensation on a monaural basis and the award of a Section 14(e) assessment should be affirmed. Employer also appeals the district director's award of an attorney's fee, BRB No. 92-362, and the administrative law judge's award of an attorney's fee, BRB No. 92-2225, arguing that the district director and administrative law judge erred in holding it liable for claimant's attorney's fees and that the fees awarded are exorbitant in relation to the benefits awarded, incorporating the objections made below into its appellate briefs. Claimant responds, urging affirmance of both fee awards.

Initially, we reject employer's contention that the administrative law judge erred in determining the extent of claimant's hearing loss on a monaural rather than binaural basis. Employer relies on the fact that both of the audiological opinions credited by the administrative law judge indicate that, despite the measured zero percent impairment rating in claimant's left ear, she sustained a bilateral sensorineural hearing loss. In *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143 (5th Cir. 1993), *rev'g* 26 BRBS 43 (1992)(Smith and Dolder, JJ., dissenting), the United States Court of Appeals for the Fifth Circuit held that claimants who suffer from a monaural impairment should be compensated under Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A)(1988). As this case arises within the jurisdiction of the Fifth Circuit, the court's decision in *Tanner* is dispositive of the issue presented in this case. Thus, pursuant to the Fifth Circuit's holding in *Tanner*, we affirm the administrative law judge's finding that claimant is entitled to receive permanent partial disability benefits pursuant to Section 8(c)(13)(A) of the Act for her 1.85 percent monaural impairment. *See Bullock v. Ingalls Shipbuilding, Inc.*, BRBS , Nos. 90-194/A (February 15, 1994)(Order on Recon. *en banc*).

Employer next contends that the administrative law judge erred in holding it liable for a Section 14(e) penalty. Specifically, employer asserts that the administrative law judge erred in finding that the "excuse" granted by the district director is invalid. Moreover, employer contends that the instant case is distinguishable from *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc)*, in that the district director's excuse was granted prior to the time that the claim was filed and employer detrimentally relied upon it. In the alternative, employer contends that even if employer had not been excused, the concept of "replacement income" is not applicable in hearing loss cases and, therefore, the Section 14(e) penalty should not apply.

The precise arguments raised by employer regarding the excuse granted by the district director and the concept of "replacement income" have been rejected by both the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991)*; see Ingalls Shipbuilding*, 898 F.2d 1095, 23 BRBS 67 (CRT). The administrative law judge's finding that employer is liable for a Section 14(e) assessment is accordingly affirmed.[3]

Turning to employer's appeals of the fee awards, employer initially asserts that it is not liable for claimant's attorneys' fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), arguing that there was no successful prosecution of the claim because it voluntarily tendered and paid all benefits due based on a .3 percent binaural hearing loss on May 12, 1989 and the administrative law judge's award of compensation made on a monaural basis is currently on appeal. In the alternative, employer argues that if it is liable for a fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), the fee should be far less than that awarded, and should be limited to the difference between the amount employer voluntarily paid to claimant and the amount ultimately awarded by the administrative law judge. Claimant responds, urging affirmance of the attorney's fee award.

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, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under 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 arguments with respect to liability under Section 28(a), as the present case is governed by Section 28(b). Employer tendered and completed voluntary payment of compensation of $172.44 for a .3 percent hearing loss and $24.64 in interest based on the conversion of claimant's 1.85 percent monaural impairment to a binaural impairment on

[3]Employer argues on appeal that its LS-202, Employer's First Report of Injury, was filed on September 4, 1987, and is the equivalent of a notice of controversion; therefore, it asserts it is not liable for a Section 14(e) penalty. Claimant has filed a motion to strike that portion of employer's petition which deals with this issue. We deny claimant's motion, but reject employer's argument, as it is raised for the first time on appeal. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that employer's argument has been rejected by the Board in *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J. dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting). Additionally, the LS-202 was not timely filed under Section 14 and, as the award of benefits in this case was for .962 weeks from claimant's July 25, 1987 date of injury, the period of entitlement ended before employer filed its LS-202 on September 4, 1987. *See Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on reconsideration).

May 12, 1989, prior to the referral of the case to the Office of Administrative Law Judges. Claimant, however, continued to assert her right to compensation on a monaural basis, as well as her right to a Section 14(e) assessment and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. As a result of her counsel's efforts before the administrative law judge, claimant was ultimately awarded $276.86 in compensation based on a 1.85 percent monaural hearing loss, which has been affirmed on appeal. In addition, claimant received $29.73 in interest, medical benefits, and a Section 14(e) assessment of $27.68. *See* Ex. E. Therefore, inasmuch as a controversy remained even after employer voluntary paid compensation, and as claimant was ultimately successful in obtaining additional compensation over that which employer voluntarily paid, employer is liable for claimant's counsel's attorney's fees pursuant to Section 28(b). Employer's assertions to the contrary are rejected. *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision on remand).[4]

Employer next argues that the lack of complexity of the case mandates a reduction or disallowance of 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, 33 U.S.C. §928, and the applicable regulation, 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 issues should be considered, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). As the administrative law judge specifically considered the complexity of the case in evaluating the fee request, and as the district director also specifically considered this factor in determining that the $100 hourly rate requested was reasonable, employer's assertion that the complexity of the case does not warrant the fees awarded is rejected. Employer also asserts that the hourly rates awarded do not conform to reasonable and customary charges in the area in which the claim arose, arguing that an hourly rate of $80 to $85 for Lowry Lomax and of $70 to $75 for the junior associates would be more appropriate for work performed at the administrative law judge level and that an hourly rate of $75 to $80 would be more appropriate for work performed before the district director. We disagree.[5] Employer's unsupported assertions are insufficient to meet

[4]We decline to address employer's argument that the amount of both fee awards is excessive in light of the benefits obtained, as this issue is raised for the first time on appeal. *See, e.g., Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988); *see generally Maples v. Texport Stevedores Co. v. Lykes Bros. Steamship Co.*, 23 BRBS 302, *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, BRBS (CRT)(5th Cir. 1991). We note, however, that as claimant was fully successful in increasing his disability award, and in establishing his right to a Section 14(e) penalty and medical expenses, the fee awards made by the administrative law judge and the district director are not inconsistent with *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

[5]We note that according to the fee petition, Mr. Lomax did not perform any services at the administrative law judge level in this case, rendering employer's argument on this point irrelevant. Additionally, *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 91-1451 (Sept. 27, 1991)(unpublished), cited by employer, has no precedential value, as it is not published. *See Lopez v. Southern*

its burden of establishing that the hourly rates awarded are unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS at 55 (1989); *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).[6]

Employer also objects to the use of the quarter-hour minimum billing method. We reject this assertion, as the Board has previously determined that this method is reasonable and complies with the applicable regulation, 20 C.F.R. §702.132. *See 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).

Finally, we reject employer's contention that time spent on certain discovery related activity, trial preparation, and in preparing and reviewing various correspondence and legal and medical documents was either unnecessary or excessive. The district director and administrative law judge considered employer's objections, and disallowed 2.75 and 6.625 hours respectively, finding the remaining services rendered by claimant's counsel to be reasonable. We decline to disturb their rational determinations. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Although employer also asserts that the district director erred in allowing 1.5 hours claimed after June 22, 1989, because these services were incurred subsequent to referral of this case to the Office of Administrative Law Judges, we reject this argument, as the district director could reasonably have viewed the services in question as necessary to "wind up" the case. Moreover, as claimant's counsel did not request these services in the fee petition filed at the administrative law judge level, claimant's counsel did not receive duplicative compensation. Accordingly, employer's arguments are rejected and the administrative law judge's and district director's fee awards are affirmed.

Accordingly, the Decision and Order of the administrative law judge awarding claimant compensation for her occupational hearing loss on a monaural basis and a Section 14(e) assessment is affirmed. BRB No. 91-1503. The Supplemental Decision and Order - Awarding Attorney's Fee of the administrative law judge and the Compensation Order - Award of Attorney's Fee of the district director are also affirmed. BRB Nos. 92-2225, 92-362.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

Stevedores, 23 BRBS 295, 300 n.2 (1990).

[6]Employer attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable, given the risk of loss factor inherent in the type of work performed by claimant's counsel.

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge