

JAMES S. JUDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for the 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 Fees (89-LHC-3273) of Administrative Law Judge Richard D. Mills 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 will not be set aside unless shown by the challenging party 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 filed a claim seeking compensation for a noise-induced, work-related binaural hearing impairment. On January 11, 1988, employer voluntarily paid claimant \$379.33 for a .94 percent binaural impairment calculated pursuant to 33 U.S.C. §908(c)(13)(B) and an unspecified attorney's fee. On May 17, 1989, employer voluntarily paid claimant a lump sum of \$1,040.28<sup>1</sup> and \$37.44 in interest for a 2.27 percent binaural hearing impairment and an unspecified attorney's fee. On August 30, 1989, the case was referred to Office of Administrative Law Judges for a formal

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<sup>1</sup>Although employer's LS-208, Notice of Final Payment Form, indicates that \$1,419.61 was paid, there is a letter and claim report from F.A. Richard and Associates in the record verifying that \$1,040.28 was actually paid.

hearing.<sup>2</sup> At the hearing, however, the parties requested that the case be continued because they were close to reaching an agreement. Thereafter, claimant requested that the case be remanded to the district director inasmuch as agreement had been reached on all issues with the exception of attorney's fees. The record reflects that pursuant to the parties' agreement claimant was to receive \$1,457.05 in disability compensation. By Order dated October 1, 1991, the administrative law judge issued an Order remanding the case to the district director for appropriate disposition. *See* 20 C.F.R. §702.315.

Thereafter, claimant's counsel submitted a fee petition requesting \$2,753.25, representing 21.88 hours of services at \$125 per hour, and \$18.25 in expenses for work performed before the administrative law judge. Employer filed objections and claimant replied to employer's objections. The administrative law judge awarded counsel a fee of \$1,760, representing 16 hours at an hourly rate of \$110, plus expenses of \$18.25. 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 has been no successful prosecution of the claim because prior to referral it completed voluntary payment of compensation based on the same percentage of binaural hearing impairment ultimately agreed upon by the parties. Moreover, employer asserts that claimant received no additional compensation as a result of his counsel's efforts before the administrative law judge.

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<sup>2</sup>Although employer apparently issued checks totalling \$1,457.05 prior to referral, claimant failed to cash several of the checks within 90 days and employer had to re-issue the checks subsequent to referral.

Initially, we need not address employer's argument which related to fee liability under Section 28(a) of the Act, 33 U.S.C. §928(a), as the case at bar is governed by Section 28(b) of the Act, 33 U.S.C. §928(b). Although at the time the case was referred by the district director to the administrative law judge employer had voluntarily paid claimant \$1,457.05, the same amount the parties ultimately agreed was owed for claimant's disability claim, the \$1,457.05 it previously voluntarily paid was to cover not only claimant's disability claim, but also an unspecified attorney's fee.<sup>3</sup> Inasmuch as the parties ultimately agreed that claimant was entitled to receive \$1,457.05 for the disability claim alone, claimant's counsel was ultimately successful in establishing an inchoate right to additional compensation greater than that which employer voluntarily agreed to pay. See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64-65 (1991)(decision on remand). Accordingly, we affirm the administrative law judge's determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b). See generally *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84, 87-88 (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 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.).

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). Employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected, as the administrative law judge considered this objection, and his award 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).

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 Supplemental Decision and Order Awarding Attorney's Fees of the administrative law judge is affirmed.

SO ORDERED.

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<sup>3</sup>Claimant's fee petition suggests that claimant may have also received medical benefits as a result of counsel's efforts before the administrative law judge but we are unable to confirm this on the sketchy record before us.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge