

JOE S. KIRKLAND	)	
	)	
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 Richard D. Mills, 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 Fees (91-LHC-0563) 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 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, on September 27, 1989, sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered on August 29, 1989, which revealed a 29.3 percent binaural impairment. Claimant underwent additional audiometric evaluations on March 21, 1990 and June 12, 1991, which revealed binaural impairments of 16.9 percent and 26.8 percent respectively. Previously, claimant filed a claim for a noise-induced work-related hearing loss on September 30, 1986; as a result of this prior claim, employer voluntarily paid permanent partial disability compensation to claimant for a 5 percent binaural impairment on December 16, 1986.

After a formal hearing, the administrative law judge found that claimant suffers from a 21.85 percent binaural impairment and awarded claimant permanent partial disability benefits for that impairment pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). Next, the administrative

law judge found that claimant was entitled to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). Lastly, the administrative law judge found that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

Subsequent to the administrative law judge's Decision and Order, claimant's counsel filed a fee petition for work performed before the administrative law judge in which he requested an attorney's fee of \$2,645, representing 20.88 hours of legal services performed at an hourly rate of \$125, and \$35 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 the hours sought by counsel to 14.375, reduced the requested hourly rate to \$110, approved counsel's requested expenses, and thereafter awarded claimant's counsel an attorney's fee of \$1,616.25.

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. Claimant has not responded to this appeal.

Employer initially contends that it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), since it accepted liability for the claim and voluntarily began paying permanent partial disability benefits to claimant prior to receiving formal notice of the claim from the district director's office. Alternatively, employer argues that under Section 28(b) of the Act, 33 U.S.C. §928(b), the fee awarded to claimant's counsel should be based solely upon the difference between the amount of voluntary benefits initially paid to claimant and the amount ultimately awarded by the administrative law judge.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(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. 33 U.S.C. §928(b). *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we need not address employer's argument with respect to liability under Section 28(b), inasmuch as the instant case is governed by Section 28(a). Specifically, we note that while employer voluntarily paid claimant permanent partial disability compensation for a 5 percent binaural impairment based on claimant's initial claim in 1986, employer did not initiate voluntary payments of compensation to claimant following the filing of claimant's September 27, 1989, claim for benefits. Rather, employer contested the issue of the extent of claimant's work-related hearing loss, as well as its liability for a penalty under Section 14(e). Thereafter, the administrative law judge determined that employer was liable for claimant's 21.85 percent binaural impairment pursuant to Section 8(c)(13), as well as a penalty under Section 14(e). As employer never

voluntarily paid claimant permanent partial disability benefits and contested the issue of the extent of claimant's hearing loss at the hearing, employer is liable for claimant's attorney's fees for services performed at the administrative law judge level pursuant to Section 28(a).<sup>1</sup>

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 been 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) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(table).

---

<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.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge