

BRB No. 93-1413

PERCY S. BEAUGEZ)	
)	
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-61) 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 December 29, 1986, which revealed an 18.3 percent binaural impairment. A second audiogram, administered on September 17, 1987, revealed that claimant suffered from an 8.4 percent binaural impairment. On October 26, 1987, employer initiated voluntary payment of compensation for an 8.4 percent binaural impairment pursuant to 33 U.S.C. §908(c)(13)(B). Emp. Ex. 6. On February 18, 1988, employer modified its voluntary payments to reflect claimant's entitlement to permanent partial disability payments based on the conversion of a 13.35 percent binaural impairment to a 5 percent whole man impairment pursuant to 33 U.S.C. §908(c)(23)(1988). Emp.

Ex. 7. The case was referred to the Office of Administrative Law Judges for a formal hearing on September 27, 1988.

In his Decision and Order, the administrative law judge averaged the two audiograms and determined that claimant suffered from a 13.35 percent binaural impairment. He then determined that as claimant was a retiree, pursuant to *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *rev'g in 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. Accordingly, he converted claimant's 13.35 percent binaural hearing impairment to a 5 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (*AMA Guides*), and awarded compensation based upon the stipulated compensation rate of \$151.33.¹ He also awarded claimant medical benefits, interest, and an assessment under Section 14(e), 33 U.S.C. §914(e).

In an Order Granting Claimant's Motion for Reconsideration, the administrative law judge granted claimant's motion to amend his Decision and Order to reflect that as claimant was to receive compensation benefits as a retiree under Section 8(c)(23), his compensation benefits should be based on the national average weekly wage of \$302.66 in effect on December 29, 1986, the date of the filing audiogram, with a corresponding compensation rate of \$201.77, for a weekly payment of \$10.09.²

Claimant's counsel sought an attorney's fee of \$3,461, representing 27.5 hours at \$125 per hour, and \$23.75 in expenses 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 \$2,278.75, representing 20.5 hours at an hourly rate of \$110, plus expenses of \$23.75. 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.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fees. Employer argues that there is no fee liability under Section 28(a) of the Act, 33 U.S.C. §928(a), because there has been no successful prosecution of the claim since it initiated voluntary payment of benefits prior to referral, on October 26, 1987, and the amount it voluntarily paid claimant pursuant to Section 8(c)(13)(B) resulted in an overpayment such that at the weekly rate awarded under Section 8(c)(23), no benefits will be due for some time. Alternatively, employer argues 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.

¹No party has challenged the award of compensation 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 is properly compensated pursuant to 33 U.S.C. §908(c)(13)).

²Employer's amended Form LS-206, Payment of Compensation Without Award, dated February 18, 1988, reflects that employer's voluntary payments of compensation were based a compensation rate of \$151.33. Emp. Ex. 7.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). 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 Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we need not address employer's argument with respect to liability under Section 28(a), as the case at bar is governed by Section 28(b).³ Although at the time the case was referred by the district director to the Office of Administrative Law Judges on September 27, 1988, employer was making payments based on the same percentage of whole man impairment and compensation rate ultimately awarded by the administrative law judge, we note that while the case was pending before the administrative law judge, claimant, who prevailed on the contested issue of causation, was awarded medical benefits and interest.⁴ As claimant's counsel was ultimately successful in obtaining additional compensation for claimant while the case was before the administrative law judge, *see Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991); *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987), we affirm his 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 also objects to counsel's method of billing in minimum increments of one-quarter

³Employer argued below that counsel's fee petition should be disallowed by the administrative law judge, because it was filed well after the 20-day period specified in the administrative law judge's Decision and Order. Inasmuch, however, as the Act and regulations do not specify a time period for filing a fee petition, the administrative law judge acted within his discretion in entertaining the fee petition although it was untimely. *See* 20 C.F.R. §702.132.

⁴Claimant's counsel's efforts before the administrative law judge also resulted in claimant's obtaining an assessment under 33 U.S.C. §914(e). The Board has recognized that an award of a Section 14(e) penalty can support an attorney's fee award payable by employer and that the fact that the 10 percent assessment may be subsumed by virtue of employer's overpayment does not absolve employer of fee liability because its credit may one day run out and it will once again be required to make weekly payments to claimant. *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64-65 (1990)(decision on remand). In the present case, however, the compensation award was made in October 1990 and the administrative law judge's Supplemental Decision Awarding Attorney's Fees dated March 23, 1993 indicates that claimant was deceased as of that time, although the exact date of death is not mentioned. As employer voluntarily paid claimant \$4,040.51 as of January 12, 1989, Emp. Ex. 12, its credit for overpayment of compensation did not run out between the time of claimant's award and the time of his death; thus, claimant received no additional compensation by virtue of the award of the Section 14(e) assessment sufficient to support a finding of fee liability.

and one-half hour. Consistent with 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. January 12, 1995) (unpublished), we reduce the October 24, 1990 entry from one-quarter to one-eighth of an hour. 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*, 29 BRBS at 42; *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

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. 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 administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fees is modified as stated herein, and is otherwise affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge