

BRB Nos. 92-2508
and 92-2508A

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

Appeals of the Decision and Order on Remand Awarding Benefits of Richard D. Mills,
Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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:

Claimant appeals and employer cross-appeals the Decision and Order on Remand Awarding Benefits (88-LHC-3333) 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 if they 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, e.g., Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a retiree, filed a claim under the Act for a 34.9 percent noise-induced binaural hearing loss. The case was forwarded to the Office of Administrative Law Judges for a formal

hearing. Prior to the scheduled hearing, the parties filed opposing motions for summary judgment on the issue of whether claimant's hearing loss should be calculated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), or Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988). Relying on *McLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988), the administrative law judge granted claimant's summary judgment motion and found that claimant was entitled to compensation for a 34.9 percent binaural hearing loss to be calculated pursuant to Section 8(c)(13) of the Act.

In a Supplemental Decision and Order dated February 15, 1990, the administrative law judge awarded claimant's counsel an attorney's fee of \$450, representing 4.5 hours of services at \$100 per hour plus \$9.75 in expenses payable by employer. Employer appealed and the Director, Office of Workers' Compensation Programs (the Director), cross-appealed the administrative law judge's Decision and Order Granting Claimant's Motion for Summary Judgment. By Order dated September 17, 1991, the Board granted employer's motion to remand the case to the administrative law judge for further action in accordance with *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). The Board further instructed the administrative law judge to consider whether claimant is entitled to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). Finally, the Board vacated the administrative law judge's attorney fee award, and instructed him to reconsider his fee award in light of his decision on remand.

On remand, consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), the administrative law judge awarded claimant benefits pursuant to Section 8(c)(23) for a 12 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The administrative law judge also held employer liable for a Section 14(e) penalty and reinstated the \$450 attorney's fee award plus \$9.75 in expenses previously made to claimant's counsel in the Supplemental Decision and Order Awarding Attorney Fees dated February 15, 1990.

Claimant filed a timely Notice of Appeal and a motion requesting that the case be held in abeyance pending the decision of the United States Supreme Court in *Bath Iron Works v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). Subsequent to the Court's decision in *Bath Iron Works*, the Board denied claimant's motion and directed claimant to file a Petition for Review and brief. On appeal, claimant argues that, pursuant to *Bath Iron Works*, he is entitled to compensation under Section 8(c)(13) for a 34.9 percent binaural impairment at the agreed compensation rate of \$201.77 per week. Employer, who has not responded to claimant's argument, cross-appeals the reinstated attorney's fee award. Claimant responds, urging affirmance of the fee award.

Subsequent to the issuance of the administrative law judge's Decision and Order on Remand in this case, the United States Supreme Court held in *Bath Iron Works* that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13). Consequently, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23), and modify his award to reflect that claimant is entitled to receive permanent

partial disability benefits for a 34.9 binaural hearing loss pursuant to Section 8(c)(13) of the Act consistent with the degree of hearing loss agreed upon in the parties' summary judgment motions.

With regard to employer's challenge to the attorney's fee awarded to claimant's counsel, 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).¹ Employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected. Although the administrative law judge found this billing method permissible, his fee 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]*, 46 F.3d 66 (5th Cir. 1995) (table).

Employer's remaining 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 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).

¹Employer's argued below that a fee award by the administrative law judge would be premature because the degree of claimant's ultimate success was unknown in light of claimant's pending appeal before the Board. It is well-established, however, that to further the goal of administrative efficiency an administrative law judge may render an attorney's fee determination when he issues his decision although such an award does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23) is vacated and his decision modified to reflect claimant's entitlement to an award for a 34.9 percent binaural impairment pursuant to Section 8(c)(13). In all other respects, the Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge