BRB Nos. 92-0927
and 92-0927A

GARY JENKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	DATE ISSUED:
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, Decision on Motion for Reconsideration, and Supplemental Decision and Order Granting 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. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Carol B. Feinberg (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration, and employer cross-appeals the Decision and Order Awarding Benefits, Decision on Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney's Fees (90-LHC-2123) 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 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).

Claimant filed a claim for benefits under the Act for a work-related hearing loss and notified employer of his injury on January 26, 1987. Previously, on December 8, 1986, claimant underwent an audiometric evaluation conducted by Dr. Wold which revealed a 22.1 percent binaural impairment. On August 2, 1989, claimant underwent a second audiometric evaluation conducted by Drs. McDill and Muller which revealed an 8.8 percent binaural impairment. Employer, on February 17, 1987, filed an LS-202 Form and, thereafter, filed a Notice of Controversion (Form LS-207) on January 17, 1989.

At the formal hearing, the parties stipulated that claimant was a retiree, that claimant suffered a work-related hearing loss, and that the applicable average weekly wage for compensation purposes was $302.66. In his Decision and Order, the administrative law judge, relying upon the results of Drs. McDill and Muller's examination, found that claimant has an 8.8 percent binaural impairment, and that claimant's hearing loss should be compensated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Thus, after converting claimant's 8.8 percent binaural impairment to a 3 percent impairment of the whole person and utilizing the compensation rate stipulated by the parties, the administrative law judge concluded that claimant was entitled to a permanent partial disability award of $6.53 per week. Next, the administrative law judge found the LS-202 Form filed by employer did not constitute a controversion, and thus determined that employer was liable for an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). Lastly, the administrative law judge ordered employer to pay claimant's medical expenses and interest on all compensation due claimant. In a subsequent Decision on Motion for Reconsideration, the administrative law judge modified his decision to reflect claimant's entitlement to permanent partial disability compensation at a rate of $6.05 per week.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of $3,512.25, representing 27.5 hours of services rendered at an hourly rate of $125, and $74.75 in expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge considered employer's specific objections to the fee request, reduced the number of hours sought to 26, reduced the hourly rate sought to $110, disallowed $29.75 in expenses, and awarded claimant's counsel an attorney's fee of $2,860, and $45 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 contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Employer further contests the amount of the attorney's fee awarded by the administrative law judge to claimant's counsel. Claimant has responded to employer's cross-appeal, urging affirmance of the administrative law judge's award of a Section 14(e) assessment and attorney's fee.

The Director initially contends that the instant case must be remanded for a determination as to the date claimant's benefits should commence. 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. Accordingly, we vacate the administrative law judge's award of 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) of the Act for an 8.8 percent binaural impairment.

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 $302.66. 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 $302.66 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.

In its appeal, employer contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Specifically, employer contends that its Form LS-202 filed on February 17, 1987, constituted a "controversion" sufficient to relieve it of liability for a Section 14(e) assessment. We disagree. Employer's argument is identical to that addressed 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). In *Snowden*, the Board held that an employer's Form LS-202, which was filled out in a manner identical to the Form LS-202 filed by employer in the instant case, was not the functional equivalent of a notice of controversion since it was inadequate to meet the statutory requirements of Section 14(d) of the Act. For the reasons set forth in *Snowden*, we hold that the Form LS-202 filed by employer in this case does not constitute a notice of controversion for purposes of Section 14(e). We, therefore, affirm the administrative law judge's finding that employer is liable for a Section 14(e) assessment.

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 contends that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel.[1] 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 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). While the complexity of the 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 this case, the administrative law judge considered this specific objection in reducing counsel's requested hourly rate from $125 to $110; we therefore reject employer's contention that the awarded fee must be reduced on this basis.[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 also asserts 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 counsel an hourly rate of $110, 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 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 Welch v. Penzoil Co.*, 23 BRBS 395 (1990); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

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[1]We decline to address employer's contention that the awarded fee should be reduced because the amount of benefits awarded in this case was nominal, since employer did not raise this argument before the administrative law judge and is not permitted to raise it now for the first time on appeal. *Ross v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB No. 92-2247 (Feb. 22, 1995); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995).

[2]Additionally, 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).

Employer additionally challenges the number of specific 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 specific objections and thereafter reduced the number of hours requested. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard and we decline to reduce or disallow the hours approved by the administrative law judge.[3] *See Maddon,* 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer also objects to counsel's use of the quarter-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*.

Accordingly, in accordance with 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

[3]For the reasons set forth in *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993), we reject employer's reliance on *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 91-1451 (Sept. 27, 1991)(unpub.).

of the onset date for the commencement of claimant's benefits. The administrative law judge's award of a Section 14(e) assessment is affirmed. The administrative law judge's fee award is vacated, and the case is remanded for reconsideration in accordance with this opinion; the hourly rate awarded is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge