

BRB Nos. 92-0361
and 92-2600

STERLING H. DAVIS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING, INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeals of the Supplemental Decision and Order - Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fee of N. Sandra Kitchin, District Director, United States Department of Labor.

Rebecca J. Ainsworth and John F. Dillon (Maples and 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:

Employer appeals the Supplemental Decision and Order - Awarding Attorney's Fee (89-LHC-2632) of Administrative Law Judge James W. Kerr, Jr., and the Compensation Order Award of Attorney's Fee of District Director N. Sandra Kitchin (OWCP No. 6-110586), 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).¹ 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).

¹We hereby consolidate for purposes of decision employer's appeal of the district director's fee award, BRB No. 92-0361, with its appeal of the administrative law judge's fee award, BRB No. 92-2600. 20 C.F.R. §802.104(a).

Claimant, a retiree, filed a claim under the Act for a noise-induced work-related hearing loss based upon the results of an audiogram dated September 8, 1987. Employer voluntarily paid claimant benefits in the amount of \$11,027.78, plus medical benefits for a 47.655 percent binaural impairment. In his Decision and Order, the administrative law judge concluded that claimant has a 48.41 percent binaural hearing impairment, which converted to a 17 percent whole man impairment and accordingly, awarded benefits pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23).² The administrative law judge additionally found that employer is liable for a ten percent penalty pursuant to Section 14(e), 33 U.S.C. §914(e). By decision dated July 15, 1992, the Board affirmed the administrative law judge's finding that employer is liable for a Section 14(e) assessment. *See Davis v. Ingalls Shipbuilding, Inc.*, BRB No. 91-494 (July 15, 1992)(unpublished).

Thereafter, claimant's counsel sought an attorney's fee of \$3,600.75, representing 28.5 hours at \$125 per hour plus \$38.25 in expenses, for work performed before the administrative law judge in connection with claimant's hearing loss claim. In his Supplemental Decision and Order - Awarding Attorney's Fee, the administrative law judge, after consideration of employer's objections, awarded a fee of \$1,738.25 for 15.125 hours at \$100 per hour and 1.5 hours at \$125 per hour, plus expenses of \$38.25.

Claimant's counsel also filed a fee petition for work performed in this case before the district director, requesting \$984.25 for 9.75 hours of services at \$100 per hour, plus \$9.25 in expenses. In her Compensation Order Award of Attorney's Fee, the district director disallowed the requested expenses and awarded a fee of \$975 for 9.75 hours at \$100 per hour.

On appeal, employer challenges both the district director's and administrative law judge's attorney's fee awards, incorporating by reference the arguments it made below into its appellate briefs. Claimant responds, urging affirmance of the fee awards.

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 in excess of what the administrative law judge awarded. 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 the nature and extent of claimant's hearing impairment as well as 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

²Neither party contests the administrative law judge's award of benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23). *Cf. Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993)(all hearing loss is to be compensated pursuant to 33 U.S.C. §908(c)(13)).

addition, the total amount of compensation awarded by the administrative law judge exceeds the amount voluntarily paid by employer.³ 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). Moreover, contrary to employer's contention, the amount of the fee is not limited to the amount of additional compensation gained. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(decision on recon.), *appeal dismissed*, No. 94-40920 (5th Cir. Sept. 20, 1995).

Employer objects to counsel's method of billing in minimum increments of one-quarter hour and one-half hour. Although the administrative law judge discounted employer's reliance on an unpublished order, his award nonetheless 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). The district director found counsel's billing method permissible in this case. Consistent with the decisions in *Fairley* and *Biggs*, we reduce the following entries for work performed before the district director from one-quarter hour to one-eighth hour: review of letters and correspondence on March 10, 1988, March 28, 1988, May 6, 1988, June 11, 1988, July 15, 1988, October 6, 1988 (two entries), November 8, 1988, November 22, 1988, November 9, 1990, December 11, 1990, December 13, 1990, and May 24, 1991. Accordingly, the district director's award is reduced by 1.625 hours. Employer's remaining objections to the number of hours and hourly rates are rejected, as it has not been shown that the administrative law judge or the district director abused his or her 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). Consequently, we affirm the administrative law judge's award of an attorney's fee of \$1,738.25 for 15.125 hours at \$100 per hour and 1.5 hours at \$125 per hour, plus expenses of \$38.25. Additionally, the district director's fee award is modified to reflect a reduction of 1.625 hours and thus, counsel is entitled to a fee of \$812.50, representing 8.125 hours at \$100 per hour.

³Claimant was awarded continuing permanent partial disability benefits for a 17 percent impairment of the whole person based on a stipulated average weekly wage of \$302.66. In light of this, claimant's award presently is in excess of the \$11,027.78 which employer voluntarily paid. See 33 U.S.C. §908(c)(23).

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in response to employer's appeals of the administrative law judge's assessment of a Section 14(e) penalty, BRB No. 91-494, and the district director's award of attorney's fees, BRB No. 92-361. Because claimant successfully defended his entitlement to a Section 14(e) assessment and as claimant's counsel has successfully defended the district director's award of attorney's fees, counsel is entitled to a fee for work performed before the Board. *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Cutting v. General Dynamics Corp.*, 21 BRBS 108 (1988).

Initially, we find that contrary to employer's contention, the requested hourly rate of \$125 is reasonable for work performed before the Board. *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988). Employer next objects to specific entries on November 30, 1990, and October 23, 1991, for review of employer's notices of appeal, on January 9, 1991 and January 17, 1992, for review of the Board's acknowledgment of appeal, on February 6, 1991, for review of employer' Petition for Review and brief, and on March 17, 1991 and March 31, 1992, for preparation and filing of responses to employer's Petitions for Review and briefs. Although the notice and acknowledgment of appeal are relatively simple tasks, they are not clerical tasks, and we reject employer's assertion on this point for the reasons stated in *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.*, 28 BRBS 27 (1994). We also find that the total of three hours requested by counsel for the preparation of claimant's responses to employer's Petitions for Review and briefs is reasonably commensurate with the necessary work performed before the Board. Consequently, we hold that claimant's counsel is entitled to a total fee of \$710.25, representing 5.25 hours at a rate of \$125, and costs of \$54.00, payable by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fee is affirmed. The district director's Compensation Order Award of Attorney's Fee is modified to reflect a reduction of 1.625 hours from the total awarded claimant's counsel. Counsel is therefore entitled to a fee of \$812.50, representing 8.125 hours at \$100 per hour. In all other respects, the district director's Compensation Order Award of Attorney's Fee is affirmed. Moreover, we award claimant's counsel an attorney's fee in the amount of \$710.25, payable directly to counsel by employer for work performed in BRB Nos. 91-494 and 92-361.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge