

ROBERT C. HAYES)	
)	
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-2364) 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 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 & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered on November 22, 1986, which revealed a 24 percent binaural impairment. A second audiogram, administered on September 15, 1987, revealed that claimant suffered from a 21.9 percent binaural impairment. Thereafter, employer voluntarily paid permanent partial disability compensation for a 21.9 percent binaural impairment on October 30, 1987. On February 5, 1988, employer amended its payment of compensation to reflect permanent partial disability payments based on an 8 percent whole man impairment. The case was referred to the Office of Administrative Law Judges for a formal hearing on June 6, 1989.

After a formal hearing, at which time employer contested the issue of its liability for penalties under Section 14(e) of the Act, 33 U.S.C. §914(e), the administrative law judge accepted

the parties' stipulation that claimant suffered from a work-related 8 percent whole man impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Additionally, the administrative law judge found that claimant was entitled to a Section 14(e) assessment.

Subsequent to the administrative law judge's initial Decision and Order, claimant's counsel filed a fee petition for work performed before the administrative law judge in which he requested an attorney's fee of \$3,036.50, representing 24 hours of legal services performed at an hourly rate of \$125, and \$36.50 in expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order, the administrative law judge considered employer's specific objections to the fee request, reduced the hours sought by counsel to 17.25, reduced the requested hourly rate to \$110, approved counsel's requested \$36.50 in expenses, and thereafter awarded claimant's counsel an attorney's fee of \$1,934.

On appeal, employer challenges the attorney's fee awarded to claimant's counsel, incorporating the objections it made below into its appellate brief.

Employer initially contends that under Section 28(b) of the Act, 33 U.S.C. §928(b), the fee awarded to claimant's counsel should be based solely upon the difference between the amount of voluntary benefits initially paid to claimant and the amount ultimately awarded by the administrative law judge. Pursuant to 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, employer voluntarily paid claimant permanent partial disability compensation based on a whole man impairment of 8 percent, pursuant to Section 8(c)(23) of the Act. At the hearing, however, employer contested the issue of whether claimant was entitled to an assessment under Section 14(e) of the Act; pursuant to the administrative law judge's decision, claimant was found to be entitled to additional compensation under Section 14(e). Employer is thus liable for claimant's attorney's fees for services performed at the administrative law judge level, pursuant to Section 28(b), since claimant's counsel succeeded in obtaining additional benefits for claimant.¹ *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision after remand).

¹Employer'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. 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)(unpublished); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Employer also contends that the fee awarded is excessive, maintaining that the instant case was routine, uncontested, and not complex. The administrative law judge considered the routine and uncomplicated nature of the instant case in reducing counsel's requested hourly rate from \$125 to \$110. Moreover, contrary to employer's contention, this was not an uncontested case as employer controverted the issue of Section 14(e) penalties before the administrative law judge. We, therefore, reject employer's contention that the awarded fee must be further reduced on this criterion because employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of \$110. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *see generally Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds).

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge. The administrative law judge addressed employer's specific objections to the number of hours requested by claimant's attorney for certain services, and reduced the number of hours requested by counsel by 6.75. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the Supplemental Decision and Order-Awarding Attorney's Fee of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge