

BRB Nos. 92-2533
and 92-2533A

JOE W. HILL)
)
 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 of C. Richard Avery, 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 (89-LHC-325 and 89-LHC-325A) 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). 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On February 6, 1987, claimant filed a claim for an 18.1 percent noise-induced work-related binaural hearing impairment. Employer did not file a notice of controversion. A June 19, 1987,

audiogram demonstrated a 16.9 percent binaural hearing loss. On October 2, 1987, employer initiated voluntary payment of compensation for a 16.9 percent binaural hearing impairment pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), based upon an average weekly wage of \$297.62. On February 9, 1988, employer agreed to pay claimant compensation for a 17.5 percent binaural hearing loss based on the average of the two audiograms and modified its payments to reflect the conversion of claimant's binaural hearing impairment to a 6 percent whole person impairment under 33 U.S.C. §908(c)(23) (1988). The case was referred to the Office of Administrative Law Judges for a formal hearing on February 19, 1988. On March 17, 1988, employer accepted liability for claimant's medical benefits. Thereafter, both parties filed motions for summary judgment, alleging that no factual dispute existed other than the issue of whether benefits should be awarded pursuant to Section 8(c)(13) or Section 8(c)(23). By Order dated December 8, 1988, the administrative law judge granted claimant's Motion for Summary Judgment and ordered employer to pay claimant compensation under Section 8(c)(13) pursuant to *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988). In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of \$875, representing 8.75 hours at \$100 per hour. In an Additional Supplemental Decision and Order-Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel an additional \$100 for one hour of time spent in defending employer's objections to the original fee petition, noting that employer did not object to this fee request.

Employer appealed and the Director, Office of Workers' Compensation (the Director), cross-appealed the administrative law judge's decision. The Director moved the Board to hold the claim in abeyance pending the issuance of *Ingalls Shipbuilding, Inc. v. Director, OWCP (Fairley)*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). The Board subsequently granted employer's motion to remand the case to the administrative law judge for further action consistent with *Fairley*. The Board further instructed the administrative law judge to consider whether claimant was entitled to a Section 14(e), 33 U.S.C. §914(e), assessment, and to reconsider his fee award in light of his decision on remand. *Hill v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-325 and 89-325A September 30, 1991(unpublished).

In his Decision and Order on Remand, the administrative law judge consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT) awarded claimant benefits pursuant to Section 8(c)(23) for a 6 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. In addition, the administrative law judge held employer liable for a Section 14(e) assessment, and reinstated the \$975 in attorney's fees he had previously awarded to claimant's counsel.

On appeal, claimant contends that the administrative law judge erred in failing to calculate his award of hearing loss benefits pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), citing *Bath Iron Works Corp. v. Director, OWCP*, U.S. ,113 S.Ct. 692 (1993). Employer responds, stating that it has no opposition to the issuance of a decision in accordance with *Bath Iron Works*. Employer cross-appeals the reinstated \$975 fee, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee.

Subsequent to the issuance of the administrative law judge Decision and Order On Remand in this case, the United States Supreme Court held in *Bath Iron Works Corp.* 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 this award to reflect that claimant is entitled to receive permanent partial disability compensation for a 17.5 percent binaural hearing loss pursuant to Section 8(c)(13), consistent with the degree of hearing loss ultimately agreed upon by the parties.

Turning to employer's appeal of the fee award, we initially reject employer's assertion that the administrative law judge erred in holding it liable for claimant's attorney's fee. Employer is liable for an attorney's fee under Section 28(b), 33 U.S.C. §928(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, the record reflects that although employer paid claimant compensation for a 17.5 percent binaural hearing loss converted to a 6 percent whole person impairment prior to referral based upon an average weekly wage of \$297.62, on February 9, 1988, it suspended its voluntary payments in light of its alleged overpayment for a 16.9 percent binaural hearing loss under Section 8(c)(13) until October 26, 1992. As of the time that employer suspended compensation, it had paid claimant only \$3,571, which is less than half of the total compensation due claimant under Section 8(c)(13). As a result of counsel's efforts before the administrative law judge and subsequently before the Board, claimant was ultimately successful in establishing entitlement to compensation for a 17.5 percent binaural hearing loss calculated under Section 8(c)(13)(B) based upon the higher average weekly wage of \$302.66, a Section 14(e) assessment, medical benefits, and interest. As claimant's counsel was successful in obtaining additional compensation for claimant, we affirm the administrative law judge's determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b). 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 contention that the fee awarded by the administrative law judge should be limited by the amount of additional compensation gained must also fail. The Board has consistently rejected the notion that the amount of a fee awarded under Section 28(b) must be limited in the manner urged by employer. See, e.g., *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(Decision on Recon.).

We also reject employer's assertion that an award of an attorney's fee is premature, since the case is on appeal and claimant's ultimate success therefore remains to be determined. It is well established that to further the goal of administrative efficiency, an administrative law judge may render an attorney's fee determination when he issues his decision; such an award, however, does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248; *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65, *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

Employer also asserts that the administrative law judge's fee award is unwarranted in light of routine and uncomplicated nature of the case. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, inasmuch as the administrative law judge considered the complexity of the case in determining the applicable hourly rate, we reject employer's contention that the awarded fee must be further reduced on this basis.

Employer's objections to the number of hours and hourly rate awarded are rejected, as it has not 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 also objects to counsel's method of billing in minimum increments of one-quarter hour. Although the administrative law judge found this billing method permissible, the fee he awarded does conform 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) with the exception of the February 22, 1988, entry which we reduce from one-half to one-quarter hour.

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.*

¹Employer objects to items on the fee petition prior to February 24, 1988, conceding in the same sentence that the case was referred to the Office of Administrative Law Judges on February 19, 1988. Inasmuch as, the services claimed were rendered after referral, their inclusion on the fee petition is proper.

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).²

Accordingly, pursuant to the Supreme Court's holding in *Bath Iron Works Corp.*, the administrative award of compensation pursuant to Section 8(c)(23) is vacated and is modified to reflect claimant's entitlement to an award of compensation benefits for a 17.5 percent binaural hearing impairment under Section 8(c)(13). The administrative law judge's reinstated fee award is also modified as stated herein. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed. stated.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

²We reject employer's assertion that claimant's attorney fee request was deficient in that it did not list the status of the person performing the itemized services, as it can be inferred from the fee petition that the services were all performed by Attorney Lomax.