

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

Appeal of the Compensation Order-Award of Attorney's Fees of N. Sandra Ramsey, District Director, United States Department of Labor.

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

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 Compensation Order-Award of Attorney's Fees (Case No. 6-99047) 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). 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 October 6, 1986, claimant filed a claim seeking compensation for a noise-induced, work-related binaural hearing impairment and provided employer with notice of his injury that same day. On June 18, 1987, employer initiated voluntary payment of compensation for a 29.07 percent binaural impairment calculated pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). On February 9, 1988, however, employer adjusted its payments to reflect a 36 percent binaural hearing loss converted to a 13 percent whole man impairment under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), entitling claimant to weekly payments of \$25.79. The case was referred to Office of Administrative Law Judges on March 27, 1990 for a formal hearing. Thereafter, the parties filed a joint motion, stating that all issues had been resolved, and requesting that the case be remanded to the district director. By Order dated June 10, 1991, the

administrative law judge granted the parties' motion and remanded the case to the district director for appropriate disposition.¹ See 20 C.F.R. §702.315.

Thereafter, claimant's counsel submitted a fee petition to the district director, requesting \$775, representing 7.75 hours of services at \$100 per hour, and \$9.00 in expenses. Employer filed objections. The district director awarded counsel a fee of \$775, representing 7.75 hours at an hourly rate of \$100. Employer appeals the district director's fee award on various grounds, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

Employer initially contends that the district director erred in holding it liable for claimant's attorney's fees. Employer argues that there has been no successful prosecution of the claim because it commenced voluntary payment of compensation based on the same percentage of binaural hearing impairment ultimately agreed upon by the parties on June 18, 1987, which resulted in an overpayment such that no further compensation would be due until March 26, 1993.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). See *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we need not address employer's argument with respect to liability under Section 28(a), as the case at bar is governed by Section 28(b). In the instant case, although employer's voluntary payments of compensation prior to referral resulted in an overpayment of compensation, while the case was before the administrative law judge employer agreed that claimant was entitled to a Section 14(e), 33 U.S.C. §914(e), penalty. The Board has held that a Section 14(e) assessment constitutes additional compensation within the meaning

¹The parties apparently agreed that claimant was entitled to compensation for a 29.07 percent binaural hearing loss converted to a 10 percent whole person impairment under 33 U.S.C. §908(c)(23)(1988).

of Section 28(b).² See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64-65 (1991) (decision on remand). Therefore, inasmuch as a controversy remained after employer voluntarily paid benefits and claimant was successful in obtaining additional compensation over that which employer initially agreed to pay, we affirm the district director's determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b). See generally *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84, 87-88 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).³

We agree with employer, however, that the district director erred in allowing a fee for the services requested on March 27, 1990 and April 12, 1990, after the case was referred to the Office of Administrative Law Judges. The district director has no authority to award an attorney's fees for work performed before the Office of Administrative Law Judges. See *Fitzgerald v. RCA International Service Corp.*, 15 BRBS 345, 347 (1983); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982); *Owens v. Newport News Shipbuilding and Dry Dock Co.*, 11 BRBS 409, 419 (1979); 20 C.F.R. §702.132(a). Accordingly, we modify the district director's fee award to reflect the reduction of these entries.

Employer further objects to counsel's method of billing in minimum increments of one-quarter hour. The district director's found this billing method permissible in this case. 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]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished), we vacate the district director's finding on this issue and remand this case for further consideration. After considering employer's remaining objections to the number of hours and hourly rate awarded, we reject employer's contentions as it has not shown an abuse of discretion made by the district director 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 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*

²The fact that the 10 percent assessment awarded under 33 U.S.C. §914(e) may be subsumed by virtue of employer's overpayment is not determinative. See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64-65 (1991)(decision on remand).

³Although claimant also argues in his response brief that medical benefits were not accepted by employer until after referral to the administrative law judge, we are unable to confirm this on the record before us.

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 Compensation Order-Award of Attorney's Fees of the district director is affirmed in part, vacated in part, and modified in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge