

BRB Nos. 92-157
and 93-1112

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

Appeals of the Decision and Order on Remand Awarding Benefits and an Attorney's Fee and Supplemental Decision and Order Awarding Attorney's Fee of James W. Kerr, Administrative Law Judge, United States Department of Labor, and the Compensation Order-Award of Attorney's Fee of N. Sandra Kitchin, District Director, United States Department of Labor.

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

Donald Majors and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for the employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits and an Attorney's Fee and Supplemental Decision and Order Awarding Attorney Fees (88-LHC-1772) of Administrative Law Judge James W. Kerr, and the Compensation Order-Award of Attorney's Fee (6-103624) of District Director N. Sandra Kitchin 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 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).

Claimant was exposed to loud noise while working in employer's shipyard from 1942 until 1980, when he retired. An audiometric examination performed on November 28, 1986, was interpreted by Dr. Wold as indicating an 18 percent binaural hearing loss. On December 1, 1986, claimant filed a claim for occupational hearing loss benefits under the Act, based on this audiogram.

A subsequent audiometric evaluation performed on September 1, 1987, was interpreted by Dr. Gordon Stanfield as indicating a 15.63 binaural impairment. On November 19, 1987, employer initiated voluntary payment of compensation pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), for a 15.63 binaural loss. On March 23, 1988, the case was referred to the Office of Administrative Law Judges for a formal hearing. Prior to the hearing, the parties filed opposing motions for summary judgment with the administrative law judge, asserting that they had agreed to split the difference between the two audiograms and that the sole issue presented for formal adjudication was whether claimant's hearing loss benefits should be calculated pursuant to Section 8(c)(13) or Section 8(c)(23), 33 U.S.C. §908(c)(13), (23).

The administrative law judge found that claimant's hearing loss benefits should be calculated under Section 8(c)(13) and entered an award for a 16.815 percent binaural impairment consistent with the parties' agreement. Claimant's attorney thereafter filed a fee petition for work performed at the administrative law judge level, which was denied by the administrative law judge. Claimant's motion for reconsideration was also denied.

In addition, claimant filed a petition for an attorney's fee for work performed before the district director requesting the sum of \$860, representing 6.875 percent hours of services at an hourly rate of \$125, plus expenses of \$36.25. In a Compensation Order-Award of Attorney's Fee dated April 14, 1991, the district director awarded claimant's counsel a fee of \$825 representing 8 hours at \$100 per hour, plus expenses of \$25. Claimant was deemed liable for \$400 of the fee, representing the services performed prior to June 23, 1987, the date employer obtained formal notice of the claim from the district director, and employer was held liable for the remaining \$425.

Employer appealed the administrative law judge's award of benefits, BRB No. 89-1352, and the district director's award of attorney's fees, BRB No. 92-157, while claimant appealed the administrative law judge's denial of his attorney's fee, BRB No. 90-803. By Order dated December 12, 1991, the Board granted employer's motion to remand BRB No. 89-1352 to the administrative law judge for further action in accordance with the United States Court of Appeals for the Fifth Circuit's decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), instructing him that he should also consider claimant's entitlement to Section 14(e), 33 U.S.C. §914(e), penalties. By Order dated May 27, 1992, the Board granted claimant's motion to remand his appeal of the administrative law judge's denial of a fee, BRB No. 90-803, instructing the administrative law judge to reconsider the fee in light of his resolution of the merits on remand. Employer's appeal of the district director's award of an attorney's fee, BRB No. 92-157, remained pending.

In his Decision and Order on Remand, the administrative law judge found that pursuant to the Fifth Circuit's decision in *Ingalls Shipbuilding*, claimant's hearing loss should be calculated

under Section 8(c)(23) and that the agreed 16.815 percent binaural hearing impairment translated to a 6 percent impairment of the whole person under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d. ed. 1988). The administrative law judge further found that inasmuch as employer failed to timely pay benefits or controvert the claim, claimant was entitled to a Section 14(e) penalty, the exact amount of which was to be determined by the district director. Finally, the administrative law judge awarded claimant a fee of \$792, representing 7.75 hours at \$100 per hour plus \$17 in expenses for services requested in the previously denied fee petition involving work performed between March 19, 1988 and April 15, 1989, when the case was initially before the administrative law judge.¹

Claimant's counsel subsequently filed a fee petition for work performed before the administrative law judge on remand, seeking \$631.25 representing 4.75 hours at \$125 per hour, plus \$37.50 in expenses. The administrative law judge awarded counsel a fee of \$506.25, representing 3.75 hours at an hourly rate of \$125, plus expenses of \$37.50.

Employer thereafter appealed both of the administrative law judge's fee awards, BRB No. 93-1112, which was consolidated with its prior appeal of the fee award made by the district director, BRB No. 92-157, incorporating by reference the arguments it made below into its appellate briefs. Claimant urges affirmance of the district director's fee award but does not respond to employer's appeal of the administrative law judge's fee awards.²

We initially reject employer's contention that it is not liable for claimant's attorney's fees.

Employer is liable for an attorney's fee under Section 28(b). Section 28(b) applies when a controversy develops over additional compensation where employer has tendered compensation or is voluntarily paying compensation. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In the instant case, employer initially commenced voluntary payments based on a 15.63 percent binaural hearing loss and a compensation rate of \$201.77 pursuant to Section 8(c)(13)(B). After referral of the case to the Office of Administrative Law Judges, employer agreed that claimant was entitled to compensation for a 16.815 percent impairment based on an average of the two record audiograms. In addition, after referral employer also agreed that claimant was entitled to medical benefits; such benefits are sufficient to support a fee award payable by employer under Section 28(b). *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); *Morgan v. General Dynamics Corp.*, 16 BRBS 336 (1984). Moreover, employer's liability for medical benefits is not offset by the overpayment of disability compensation. *See Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 15, 1991). Finally, the Board has held that the

¹In this petition, claimant's counsel sought an attorney's fee of \$985.75, representing 7.75 hours at \$125 per hour plus \$17 in expenses, for work performed before the administrative law judge in connection with claimant's hearing loss claim

²No one challenges the award of benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). *Cf. Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993) (all hearing loss properly compensated under 33 U.S.C. §908(c)(13)).

award of a Section 14(e) assessment constitutes additional compensation within the meaning of Section 28(b). See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991). Thus, we reject employer's argument that it is not liable for an attorney's fee. See *Fairley*, 25 BRBS at 64; 33 U.S.C. §928(b).³

Employer objects to counsel's method of billing in minimum increments of one-quarter hour. The fee awarded by the district director, however, is 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) (unpublished). While the fee awards made by the administrative law judge generally comply with *Fairley* and *Biggs*, we reduce the following entries from one-quarter hour to one-eighth hour each: the April 5, 1989, entry in the fee award contained in the Decision and Order On Remand, and the June 8, 1992, entry in the fee awarded in the Supplemental Decision and Order.

Employer's remaining objections to the number of hours and hourly rate awarded by the administrative law judge and the district director are rejected, as it has not been shown that either tribunal abused its discretion in this regard. See *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). Inasmuch, however, as the district director did, as employer asserts, award a fee for 8 hours of services when only 6.875 hours were requested in claimant's amended November 8, 1990, fee petition, and there is no indication from her decision that she intended to augment the fee, we modify the district director's fee award to award counsel a fee of \$687.50 for 6.875 hours. Based on the finding that counsel's time prior to June 23, 1987 is claimant's responsibility, claimant is liable for a fee of \$412.50 for 4.125 hours, and employer is liable for a fee of \$275 for 2.75 hours.

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 in part. part 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).

³Employer also argues on appeal that given the fact that claimant is now deceased and it is entitled to be reimbursed for the overpayment of compensation it made, claimant was not truly successful in obtaining additional compensation while the case was before the administrative law judge. Assuming, *arguendo*, that employer's assertion is true, claimant's subsequent death is not a part of the record upon which the administrative law judge awarded compensation. The fact that claimant may have died prior to employer's recoupment of the overpayment would not, in any event, negate his counsel's success at the time the award was entered when claimant obtained an inchoate right to additional compensation within the meaning of 33 U.S.C. §928(b). See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision after remand).

Lastly, claimant has submitted a fee petition for work performed before the Board in BRB Nos. 89-1352 and 90-803 prior to the remand of this case. Counsel seeks \$2,631.25, representing 16.50 hours at \$125 per hour, plus \$59.50 in expenses for this work. Employer responds, objecting to the fee request.

Employer initially contends that inasmuch as claimant only achieved partial success before the Board, counsel should not be awarded the entire requested fee. Because claimant did not prevail in establishing entitlement to compensation under Section 8(c)(13), we agree with employer that the time spent in for responding to employer's appeal of the administrative law judge's initial award of benefits in BRB No. 89-1352 should be disallowed. *See Hensley v. Eckerhardt*, 461 U.S. 424 (1983). We note that claimant's filings in this appeal also addressed Section 14(e), an issue claimant successfully prosecuted. We therefore disallow the 2.5 hours on July 25, 1989, and September 21, 1989, as related to the Section 8(c)(13) issue.

Employer also objects to specific entries on April 18, 1989, June 15, 1989, May 15, 1991, February 19, 1990, and April 11, 1990, involving review of employer's and preparation of claimant's notices of appeals and the Board's acknowledgment thereof. In addition, employer contends the 1 hour claimed on January 16, 1992 for review of the file does not meet the specificity requirements of the regulations and asserts that this time and the .5 hours requested on June 20, 1990 for preparation of a letter and status review should be disallowed as there is no indication that these services were necessary to establish entitlement. 20 C.F.R. §802.203(d). Moreover, employer contends that the time claimed for various other itemized entries is excessive.

We conclude that the one-quarter hour entries claimed for receipt and review of claimant's and employer's notices of appeal conform to the guidelines set forth in *Fairley* and *Biggs*. We agree with the employer, however, that the one-quarter hour requested on June 15, 1989 for receipt and review of the Board's acknowledgement of employer's appeal is excessive under the aforementioned criteria and will allow only one-eighth for this entry.

We also agree with employer that the 1 hour charges for preparation of claimant's response briefs on December 19, 1989 and July 11, 1990, and the 1.50 hours claimed for preparation and filing of claimant's response to employer's Petition for Review on February 10 and 11, 1992, are excessive given that counsel has filed virtually identical briefs in numerous other hearing loss cases involving this employer. Accordingly, we will allow only one-half hour for each of these entries. As we view the remaining hours as reasonably commensurate with the necessary work performed before the Board, counsel is awarded a fee for 10.25 hours of services.

We further reject employer's objections to the requested hourly rate of \$125, which we find reasonable in this case after consideration of the relevant factors. *See generally Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); 20 C.F.R. §802.203. Consequently, we award claimant's counsel an attorney's fee of \$1,281.25, plus \$59.25 in expenses.

Accordingly, the Compensation Order-Award of Attorney's Fees is modified to reflect claimant's entitlement to a fee for the 6.875 hours requested, as provided by this Decision, but is affirmed in all other respects. BRB No. 92-0157. The Decision and Order on Remand and Awarding Attorney's Fee and Supplemental Decision and Order Awarding Attorney's Fee of the administrative law judge, BRB No. 93-1112, are modified as stated herein but are, in all other respects affirmed. Claimant's counsel is awarded an attorney's fee of \$1,281.25, plus \$59.25 in expenses, for services performed before the Board in BRB Nos. 89-1352 and 90-803.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge