

BRB No. 91-2089

WILLIAM G. BENKOWICH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Paul M. Franke, Jr. and Traci 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 Supplemental Decision and Order - Awarding Attorney Fees (89-LHC-2674) of Administrative Law Judge C. Richard Avery 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). 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 sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered on January 7, 1989, which revealed a 1.5 percent binaural impairment. A second audiogram taken on July 5, 1989, revealed a 7.8 percent binaural impairment. A formal hearing was held on August 6, 1990, wherein the parties disputed the issues of the nature and extent of disability and employer's liability for an

*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).
attorney's fee. After averaging the results of the two audiograms, the administrative law judge, in his Decision and Order, found that claimant suffers from a binaural impairment of 4.65 percent, and

awarded claimant permanent partial disability benefits for a 4.65 percent binaural impairment under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). In addition, the administrative law judge found employer to be liable for claimant's reasonable medical expenses under Section 7 of the Act, 33 U.S.C. §907, and interest on all sums in arrearage pursuant to 28 U.S.C. §1961.

Claimant's counsel subsequently submitted a fee petition requesting an attorney's fee of \$3,222, representing 25.5 hours of services performed before the administrative law judge at \$125 per hour, plus \$34.50 in expenses. Thereafter, 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 by claimant to 24, reduced the hourly rate sought to \$100, rejected counsel's request for photocopying and travel expenses, and thereafter awarded claimant's counsel an attorney's fee of \$2,400.

On appeal, employer challenges the amount of the attorney's fee awarded to claimant's counsel. Claimant responds, urging affirmance of the administrative law judge's award.

Employer first contends that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded by the administrative law judge to claimant's counsel.¹ 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 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 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 further 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 employer's objections to the hours spent by claimant's attorney for certain services, and

¹Employer additionally challenges the amount of the attorney's fee approved by the administrative law judge on the basis that the benefits ultimately received by claimant were nominal. Employer, however, failed to raise this contention in its objections to the fee petition which it filed with the administrative law judge; thus, we will not address this contention since it is raised for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(Brown and McGranery, JJ., concurring and dissenting); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that employer did not voluntarily pay benefits to claimant, *see* Jt. Ex. 1, and that claimant, after being represented by counsel at the formal hearing, ultimately was successful on all issues and was awarded benefits in excess of \$1,900 for his 4.65 percent binaural hearing impairment.

reduced the number of hours requested by counsel 1.5 hours. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to reduce 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). We further hold that the administrative law judge acted within his discretion in viewing counsel's billing method as permissible.² *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); *Neely v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Lastly, we reject employer's assertion that the awarded hourly rate 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, not \$110 as asserted by employer. The administrative law judge found the hourly rate of \$100 to be fair and reasonable for the issues involved in this case and in the region where this case originated. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose 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).

²We 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.

Accordingly, 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