

WILLIAM A. MALONE	)	
	)	
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 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.

Employer appeals the Supplemental Decision and Order - Awarding Attorney Fee (89-LHC-2637) 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's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of \$2,968.75, representing 23.75 hours of legal services, at an hourly rate of \$125 per hour, as well as \$42.25 in expenses, for work performed before the administrative law judge in connection with claimant's hearing loss claim. Employer filed objections to the attorney's fee petition. Subsequently, the administrative law judge, after noting employer's objections to the fee petition, reduced both the number of hours and the hourly rate sought by counsel and awarded counsel a fee of \$2,062.25, representing 18.75 hours of services rendered at an hourly rate of \$110, as well as the expenses requested by counsel.

Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief.

Employer initially contends that claimant's counsel is not entitled to an attorney's fee payable by employer since employer voluntarily paid benefits to claimant and thus claimant did not engage in a successful prosecution of his claim. Pursuant to Section 28(b) of the Act, 33 U.S.C. §928(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. *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 pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). At the hearing, however, employer contested the issue of whether claimant was entitled to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e); pursuant to the administrative law judge's decision, claimant was found to be entitled to additional compensation under Section 14(e). Employer is hence 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.<sup>1</sup> *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991).

Employer next 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. 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); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *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).

We next reject employer's objections to the number of hours awarded by the administrative law judge, as it has not shown that the administrative law judge abused his discretion in this regard. *See Ross*, 29 BRBS at 42; *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Moreover, employer's objection to counsel's method of billing in minimum increments of one-quarter hour is rejected since the administrative law judge in the instant case specifically reduced various entries submitted by counsel from one-quarter hour to one-eighth hour; thus, the administrative law judge's award conforms to the criteria set forth in the

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<sup>1</sup>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.2d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

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. Jan. 12, 1995) (unpublished).

Finally, we note that the administrative law judge's fee order contains a mathematical error. Specifically, in the body of his decision, the administrative law judge approved 18 hours of services rendered at an hourly rate of \$110; in his order, however, administrative law judge directs employer to pay claimant's counsel a fee of \$2,062.50, representing 18.75 hours of services rendered at an hourly rate of \$110. We therefore modify the administrative law judge's fee award to reflect employer's liability for a fee of \$1,980, representing 18 hours of approved services at an hourly rate of \$110.

Accordingly, the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fee is modified to reflect employer's liability for an attorney's fee of \$1,980; in all other respects the administrative law judge's fee award is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge