

|                       |   |                    |
|-----------------------|---|--------------------|
| JEFFRIE R. BROWN      | ) |                    |
|                       | ) |                    |
| Claimant-Respondent   | ) |                    |
|                       | ) |                    |
| v.                    | ) |                    |
|                       | ) |                    |
| INGALLS SHIPBUILDING, | ) | DATE ISSUED:       |
| INCORPORATED          | ) |                    |
|                       | ) |                    |
| Self-Insured          | ) |                    |
| Employer-Petitioner   | ) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth and John F. Dillon (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 Fees (88-LHC-3612) 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 performed on July 16, 1987, which revealed a 13.65 percent binaural hearing impairment. On February 4, 1988, employer commenced voluntary payment of compensation for a 13.65 percent binaural hearing loss based on an average weekly wage of \$302.66. The case was referred for a formal hearing on September 16, 1988. Prior to the formal hearing, on May 3, 1989,

employer voluntarily paid permanent partial disability benefits for a 13.65 percent binaural hearing loss based on an average weekly wage of \$479.10.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffers from a 13.65 percent binaural hearing loss and determined that as claimant's hearing loss was work-related, he was entitled to compensation pursuant to 33 U.S.C. §908(c)(13)(B) based on the stipulated average weekly wage of \$479.10. The administrative law judge further determined, over employer's objection, that claimant is entitled to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e).

Claimant's counsel sought an attorney's fee of \$3,053.25, representing 24 hours of services at \$125 per hour, and \$22 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 \$1,974.50, representing 17.75 hours of services at an hourly rate of \$110, plus expenses of \$22. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant, incorporating his reply brief below, responds, urging affirmance of the fee award.

On appeal, employer initially contends that under Section 28(b) of the Act, 33 U.S.C. §928(b), it should not be liable for an attorney's fee after February 4, 1988, because employer commenced voluntary payment of compensation as of that date and claimant's counsel's efforts thereafter did not result in the successful prosecution of the hearing loss claim.

In the instant case, employer voluntarily paid claimant for a 13.65 percent binaural hearing loss based upon average weekly wage of \$302.66 prior to referral. While the case was pending before the administrative law judge, employer agreed to pay claimant compensation based on the higher average weekly wage of \$479.10 and to accept liability for his medical expenses. Moreover, as a result of counsel's effort before the administrative law judge, claimant ultimately prevailed, over employer's objection, in establishing claimant's entitlement to an assessment under Section 14(e). As claimant's counsel was successful in obtaining additional compensation for claimant while the case was before the administrative law judge, 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 specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected. Although the administrative law judge erred in finding this method of billing permissible, this error is harmless as 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 Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge