BRB No. 91-723

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

Appeal of the Decision and Order and Supplemental Decision and Order of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth and John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

Paul B. Howell and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for the employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees (89-LHC-438) of Administrative Law Judge Quentin P. McColgin 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 rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b), (3). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant worked for employer, Ingalls Shipbuilding, Inc. (Ingalls), from 1969 until 1979,

where he was exposed to loud noise. He subsequently worked for two other maritime employers. Claimant worked for Allied Ship Repair (Allied) for one day, and for Stanwick Corporation (Stanwick) for six months. Claimant, who retired in 1981, underwent audiometric testing on March 14, 1988, which indicated he suffered a 5.9 percent binaural hearing loss. Cl. Ex. 2. Claimant subsequently filed this claim for benefits under the Act, alleging that his hearing loss stemmed from his exposure to repeated loud noise while employed with Ingalls. Cl. Ex. 4. Ingalls controverted the claim, arguing that it could not be held liable for any benefits resulting from claimant's hearing loss, as any noise-induced hearing impairment was caused by his employment with subsequent maritime employers. Claimant subsequently underwent a second audiometric examination which revealed a 9.38 percent binaural impairment.

The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's hearing loss arose from his employment with Ingalls based on the parties' stipulation that claimant suffers from a noise-induced hearing loss and that he was exposed to noise levels during his employment with Ingalls which could have caused his hearing loss. The administrative law judge then found that Ingalls did not rebut the Section 20(a) presumption because the administrative law judge credited claimant's testimony that he was not exposed to excessive noise levels while employed by subsequent longshore employers. The administrative law judge therefore concluded that claimant's hearing loss resulted from noisy working conditions at Ingalls, and he held Ingalls liable for claimant's benefits.

The administrative law judge further found that claimant is a retiree, and that therefore benefits should be calculated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). The administrative law judge, averaging the results of the two audiograms, determined that claimant suffers from a 7.6 percent binaural impairment, which converts to a 3 percent permanent impairment of the whole person under Section 8(c)(23). The administrative law judge also held Ingalls liable for claimant's medical benefits, including claimant's initial hearing evaluation which employer had refused to pay. Lastly, the administrative law judge found that employer is liable for an attorney's fee to claimant's counsel.

Claimant's attorney thereafter filed a fee petition for work performed before the administrative law judge, requesting a fee for 26 hours of time billed at an hourly rate of $125, representing a total fee of $3,289.50, plus $39.50 in expenses. In his Supplemental Decision and Order, the administrative law judge considered claimant's fee petition and employer's objections thereto. The administrative law judge reduced the requested hours to 19.625 and the hourly rate to $100, awarding claimant's counsel the sum of $1,962.50 plus $39.50 in expenses, to be paid by employer. Supplemental Decision and Order at 2.

On appeal, employer contends the administrative law judge erred in finding it to be the responsible employer. Specifically, employer notes that in an earlier claim for benefits for an asbestos-related condition, claimant testified as to his employment responsibilities at Stanwick, and employer contends that this employment subjected claimant to loud noise. Employer therefore contends that it is not the responsible employer. Employer also appeals the administrative law judge's award of an attorney's fee. Claimant responds, urging affirmance.

In the instant case, the administrative law judge invoked the Section 20(a) presumption. To rebut the presumption, employer must present facts to show that exposure to injurious stimuli did not cause claimant's harm. Employer also may escape liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see also General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991). The employer responsible for a claimant's disability compensation is the last maritime employer to expose claimant to injurious stimuli prior to the date on which claimant became aware of the fact that he was suffering from an occupational disease. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In the instant case, the responsible employer is the last maritime employer to expose claimant to injurious noise stimuli prior to his date of awareness, which the administrative law judge found to be March 14, 1988. Order Amending Decision and Order at 1.

Employer asserts that either Allied or Stanwick is the responsible employer, contending that claimant's subsequent work with those employers was noisy. The administrative law judge credited claimant's testimony that the nature of his work activities during this subsequent employment did not expose him to excessive noise levels. Decision and Order at 4. Claimant testified that he did not perform much labor himself, but that he only observed the fitting and burning of plastic pipe. Claimant repeatedly stated that he was not exposed to loud noise at either Allied or Stanwick throughout his hearing testimony and deposition testimony. *See* Tr. at 30-31, 34; Emp. Ex. 18 at 58-59, 72, 95, 100. Moreover, although claimant testified in an earlier proceeding that he actually burned uninsulated steel pipes at Stanwick, he was not asked about the noise level to which he was exposed. *See, e.g.*, Emp. Ex. 16 at 31, 34, 39. The administrative law judge is not compelled to infer from this testimony that claimant was exposed to injurious noise levels. As the administrative law judge has considerable discretion in matters involving the credibility of witnesses, *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990), we affirm his crediting of claimant's testimony in the instant proceeding and his finding that employer failed to establish that claimant was exposed to injurious noise in his subsequent employment. *Avondale Industries, Inc.*, 977 F.2d at 192, 26 BRBS at 115 (CRT). Therefore, we affirm the administrative law judge's finding that Ingalls is the responsible employer. *See Lins*, 26 BRBS at 65; *see also Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

In its appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, employer contends that it is not liable for an attorney's fee because there has been no

final order issued in the instant case, and, therefore, no successful prosecution pursuant to Section 28, 33 U.S.C. §928. In the alternative, employer contends that the fee award should be reduced given the amount of benefits and the routine and uncomplicated nature of the case. Employer also contests the $100 hourly rate awarded claimant's counsel, asserting that a rate of $75 or $80 would be more appropriate. In addition, employer incorporates into its appellate brief the objections to various itemized entries it presented below.

We initially reject employer's contention that there has been no successful prosecution under Section 28 merely because the case has not become final. It is well-established that an administrative law judge may enter a fee award before the case is final, but that the award is not enforceable until all appeals are exhausted. *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980).

We further reject employer's contention that the fee award is excessive and should be reduced. With regard to employer's specific objections to itemized entries, which it made below, the administrative law judge discussed all of employer's objections, reduced the number of hours by 6.375, and subsequently found that the remaining work performed by claimant's attorney's was reasonable and necessary. Employer has not established that the administrative law judge abused his discretion in so doing. Thus, we decline to disturb the administrative law judge's rational determinations. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Lastly, we hold that the rate of $100 per hour, which was awarded to claimant's attorney, is reasonable. The administrative law judge agreed with employer that the requested rate of $125 was excessive in light of the routine nature of the case, and employer has not established that the awarded rate of $100 constitutes an abuse of discretion.[1] *See Maddon*, 23 BRBS at 62; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1992).

Accordingly, the Decision and Order and Supplemental Decision and Order of the administrative law judge are affirmed.

SO ORDERED.

---

[1] We decline to address employer's contention that the fee award should be reduced because of the amount of benefits awarded, as employer did not raise this issue below. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note however that the administrative law judge's award of an attorney's fee in this case is consistent with the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983). Employer did not pay benefits voluntarily and controverted the claim. Claimant was successful in the prosecution of his claim, obtaining permanent partial disability benefits pursuant to Section 8(c)(23), medical benefits, and interest. Moreover, the administrative law judge fully considered employer's objections in arriving at a reasonable fee award consistent with the regulatory criteria set forth in 20 C.F.R. §702.132. *See also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161, 165 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988).

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge