

BRB No. 93-1478

ROBERT E. GARNER	)	
	)	
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.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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-2645) 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 contrary to law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On April 28, 1987, claimant, a shipfitter for employer, filed a claim for a 16.3 percent noise-induced work-related binaural hearing impairment. Employer did not file a notice of controversion. On December 18, 1987, employer made a lump sum voluntary payment of \$1,662.79, for a 10.55 percent monaural hearing impairment pursuant to Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A), based upon an average weekly wage of \$455.20. The case was referred to the Office of Administrative Law Judges for a formal hearing on June 7, 1989.

In his Decision and Order, the administrative law judge awarded claimant compensation for a 10.55 percent monaural impairment under Section 8(c)(13)(A), based upon an average weekly wage of \$499, interest, medical benefits, and an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). On appeal, the Board vacated the monaural award, holding that in light of the

aggravation rule claimant is entitled to compensation for a 22 percent binaural hearing loss under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B). *Garner v. Ingalls Shipbuilding, Inc.*, BRB Nos. 91-589 and 91-1148 (May 29, 1992) (unpublished).

Claimant's counsel sought an attorney's fee of \$3,162.75, representing 24 hours at \$125 per hour, and \$162.75 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 \$2,170.25, representing 18.25 hours at an hourly rate of \$110, plus expenses of \$162.75. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant responds to employer's appeal, incorporating his response brief below into his brief on appeal.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fees. Employer argues that there was no successful prosecution of the claim under Section 28(a) of the Act, 33 U.S.C. §928(a), because it accepted liability for the claim and commenced payment of benefits for a 10.55 percent monaural hearing loss on December 18, 1987, within 30 days of receiving formal notice of the claim from the district director. Employer asserts that because it voluntarily tendered compensation, Section 28(b) of the Act, 33 U.S.C. §928(b), is applicable to the determination of fee liability and any fee awarded pursuant to this subsection should be limited to the difference between the compensation for a 10.55 percent monaural hearing loss voluntarily paid by employer and the compensation for a 22 percent binaural hearing loss ultimately found due by the Board.

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). Although at the time the case was referred by the district director to the Office of Administrative Law Judges on June 7, 1989, employer had completed voluntary payment of compensation for a 10.55 percent monaural impairment based upon an average weekly wage of \$455.20, as a result of counsel's efforts before the administrative law judge and subsequently before the Board, claimant was awarded compensation for a 22 percent binaural hearing loss based upon the higher average weekly wage of \$499, a Section 14(e) assessment, medical benefits, and interest. As claimant's counsel was ultimately successful in obtaining additional compensation for claimant, we affirm the administrative law judge's 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'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 objection to various itemized entries involving billing in minimum increments of one-quarter hour also is rejected, as the administrative law judge considered employer's objections, 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]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished).

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 Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge