

BRB Nos. 91-1627
and 91-1627A

SAMUEL CUEVAS)	
(Estate of CLEANATH CUEVAS))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fee of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

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

Karen B. Kracov (Thomas S. Williamson, 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fee (89-LHC-3308) 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). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Decedent was employed by employer from 1941 until his retirement in 1975, during which time he was exposed to injurious noise. On October 24, 1986, decedent underwent an audiological evaluation, the results of which revealed a 100 percent binaural hearing impairment. Based upon these results, decedent filed a claim for compensation under the Act on January 6, 1987; however, he died on May 11, 1987. Subsequently, decedent's widow died on August 12, 1987, prior to the adjudication of this claim. Employer filed a notice of controversion on November 4, 1988. At the formal hearing, claimant¹ and employer stipulated that decedent had sustained a 35 percent impairment to the whole man and that decedent's average weekly wage for compensation purposes is \$302.66.

In his Decision and Order, the administrative law judge, after noting decedent's status as a retiree, awarded decedent compensation pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), for a 35 percent impairment of the whole person, penalties under Section 14(e), 33 U.S.C. §914(e), medical expenses and an attorney's fee. The administrative law judge ordered employer to pay the benefits awarded under the Act to the Special Fund pursuant to Section 8(d)(3), 33 U.S.C. §908(d)(3)(1988), as he determined that claimant did not qualify as a statutory survivor. In his Decision and Order on Motion for Reconsideration, the administrative law judge corrected a clerical error noted by employer, thus changing the start of the decedent's benefits from October 4 to October 24, 1986. Additionally, the administrative law judge denied claimant's motion that he had erred in finding that the Special Fund and not the decedent's estate was entitled to the benefits awarded.

Thereafter, claimant's counsel submitted a fee petition for work performed before the administrative law judge in which he requested an attorney's fee of \$3,979, representing 30.75 hours of legal services performed at an hourly rate of \$125, and \$135.25 in expenses. Employer thereafter filed objections to the fee petition. In a Supplemental Decision and Order Awarding Attorney's Fee, the administrative law judge considered employer's specific objections to the fee request, reduced the hourly rate sought to \$100, reduced the number of hours sought to 29.25, reduced the expenses sought to \$99, and thereafter awarded claimant's counsel an attorney's fee of \$3,024.

On appeal, claimant challenges the administrative law judge's decision to award the Special Fund benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly found that the award was payable to the Special Fund. In its cross-appeal, employer challenges the attorney's fee awarded to claimant's counsel by the

¹Claimant is the surviving adult son of decedent and his widow.

administrative law judge.

I. Award of Benefits.

Initially, we note that in the time since the parties filed their briefs on appeal, 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 must be addressed in order to correctly resolve this case. See generally *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125 (1994), *modifying* 26 BRBS 114 (1992). 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*, we hold that decedent's benefits must be calculated pursuant to Section 8(c)(13) of the Act. See *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). Accordingly, while we note that no party challenges the accuracy of the sole audiological evaluation of record which revealed a 100 percent binaural impairment, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to recalculate decedent's benefits in accordance with the holding of the Supreme Court in *Bath Iron Works*.

II. Section 8(d).

Claimant contends the administrative law judge erred in awarding decedent's benefits to the Special Fund. In response, the Director argues that, as decedent died without statutory survivors, the plain language of Section 8(d)(3) mandates payment of the award to the Special Fund. Section 8(d) of the Act provides for the disbursement of a deceased employee's scheduled disability benefits in the event he dies prior to the payment of benefits for reasons unassociated with his work-related injury. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid scheduled benefits are distributed accordingly; however, if he dies without statutory survivors, his benefits are paid to the Special Fund pursuant to Section 8(d)(3). The Board has recently interpreted Section 8(d) and held that an employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is entered. *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), *modified in part on recon.* 28 BRBS 156 (1994). See generally *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986); *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C.

Cir. 1948); *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983). The Board additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors. *Clemon*, 28 BRBS at 112-113; *Wood*, 28 BRBS at 36-38.

In the instant case, because decedent retired in 1975, it is clear that any permanent partial disability compensation due decedent for his hearing loss claim accrued prior to his death in 1987. 33 U.S.C. §908(c)(13) (1988); *Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore*, 27 BRBS at 79. For the reasons set forth in *Clemon* and *Wood*, we reverse the administrative law judge's award of decedent's accrued benefits to the Special Fund, and we modify the administrative law judge's decision to reflect decedent's estate's entitlement to any accrued scheduled permanent partial disability benefits awarded by the administrative law judge on remand. *Clemon*, 28 BRBS at 112; *Wood*, 28 BRBS at 36.

III. Attorney's Fee.

Employer, in its cross-appeal, challenges the administrative law judge's award of an attorney's fee to claimant's counsel. 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).

Initially, employer contends that it is not liable for claimant's counsel's fee since the benefits awarded by the administrative law judge were payable to neither decedent nor his estate. Based on our decision herein, claimant has prevailed in obtaining compensation payable to decedent's estate; thus, claimant's counsel has successfully prosecuted this case and is accordingly entitled to an attorney's fee payable by employer. *See Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992).

Next, employer contends that the fee awarded by the administrative law judge is excessive in view of the benefits awarded and the complexity of the case. 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 provide that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, 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). In the instant case, the administrative law judge considered employer's specific objection regarding the complexity of this case in reducing counsel's requested hourly rate from \$125 to \$100; moreover, the administrative law judge on two occasions found claimant's counsel's services to be necessary. We, therefore, reject employer's contention that the awarded fee must be further reduced on these bases.

We also reject employer's assertion that the awarded hourly rate is excessive. The administrative law judge determined that the hourly rate of \$125 was excessive and thereafter

awarded counsel an hourly rate of \$100, finding this rate to be fair and reasonable in the area where this claim arose. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area is insufficient to meet its burden of providing that the rate is excessive, we affirm the rate awarded by the administrative law judge.² *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 181 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993); *LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979).

Employer additionally challenges the number of hours requested by claimant's counsel and approved by the administrative law judge. In considering counsel's fee petition, the administrative law judge set forth employer's specific objections, reduced the number of hours requested for the hearing, denied an additional hour requested for preparing answers to employer's objections, and determined that the remaining time requested by claimant's counsel for services rendered was both reasonable and necessary. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard. We, therefore, decline to reduce or disallow the hours approved by the administrative law judge.³ See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Lastly, employer objects to counsel's use of the one-quarter and half-hour minimum billing method. Claimant's counsel utilized this method in his petition for a fee, and the administrative law judge specifically found that minimum billing in increments of one-quarter or one-half hour is permissible. The United States Court of Appeals for the Fifth Circuit has recently held that its unpublished fee order rendered in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), is considered circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995). In *Fairley*, the court held that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for preparing a one-page letter. See *Fairley*, slip op. at 2. As the administrative law judge did not ascertain whether the individual tasks billed at the quarter-hour minimum warranted that amount of time in this case, we must remand the case for reconsideration of the fee award in light of the Fifth Circuit's decisions in *Fairley* and *Biggs*.⁴ See *Ross v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 92-2247 (Feb. 22, 1995).

²We note that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, does not support employer's contention that the fee awarded in the instant case was unreasonable.

³Additionally, we reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (September 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

⁴On March 18, 1991, claimant's counsel requested one hour for preparation and filing of claimant's Motion for Protective Order and Remand. Employer challenged this time as excessive, but the administrative law judge rejected employer's objection. However, we note that said motion is a one-page document. On remand, in light of the decisions in *Fairley* and *Biggs*, the administrative law judge must reconsider the time approved for this task.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Awarding Decision on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fee are vacated and the case is remanded for findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge