

BRB Nos. 96-0615
and 96-0615S

DONALD E. McLEOD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:_____
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Tracie M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees (94-LHC-1966) of Administrative Law Judge Lee J. Romero, 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and may be set aside only if shown by the challenging party 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).

On August 20, 1993, claimant filed a notice of injury and a claim for hearing loss benefits against employer for whom claimant last worked on October 2, 1986. In his Decision and Order, the administrative law judge, after calculating claimant's average weekly wage pursuant to 33 U.S.C. §910(c), awarded claimant benefits for a 4.06 percent binaural impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). The administrative law judge additionally held employer liable for interest on any sums determined to be due and owing as of August 20, 1993, the date of the notice of injury.

Claimant's counsel subsequently filed a fee petition with the administrative law judge requesting attorneys' fees totalling \$2,651.50, representing 11.6 hours of services rendered by lead counsel at \$165 per hour and 5.9 hours of service by associate counsel at \$125 per hour, for work performed before the administrative law judge in connection with this hearing loss claim. Employer filed objections to the fee request. In a Supplemental Decision and Order, the administrative law judge, after considering the objections raised by employer, reduced the number of hours sought by counsel to 11.5, reduced the hourly rate sought to \$150 for claimant's lead counsel, approved the hourly rate of \$125 for claimant's associate counsel, and thereafter awarded claimant's counsel attorneys' fees totalling \$1,427.50.

On appeal, claimant contends that interest should accrue as of October 2, 1986, the date of claimant's last covered exposure to injurious noise, and not from when employer obtained knowledge of claimant's injury. Claimant additionally contends that the administrative law judge erred by determining claimant's average weekly wage pursuant to 33 U.S.C. §910(c), on the basis of claimant's earnings during the ten-week period that claimant was employed by employer. In a supplemental appeal, claimant challenges the fee awarded by the administrative law judge; specifically, claimant asserts that if the Board should reverse the administrative law judge's decision on the aforementioned interest and average weekly wage issues, it must consequently hold that counsel is entitled to a fee for all time reasonably expended on those issues. Employer responds, urging affirmance of both decisions.

We first address claimant's argument that his entitlement to interest accrues from his last date of exposure to injurious noise in 1986. The Board's recent decision in *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (*en banc*), is dispositive of the issue raised by claimant. In *Renfroe*, the Board held that in a hearing loss case, interest accrues on compensation from the date benefits become due under Section 14(b), 33 U.S.C. §914(b), and accrues on all benefits due and unpaid from that date until they are paid. The Board held that an employer cannot wrongfully withhold or delay the payment of benefits until they are "due," and benefits do not become "due" under Section 14(b) until employer has knowledge of the injury, or notice of the injury pursuant to Section 12, 33 U.S.C. §912. *Renfroe*, 30 BRBS at 105; *see also Meardry v. Int'l Paper Co.*, 30 BRBS 160 (1996). Therefore, for the reasons articulated in *Renfroe*, we reject claimant's contention that interest should accrue as of the date of last exposure to injurious noise, and not as of the date that employer obtained knowledge of claimant's injury. We thus affirm the administrative law judge's determination that employer is liable for interest on benefits accruing as of August 20, 1993, the date of the notice of injury.

Claimant next challenges the administrative law judge's calculation of his average weekly wage at the time of his injury, contending that the administrative law judge should have calculated his average weekly wage under Section 10(a) of the Act rather than Section 10(c) of the Act. 33 U.S.C. §910(a), (c). We disagree. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); see *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.¹ See *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. See *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. See *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).

In the instant case, the administrative law judge determined that Section 10(a) was inapplicable since claimant's Social Security Earnings Statement fails to specify during which months or quarters of 1985 and 1986 claimant received the earnings, the record contains no evidence as to the number of weeks or the number of days that claimant actually worked during the relevant time period from October 3, 1985 through October 2, 1986, and that the record evidence was devoid of any other evidence which could establish the actual earnings claimant received during the 52-week period preceding his injury. The administrative law judge thus declined to use Section 10(a) and, rather, calculated claimant's average weekly wage pursuant to Section 10(c). Our review of the record reveals that claimant's payroll records fail to apportion the number of hours worked by claimant during a pay period to specific days. See Employer's Exhibit 6. We thus hold that the administrative law judge rationally determined that Section 10(a) could not be applied to the instant case, and that claimant's average weekly wage should be calculated pursuant to Section 10(c). Accordingly, as the administrative law judge's calculation under Section 10(c) is unchallenged, it is affirmed.

Lastly, in his supplemental appeal, claimant challenges the administrative law judge's reduction of his requested fee. Specifically, claimant contends that, should the Board hold that the administrative law judge erred in determining the date upon which to base the calculation of interest due claimant and in determining claimant's average weekly wage, claimant would have successfully prosecuted these issues and would be entitled to a fee. See 33 U.S.C. §928(b). In reducing the fee sought by claimant for work performed at the administrative law judge level, the administrative law judge specifically found that claimant had not been successful regarding the two disputed issues

¹In the instant case, no party contends that Section 10(b) is applicable.

referred to the Office of Administrative Law Judges for resolution; average weekly wage and the amount of interest due claimant. As we have affirmed the administrative law judge's determinations regarding the calculation of interest and average weekly wage in this case, claimant has not been successful in overturning the administrative law judge's decision on those issues; the relief requested by claimant is therefore denied. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees of the administrative law judge are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge