

SYLVESTER HAYES)	
)	
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.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, 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 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, who was employed by Ingalls Shipbuilding, Incorporated from March 15, 1972 until December 8, 1972, sought occupational hearing loss benefits under the Act. In his Decision and Order on the merits, the administrative law judge found that claimant had a work-related binaural high frequency hearing loss which measured as a zero percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), and was thus not compensable. Inasmuch, however, as claimant was successful in establishing that his non-rateable hearing impairment was work-related, the administrative law judge found that employer was required to pay or reimburse claimant for reasonable medical expenses which resulted from his work injury.

Thereafter, claimant's counsel sought an attorney's fee of \$1,800, representing 12 hours at \$150 per hour, 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 \$1,375, representing 11 hours at an hourly rate of \$125 plus expenses of \$50. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

On appeal, employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fees, arguing that as the successful claim upon which the attorney fee request is based on an award of medical benefits which to date totals zero, there has been no truly successful prosecution of the claim. We disagree. The United States Court of Appeals for the Fifth Circuit's opinion in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 155, 27 BRBS 14, 16 (CRT)(5th Cir. 1993) is dispositive of this issue. In *Baker*, the court held that although a claimant may suffer a work-related hearing loss that does not result in measurable impairment under the *AMA Guides*, he may still be entitled to medical benefits under Section 7 provided that an adequate evidentiary basis exists to support the award and that an attorney's fee may be assessed against employer contingent thereon. In this case, employer controverted causation and claimant ultimately prevailed on this issue, a necessary prerequisite to establishing his entitlement to an award of medical benefits. Moreover, as claimant asserts in his response brief, because Dr. Garcia recommended binaural amplification in his February 15, 1992 report, CX-7, the administrative law judge's award of medical benefits was premised on an adequate evidentiary basis. As claimant's counsel successfully prosecuted his claim for medical benefits, the administrative law judge's finding that claimant's attorney is entitled to a fee to be assessed against employer pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), is affirmed. See *Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT); *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987).

Employer also avers that claimant obtained only a nominal gain in benefits, and the attorney's fee awarded therefore should be limited, in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). In considering counsel's fee petition, the administrative law judge specifically addressed the regulatory criteria governing approval of an attorney's fee under the Act pursuant to 20 C.F.R. §702.132, which provides that the award of any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. See generally *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Moreover, the administrative law judge also considered employer's argument that claimant's only gain in benefits was that of future medical benefits in evaluating the fee request. See Supplemental Decision and Order at 2. Employer's assertion that the hours claimed by counsel were excessive and unnecessary in light of the *de minimis* or nominal value of the claim is rejected.¹ The administrative law judge's

¹Although employer cites *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished), in support of its assertion that the fee awarded is excessive, the Board has held

finding that counsel's fee is not limited to an amount less than the compensation obtained accords with law. *See, e.g., Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). Inasmuch as the administrative law judge considered the amount of benefits obtained in relation to the fee requested in making his fee award, we reject employer's contention that the fee must be further reduced on this basis. *See generally Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89, 93 (1993)(Brown, J., dissenting).

Employer next objects to the number of hours and hourly rates awarded by the administrative law judge; we reject these contentions, as employer has not shown that the administrative law judge abused his discretion in this regard.² *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, as 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]*, 46 F.3d 66 (5th Cir. 1995) (table). Accordingly, the number of hours and hourly rates awarded by the administrative law judge are affirmed.

that unpublished cases should not be cited or relied on by the parties as they lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990). In addition, the Board's decision in *Cuevas* was based on the facts of that case and has no bearing on the fee award herein. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 236-237 (1993).

²Employer additionally contends that counsel's fee should be reduced given the routine and non-complex nature of the case. We note that the complexity of the case was among the factors considered by the administrative law judge in evaluating the fee request. We therefore reject employer's contention that the awarded fee must be further reduced on this basis. *See* 20 C.F.R. §702.132; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (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