

BRB Nos. 92-480
and 93-561

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

Appeal of the Decision and Order Awarding Benefits, the Supplemental Decision and Order Awarding Attorney Fees, and the Decision and Order on Reconsideration of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Supplemental Decision and Order Awarding Attorney's Fees, and the Decision and Order on Reconsideration of the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-2935) of Administrative Law Judge Richard D. Mills 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'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 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On February 17, 1987, claimant, a painter for employer since 1954, filed a claim for occupational hearing loss benefits under the Act, providing employer with notice of his injury on the

same date. Cl. Ex. 4. On March 2, 1987, employer filed its Form LS-202, First Report of Injury. Emp. Ex. 2. On October 28, 1987, employer completed voluntary payment of compensation for a 5.94 percent binaural hearing loss calculated pursuant to 33 U.S.C. §908(c)(13)(B) based upon an average weekly wage of \$442.08. On June 23, 1989, the case was referred to the Office of Administrative Law Judges for a formal hearing.

In his Decision and Order the administrative law judge awarded claimant compensation for an 11.07 percent binaural hearing loss based on the average of two audiograms performed by Drs. Wold and Stanfield on June 19, 1987, and December 14, 1990, and an average weekly wage of \$495.55.¹ The administrative law judge also awarded claimant medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907, and an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).²

Claimant's counsel sought an attorney's fee of \$3,411, representing 25.63 hours at \$125 per hour, for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of \$1,939.30, representing 17.63 hours at an hourly rate of \$110, plus expenses of \$ 207.25. In a Decision and Order on Reconsideration of the Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge summarily denied employer's motion for reconsideration of the fee award.

Employer appeals the administrative law judge's Decision and Order Awarding Benefits, contending that the administrative law judge erred in holding it liable for a Section 14(e) penalty because its Form LS-202, First Report of Injury, filed on March 2, 1987, was the functional equivalent of a timely filed notice of controversion. BRB No. 92-480. Claimant responds, urging affirmance of the Section 14(e) assessment. Employer also appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. BRB No. 93-561. Claimant has not responded to employer's appeal of this fee award.

Initially, we reject employer's assertions that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Employer's argument that its March 2, 1987, First Report of Injury Form was the functional equivalent of a timely filed notice of controversion has previously

¹The administrative law judge discounted the results of Dr. McClelland's January 8, 1987, audiogram because Dr. McClelland conceded that Dr. Stanfield's test was more accurate.

²Section 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.

been considered and is rejected for the reasons stated 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). Accordingly, the administrative law judge's determination that employer is liable for a Section 14(e) assessment is affirmed.

Turning to employer's appeal of the administrative law judge's fee award, we reject employer's assertion that the administrative law judge erred in holding it liable for claimant's attorney's fees. Employer contends that it should not be held liable for counsel's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b), because it completed voluntary payment of compensation as early as October 28, 1987, prior to referral of the case to the Office of Administrative Law Judges. In the present case, however, although employer completed voluntary payment of compensation for a 5.94 percent binaural hearing loss as of October 28, 1987, as a result of counsel's efforts before the administrative law judge claimant was ultimately awarded compensation for an 11.07 percent binaural hearing impairment based on a higher average weekly wage than employer's voluntary payments, medical benefits, and an assessment under Section 14(e). As claimant's counsel was ultimately successful in obtaining additional benefits for claimant while the case was before the administrative law judge, we affirm his determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b).³ See *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

Employer's objections to the number of hours and hourly rate awarded are rejected, as it has not been shown that the administrative law judge abused his 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). Employer's objections to various entries which involved billing in minimum increments of one-quarter hour are also rejected, as they were considered by the administrative law judge, and his award conforms 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]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished).

³We note that, contrary to employer's contentions, claimant obtained substantially greater benefits above those voluntarily paid.

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. Dec. 9, 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the Decision and Order, Supplemental Decision and Order, and the Decision and Order on Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge