

BRB No. 93-1470

BURLEN W. STRINGER)
)
 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 (88-LHC-1777) 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 September 8, 1987, which revealed a 13.8 percent binaural impairment. Thereafter, employer voluntarily paid permanent partial disability compensation to claimant for a 13.8 percent binaural impairment on June 8, 1988, pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13).

After a formal hearing, at which time employer contested the issues of the extent of claimant's work-related hearing loss and its liability for penalties under Section 14(e) of the Act, 33 U.S.C. §914(e), the administrative law judge awarded claimant permanent partial disability compensation for a 13.8 percent binaural impairment, pursuant to Section 8(c)(13) of the Act. Additionally, the administrative law judge found that claimant was entitled to a Section 14(e), 33 U.S.C. §914(e), assessment. Thereafter, in an order granting employer's motion for reconsideration, the administrative law judge modified his decision to reflect claimant's entitlement to permanent partial disability compensation for a 5 percent whole man impairment, pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23).

Claimant's counsel filed a fee petition for work performed before the administrative law judge in which he requested an attorney's fee of \$2,365.75, representing 18.5 hours of legal services performed at an hourly rate of \$125, and \$53.25 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 both the number of hours and the hourly rate requested by counsel, and thereafter awarded claimant's counsel an attorney's fee of \$1,950.75, representing 17.25 hours of legal services performed at a rate of \$110 per hour, and \$53.25 in expenses.

On appeal, employer challenges the attorney's fee awarded to claimant's counsel by the administrative law judge, incorporating the objections 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 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 *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991).

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 the extent of claimant's hearing loss, as well as 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).

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). 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 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 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 14 hours of services rendered at an hourly rate of \$110; in his order, however, the administrative law judge directs employer to pay claimant's counsel a fee of \$1,897.50, representing 17.25 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 \$1,540, representing 14 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 \$1,540; 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