

JULIUS W. REDMOND)	BRB No. 91-0257
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	
)	
JULIUS W. REDMOND)	BRB Nos. 92-2385
)	and 92-2585
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor, and the Findings of Fact of N. Sandra Ramsey, District Director, United States Department of Labor.

John F. Dillon and Rebecca J. Ainsworth (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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits, and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-1441) of Administrative Law Judge Quentin P. McColgin, and the Findings of Fact (Case No. 6-101544) of District Director N. Sandra Ramsey, 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).¹ 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'Keeffe 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 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 Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On November 17, 1986, claimant filed a claim for compensation under the Act for a noise-induced work-related hearing loss and that same day notified employer of the injury. Employer filed a notice of controversion on July 22, 1987. The case was referred to the Office of Administrative Law Judges for a formal hearing on February 29, 1988.

In his Decision and Order, the administrative law judge awarded claimant compensation, pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A), for a 5.9 percent monaural hearing loss.² The administrative law judge further found that he lacked the authority to rule on the issue of whether employer was obligated to pay an additional ten percent penalty under Section 14(e), 33 U.S.C. §914(e), for failure to timely controvert the claim. Finally, the administrative law judge found that claimant's counsel was entitled to an attorney's fee for services rendered.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of \$3,390.62, representing 27.125 hours of legal services performed at an hourly rate of \$125, and \$74.75 in expenses. Employer thereafter submitted objections to counsel's fee request. In a Supplemental Decision and Order Awarding Attorney Fees, 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 requested to 19.625, and awarded

¹By Order dated December 9, 1992, the Board consolidated for purposes of decision claimant's appeal of the administrative law judge's Decision and Order, BRB No. 91-0257, with employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, BRB No. 92-2585, and its appeal of the district director's Findings of Fact, BRB No. 92-2385. 20 C.F.R. §802.104.

²In an Order Granting Motion for Reconsideration the administrative law judge modified the Decision and Order to award compensation for a monaural hearing loss of 5.6 percent, pursuant to the stipulation of the parties. *See JX 1.*

claimant's counsel an attorney's fee of \$1,962.50, plus \$74.75 in expenses.

Claimant's counsel also filed a fee petition for work performed before the district director in which he requested an attorney's fee of \$975, representing 9.75 hours of legal services performed at an hourly rate of \$100, and \$15 in expenses. Employer filed objections to this fee request. After noting that employer had filed specific objections to counsel's fee request, the district director approved the attorney's fee request and awarded claimant's counsel a fee of \$975. Of this awarded fee, claimant was held liable for \$362.50, representing attorney services rendered prior to employer's receipt of formal notice of the claim on April 6, 1987, *see* 33 U.S.C. §928(c), while employer was found to be liable for the remaining \$612.50, representing 6.125 hours of services rendered at an hourly rate of \$100.

On appeal, claimant challenges the administrative law judge's Decision and Order - Awarding Benefits, contending that he is entitled to a penalty pursuant to Section 14(e). BRB No. 91-0257. Employer has not responded to claimant's appeal. Employer appeals the attorney's fee awarded by both the district director, BRB No. 92-2385, and administrative law judge, BRB No. 92-2585, incorporating the objections it made below into its appellate briefs. Claimant responds to these appeals, urging affirmance of the fee awards.

On appeal, claimant contends that the administrative law judge erred in failing to assess a penalty against employer pursuant to Section 14(e). BRB No. 91-0257. Section 14(e) of the Act, 33 U.S.C. §914(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 an additional 10 percent of such 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 be 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.

The administrative law judge in the instant case correctly noted that the Board held in *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), *aff'd in pertinent part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), that the "excuse" provided by employer for failure to timely pay benefits or controvert the claim based on administrative difficulties at the district director's office was invalid as it did not conform to the Act. Decision and Order at 5. However, the administrative law judge declined to make a finding on the applicability of the Section 14(e) penalty in this case.³ While remand to the administrative law judge is appropriate where factual findings are necessary to determine employer's liability for a Section 14(e) assessment, in the instant case there are no factual disputes. Our review of the record reveals that it is uncontroverted that the claim was filed on November 17, 1986, with simultaneous

³Contrary to the administrative law judge's statement, it is within his authority to decide issues raised under Section 14(e).

notice to employer, and that employer did not begin to pay benefits, or file a notice of controversion, until July 22, 1987. Therefore, we hold that employer is liable for an additional 10 percent assessment on the benefits due in this case for claimant's 5.6 percent monaural impairment under Section 8(c)(13)(A). *See Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); 33 U.S.C. §914(b), (d), (e). As the administrative law judge's award was for 2.91 weeks of benefits, and this period ended before employer filed its notice of controversion, the penalty applies to the entire award of compensation in this case. *See Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993); *Browder v. Dillingham Ship Repair*, 25 BRBS 88 (1991), *aff'g on recon.* 24 BRBS 216 (1991).

In its appeals, employer challenges the attorney's fees awarded by both district director and the administrative law judge. BRB Nos. 92-2385, 92-2585. Employer initially challenges the amount of the attorney's fee approved by the district director and 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 petitions which it filed with the district director and the administrative law judge; thus, we will not address these contentions since they are raised for the first time on appeal. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(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).

Employer also argues that the lack of complexity of the instant case mandates a reduction in the amount of the fees awarded by the district director and the administrative law judge 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, the complexity of the legal issues is but one factor to be considered when awarding an attorney's fee. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge considered this objection in reducing counsel's hourly rate from \$125 to \$100; similarly, the district director considered this specific objection in approving counsel's requested hourly rate of \$100. We therefore reject employer's contention that the awarded fee must be reduced on this basis. Moreover, we reject employer's assertion that the awarded hourly rates do not conform to the reasonable and customary charges in the area where the claim arose. Employer's mere assertion in this regard is insufficient to meet its burden of proving that the awarded hourly rates are excessive; we therefore affirm the rates awarded to counsel by the district director and the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer additionally challenges the number of hours requested by counsel and approved by the district director and the administrative law judge. In considering counsel's fee petition, the administrative law judge specifically considered employer's objections and reduced the number of

hours requested from 28.125 to 19.625, a reduction of approximately 30 percent. The district director, after noting that employer had set forth specific objections to the number of hours requested by claimant's attorney for certain services, specifically determined that the time requested by claimant's counsel for services rendered was both necessary and proper. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge and the district director abused their discretion in this regard; thus, we decline to reduce or disallow the hours approved by the administrative law judge and the district director. See *Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Moreover, employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected, as the administrative law judge and district director considered this objection, and their awards conform to the criteria set forth in 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)(unpublished).

Lastly, with regard to the district director's award of an attorney's fee, employer asserts that the district director improperly found it liable for services rendered after the case referred to the Office of Administrative Law Judges. Claimant's fee petition indicates that fourteen one-quarter hour entries were requested subsequent to February 29, 1988. We agree with employer that time spent on October 24, 1990 and October 30, 1990, should be disallowed; we decline, however, to reduce the time awarded by the district director subsequent to October 30, 1990, since these services were performed after the administrative law judge's issuance of his Order Granting Motion for Reconsideration and employer has not shown that the services rendered were either excessive or unnecessary.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is modified to reflect employer's liability for an assessment pursuant to the Section 14(e) of the Act; in all other respects the administrative law judge's Decision and Order - Awarding Benefits is affirmed. BRB No. 91-0257. The district director's Findings of Fact are modified to reflect the disallowance of the one-half hour sought for services performed on October 24, 1990 and October 30, 1990; in all other respects, the district director's Findings of Fact are affirmed. BRB No. 92-2385. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed. BRB No. 92-2585.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge