

GROVER BILBO)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED: _____
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order--Awarding Attorney's Fee of James W. Kerr., Jr., 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 Supplemental Decision and Order -- Awarding Attorney's Fee (89-LHC-2647) of Administrative Law Judge James W. Kerr, Jr., 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 only be set aside if shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked at employer's facility for 40 years where he was exposed to loud workplace noise. A July 3, 1986, audiogram performed by Dr. Gordon Stanfield revealed a 51.88 percent binaural hearing impairment. On August 1, 1986, claimant filed a claim under the Act for occupational noise-induced hearing loss benefits and provided employer with notice of his injury. On October 9, 1986, employer initiated voluntary payment of compensation for a 51.88 percent binaural hearing loss based upon an average weekly wage of \$297.62 pursuant to 33 U.S.C. §908(c)(13)(B). A May 19, 1987, audiogram performed by audiologist Marianne Towell, was interpreted as reflecting a 54.7 percent binaural hearing loss. On February 16, 1988, employer modified its payments based on the average binaural hearing loss reflected on the aforementioned two audiograms converted to a 19 percent whole person impairment which entitled claimant to \$37.70 per week pursuant to 33 U.S.C. §908(c)(23)(1988). In light of its overpayment of

compensation under Section 8(c)(13), employer notified claimant on the same date that no additional compensation is owed until March 20, 1995. The case was referred to the Office of Administrative Law Judges for a formal hearing on June 7, 1989.

In his Decision and Order, the administrative law judge averaged the two audiograms and determined that claimant suffered from a 53.29 percent binaural impairment.¹ He then determined that as claimant was a retiree, and his case arose within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit, pursuant to *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in part. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), his benefits must be calculated pursuant to Section 8(c)(23) of the Act.² Accordingly, he converted claimant's binaural hearing impairment to a 19 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), and awarded claimant compensation based upon the stipulated average weekly wage of \$302.66, medical benefits, interest, and an assessment under Section 14(e), 33 U.S.C. §914(e).

Claimant's counsel sought an attorney's fee of \$2,750, representing 22 hours at \$125 per hour, for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of \$2,060.63, representing 18.39 hours at an hourly rate of \$110, plus expenses of \$38. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant has not responded to employer's appeal.

We initially reject employer's contention that the administrative law judge erred in holding it liable for claimant's attorney's fees. Although employer argues that there has been no successful prosecution of the claim because the compensation it voluntarily paid claimant prior to referral pursuant to Section 8(c)(13)(B) resulted in an overpayment such that no benefits will be due until January of 1995, we disagree. As a result of counsel's efforts before the administrative law judge, claimant was awarded compensation based upon the higher average weekly wage of \$302.66, medical benefits, interest, and an assessment under Section 14(e). As claimant's counsel was ultimately successful in obtaining additional compensation for claimant while the case was before the administrative law judge, we affirm his determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(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), and reject employer's assertion that its liability terminated as of February 16, 1988.

¹Although the record also contains an August 1, 1986, audiogram performed by Beltone, the administrative law judge disregarded the results of this examination because the name and qualifications of the examiner was unknown.

²No one challenges the award of benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). *Cf. Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993) (all hearing loss properly compensated under 33 U.S.C. §908(c)(13)).

Employer 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 awarded is consistent with the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. 1990) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (unpublished). After considering employer's remaining objections to the number of hours awarded, and to the hourly rate, we reject these contentions, 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).³

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).

Accordingly, the Supplemental Decision and Order of the administrative law is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

³Although employer argues that the administrative law judge erred in entertaining counsel's fee petition because it was not filed within the 20 days allowed in the administrative law judge's Decision and Order, we disagree. Inasmuch as the Act and regulations do not specify a time period for filing a fee petition his decision to entertain the fee petition despite its untimeliness was within his discretionary authority. See *Baker v. New Orleans Stevedoring Co.*, 1 BRBS 134 (1974).