

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

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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:

Employer appeals the Decision and Order on Remand (88-LHC-3634) of Administrative Law Judge C. Richard Avery 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 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, e.g., Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

On August 24, 1987, claimant filed a claim under the Act for a noise-induced work-related hearing loss. By Decision and Order dated January 30, 1990, the administrative law judge found that claimant suffered an 11.2 percent binaural hearing loss.<sup>1</sup> The administrative law judge additionally found that employer was liable for a ten percent penalty pursuant to Section 14(e), 33 U.S.C. §914(e). In his Supplemental Decision and Order - Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel a fee of \$2,075, representing 20.75 hours at \$100 per hour, payable by employer.

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<sup>1</sup>At the time of the hearing, employer had voluntarily paid claimant benefits for a 13.1 percent binaural hearing impairment.

Employer appealed both the administrative law judge's Decision and Order and the Supplemental Decision and Order - Awarding Attorney's Fees, specifically contesting the administrative law judge's assessment of a ten percent penalty under Section 14(e) as well as the administrative law judge's award of an attorney's fee under Section 28, 33 U.S.C. §928. In its Decision and Order dated October 23, 1991, the Board affirmed the administrative law judge's application of a ten percent penalty against employer pursuant to Section 14(e). *Fast v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1399 (Oct. 23, 1991)(unpublished). However, noting that the instant case is governed by Section 28(b), 33 U.S.C. 928(b),<sup>2</sup> the Board held that it was unable to discern whether claimant ultimately obtained benefits exceeding what employer voluntarily paid. *Id.* Consequently, the Board vacated the administrative law judge's award of an attorney's fee and remanded the case for the administrative law judge to determine whether claimant had successfully prosecuted his claim. *Id.*

On remand, the administrative law judge determined that since claimant was awarded greater benefits than employer had formerly agreed to pay and because a Section 14(e) penalty was also awarded to claimant, there was a successful prosecution of the claim. Accordingly, the administrative law judge reinstated his prior award of \$2,075 in attorney's fees to claimant's counsel.

On appeal, employer challenges the administrative law judge's award of an attorney's fee, incorporating by reference the objections it raised below into its appellate brief. Claimant has not responded to this appeal.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that there was no successful prosecution of the claim because it voluntarily paid claimant compensation for a greater percentage of impairment than was ultimately awarded by the administrative law judge. We disagree. 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, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In the instant case, although employer voluntarily paid claimant compensation for his hearing impairment, it continued to dispute claimant's entitlement to a Section 14(e) assessment. Thus, a controversy remained even after employer voluntarily paid compensation. Claimant was successful in establishing his right to a Section 14(e) assessment over employer's objections. In addition,

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<sup>2</sup>In light of this, the Board declined to address employer's specific arguments with respect to liability for attorney's fees under Section 28(a), 33 U.S.C. §928(a). *Fast v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1399 (Oct. 23, 1991)(unpublished).

the total amount of compensation awarded by the administrative law judge exceeds the amount voluntarily paid by employer.<sup>3</sup> The additional compensation and the assessment of a Section 14(e) penalty are sufficient to support an award of an attorney's fee payable by employer pursuant to Section 28(b). See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand). Contrary to employer's contention, the amount of the fee is not limited to the amount of additional compensation gained under Section 28(b). *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting)(decision on recon.). Additionally, we note that the administrative law judge considered and rationally rejected employer's objection on this issue, on the grounds that employer contested causation and claimant's entitlement to a Section 14(e) penalty in this case.

Employer objects to counsel's method of billing in minimum increments of one-quarter hour and one-half hour. The administrative law judge 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]*, 46 F.3d 66 (5th Cir. 1995)(table), we reduce the following entries from one-quarter hour to one-eighth hour: a review of a check on November 5, 1988, and the review of letters on April 9, 1989, May 10, 1989, June 21, 1989, July 15, 1989, and February 28, 1990. Additionally, we reduce the following entries from one-half hour to one-quarter hour: preparation of letters on October 12, 1988, June 23, 1989, June 27, 1989, and October 3, 1989. Accordingly, the administrative law judge's award is reduced by 1.875 hours. 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 that the administrative law judge abused his discretion in this regard.<sup>4</sup> 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).

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<sup>3</sup>Specifically, employer paid compensation totalling \$7,413.81, which is less than the \$7,435.23 awarded by the administrative law judge. The greater sum occurs as a result of his using a higher average weekly wage to calculate benefits.

<sup>4</sup>We decline to address employer's contentions regarding the amount of the fee in light of the nominal amount of benefits or claimant's partial success in prosecuting his claim as these issues were not raised before the administrative law judge. See *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 Productions Co.*, 21 BRBS 261 (1988).

Accordingly, the Decision and Order on Remand of the administrative law judge is modified to reflect a reduction of 1.875 hours from the total awarded claimant's counsel. Counsel is therefore entitled to a fee of \$1,887.50, representing 18.875 hours at \$100 per hour. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge