

BRB Nos. 88-4033
and 88-4033A

LOUISE ELIZABETH TAYLOR)
(Widow of WILLIAM J. TAYLOR))
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 INGALLS SHIPBUILDING,)
 INCORPORATED) DATE ISSUED: _____
)
 Self-Insured)
 Employer-Respondent)
 Cross-Petitioner) DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney's Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

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

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

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, decedent's widow, appeals, and employer cross-appeals, the Decision and Order - Awarding Benefits, and employer appeals the Supplemental Decision and Order Granting Attorney's Fee (88-LHC-1155), of Administrative Law Judge David W. Di Nardi 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee is discretionary and will not be set aside unless shown by the challenging party 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).

On December 9, 1986, decedent, a retiree, filed a claim for benefits under the Act for work-

related hearing loss. CX 4. On December 17, 1986, employer filed its First Report of Injury, Form LS-202, *see* Employer's Response Brief EX C, and its "answer" to the claim on January 5, 1987. EX 1. On May 14, 1987, Assistant District Director¹ Robert H. Bergeron 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, or 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 on employer of a claim by the district director's office. EX 3. The district director notified employer of this claim on June 23, 1987. EX 2. On March 24, 1988, employer filed a Payment of Compensation Without Award, Form LS-206, which indicated that decedent would be paid compensation in the amount of \$12.11 per week for an 18 percent binaural hearing loss, calculated to be 6 percent impairment of the whole man, based on an average weekly wage of \$302.66; final payment was made on June 10, 1988, when benefits were terminated in light of decedent's death on August 18, 1987. EXS 4, 5, 7, 9. Because the parties disagreed as to the amount of compensation due decedent, the claim was referred to the Office of Administrative Law Judges for a formal hearing. CX 11.

The administrative law judge accepted the parties' stipulation to an 18 percent binaural hearing impairment, and noted their apparent agreement to an applicable average weekly wage of \$302.66. EX 4. He awarded decedent benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), of the Act. Next, the administrative law judge determined that he did not have the authority to review the excuse granted by the district director. On the assumption that the district director's action was improper, however, the administrative law judge determined that employer's "answer" constituted a notice of controversion and was timely filed; thus, the administrative law judge concluded that decedent was not entitled to a penalty under Section 14(e), 33 U.S.C. §914(e). The administrative law judge also found that employer was liable for an attorney's fee. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of \$1,200.

On appeal, claimant contends that decedent is entitled to a Section 14(e) penalty. Employer responds that no Section 14(e) penalty is due because employer timely controverted the claim by filing its First Report of Injury, Form LS-202. Employer cross-appeals the administrative law judge's decision to award benefits pursuant to Section 8(c)(13), and further challenges the fee awarded to claimant's counsel, incorporating by reference the objections it made below into its appellate brief.

¹The title "District Director" has been substituted for the title "Deputy Commissioner" used in the statute. 20 C.F.R. §702.105.

1. Calculation of Hearing Loss Benefits

Employer contends that the administrative law judge erred in awarding decedent compensation under Section 8(c)(13), instead of under Section 8(c)(23), 33 U.S.C. §908(c)(23). We disagree. In the time since employer filed its appellate brief, 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). In *Bath Iron Works*, the Court 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) of the Act. Thus, for the reasons set forth in *Bath Iron Works*, we affirm the administrative law judge's decision to award decedent compensation under Section 8(c)(13).

2. Employer's liability under 33 U.S.C. §914(e)

Claimant challenges the administrative law judge's determination that employer is not liable for a Section 14(e) assessment. Section 14(e) provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for any additional 10 percent of such overdue installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing that owing to conditions over which employer had no control, such installment could not have paid within the period prescribed for the payment. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the 14th day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury. Under Section 14(d), 33 U.S.C. §914(d), if employer controverts the right to compensation, employer must file a notice of controversion on the fourteenth day after receipt of a notice of injury. Thus, once employer receives notice, it must file a notice of controversion within 14 days or commence payments on the 28th day after receipt of notice; otherwise, the penalty attaches to all payments due. The administrative law judge determined that employer timely controverted the claim and thus, no Section 14(e) penalty was due.

Disposition of the Section 14(e) issue is controlled by the Board's decision in *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), *aff'd in part, part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990); *see also 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); *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993). In *Fairley*, 22 BRBS at 184, the Board determined, *inter alia*, that the excuse granted by the district director in the relevant group of cases was invalid. The United States Court of Appeals for the Fifth Circuit affirmed, in *Ingalls Shipbuilding*, 898 F.2d at 1095, 23 BRBS at 67 (CRT), the Board's holding that the district director abused his discretion in excusing employer from filing notices of controversions. For the reasons set forth in *Ingalls Shipbuilding* and *Fairley*, we hold, as a matter of law, that the district director's excuse was invalid.

Moreover, in *Fairley*, *supra*, the Board considered whether an "answer" filed by employer,

which contained language identical to the "answer" filed by employer in the instant case, constituted a Section 14(d) notice of controversion. The Board held that since it was not clear from the document whether employer was even controverting the claim at all, the document was not a notice of controversion as the requirements of Section 14(d) were not met. *Fairley*, 22 BRBS at 192. In affirming the Board's holding on this issue, the United States Court of Appeals for the Fifth Circuit noted that Section 14(d) requires that employer controvert the claim on specified grounds, and that the document failed to do so. *Ingalls Shipbuilding*, 898 F.2d at 1095-1096, 23 BRBS at 67 (CRT). For the reasons set forth in *Fairley* and *Ingalls Shipbuilding*, we reverse the administrative law judge's determination that employer's "answer" constitutes a notice of controversion, and hold that decedent is entitled to a Section 14(e) penalty. As claimant provided notice of the injury to employer on December 9, 1986, this date triggered employer's duty to pay benefits or controvert the claim. 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 commences on the date of his last exposure to injurious noise, we hold that decedent's benefits must commence on the date of his last exposure to injurious noise levels while working for employer. *See Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). In the instant case, the administrative law judge's finding that decedent retired in 1978 is unchallenged; thus, as the award was for 36 weeks and this period ended before the commencement of any voluntary payments, the penalty applies to the entire award. *Pullin*, 27 BRBS at 45. The administrative law judge's decision is therefore modified to reflect that employer is liable for an additional 10 percent penalty assessed on the entire award of compensation in this case.²

3. Employer's Liability for An Attorney Fee and Claimant's Counsel's Entitlement to a Fee

Claimant's counsel sought an attorney's fee of \$1,875, representing 18 hours of services rendered at \$100 per hour, plus \$75 in expenses. Employer filed objections to this fee petition. The administrative law judge reduced the number of hours requested by 6.75; he awarded counsel a fee of \$1,200, for 11.25 hours of services rendered at the hourly rate of \$100, plus the requested \$75 in expenses.

Employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel, initially contending that it is not liable for any attorney's fee because it accepted compensability of the claim, *see* 33 U.S.C. §928(a), and voluntarily paid decedent all benefits to which he was entitled. We need not address employer's contentions regarding Section 28(a) as this case is governed by Section 28(b). After employer voluntarily paid decedent under Section 8(c)(23), he obtained an increase in compensation by virtue of the award pursuant to Section 8(c)(13).

²For the reasons set forth 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), we reject employer's contention that its First Report of Injury, Form LS-202, constituted a notice of controversion sufficient to relieve it of liability for an assessment under Section 14(e), 33 U.S.C. §914(e).

Employer is, therefore, liable for counsel's fee under Section 28(b). *Ping v. Brady-Hamilton Stevedore Co.*, 21 BRBS 223, 225 (1988); *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180, 182 (1986). Moreover, the Board has held that an attorney's fee is not limited under Section 28(b) to the amount of additional compensation gained. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.* 12 F.3d 209 (5th Cir. 1993).

Employer objects to counsel's method of billing in minimum increments of one-quarter hour. Consistent with the decisions of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP* [Fairley], No. 89-4459 (5th Cir. July 25, 1990)(unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP* [Biggs], 46 F.3d 66 (5th Cir. 1995)(table), we reduce the March 24, 1988 and July 14, 1988, entries for review of letters from one-quarter hour to one-eighth hour each. After considering employer's remaining objections to the number of hours awarded, and to the hourly rate, we reject these contentions, as it has not shown that the administrative law judge abused his discretion in this regard. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer's contentions which were not raised below will not be addressed for the first time on appeal. *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 mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP* [Biggs], 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the administrative law judge's award of benefits to decedent is affirmed, the denial of a Section 14(e) penalty is reversed, and the administrative law judge's Decision and Order is modified to reflect employer's liability for a 10 percent penalty on the entire

award. The Supplemental Decision and Order Granting Attorney's Fee is modified to reflect the reduction of two quarter-hour entries to one-eighth of an hour each. Counsel is therefore entitled to a fee of \$1,175, representing eleven hours of services rendered at a rate of \$100 per hour, plus the requested \$75 in expenses. In all other respects, the administrative law judge's Supplemental Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge