BRB Nos. 91-1104
and 91-1104A

J. W. BROADWAY	)	
	)	
Claimant-Respondent	)	
Cross-Respondent	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Traci M. Castille and Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

*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).

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits, and employer cross-appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-2717) of Administrative Law Judge C. Richard Avery 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 findings of fact and conclusions of law of the administrative law judge 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).

On July 7, 1987, claimant filed a claim for benefits under the Act for a work-related hearing loss and notified employer of his injury. Previously, on June 6, 1987, claimant underwent an audiometric examination conducted by Dr. Wold which revealed a 65.9 percent binaural impairment.[1] On May 11, and 14, 1987, Assistant District Director[2] Robert H. Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, or controversions, and making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of claim by the district director's office. Employer subsequently filed a Notice of Controversion (Form LS-207) on December 7, 1987; no benefits were paid prior to the formal hearing.

At the formal hearing conducted on September 26, 1990, the parties stipulated that claimant suffered a work-related hearing loss and that, because claimant was a retiree, compensation should be based on an impairment rating of the whole person; the parties further stipulated that the applicable average weekly wage for compensation purposes was $302.66. Subsequent to the hearing, claimant underwent another audiometric examination, conducted by Dr. Graves on November 21, 1990, which revealed a 24.4 percent binaural hearing loss.

[1]Prior to the hearing, claimant underwent two additional audiograms. Dr. Lamppin conducted an audiogram on August 28, 1987, but the results were invalid due to lack of cooperation. Dr. Hans conducted an audiogram on October 13, 1987 revealing zero percent impairment, but an accompanying report meeting the regulatory requirements was not provided. The administrative law judge, therefore, found neither of these audiograms to be valid.

[2]The title "District Director" has been substituted for the title "Deputy Commissioner" used in the statute. 20 C.F.R. §702.105.

In his Decision and Order, the administrative law judge, relying upon the results of Dr. Graves' examination, found that claimant has a 24.4 percent binaural impairment, and that claimant's hearing loss should be compensated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Thus, after converting claimant's 24.4 percent binaural impairment to an 8 percent impairment of the whole person and utilizing the compensation rate stipulated to by the parties, the administrative law judge concluded that claimant was entitled to a permanent partial disability award of $16.14 per week. The administrative law judge also found the "excuse" granted by the district director to be invalid, and thus determined that employer was liable for an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). Lastly, the administrative law judge ordered employer to pay claimant's medical expenses and interest on all compensation due claimant.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of $4,190.15, representing 32.25 hours of services rendered at an hourly rate of $125, and $158.90 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 number of hours sought to 30.75, reduced the hourly rate sought to $100, disallowed $48.90 in expenses, and thereafter awarded claimant's counsel an attorney's fee of $3,075, and $110 in expenses.

On appeal, the Director contends that the administrative law judge erred in failing to provide a date on which claimant's benefits should commence. The Director further argues that the administrative law judge's Decision and Order sets forth no information as to whether the stipulated compensation rate is the correct rate in accordance with *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). In its cross-appeal, employer contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Employer further contests the amount of the attorney's fee awarded by the administrative law judge to claimant's counsel. Claimant has responded to employer's cross-appeal, urging affirmance of the administrative law judge's award of a Section 14(e) assessment[3] and attorney's fee.

The Director initially contends that the instant case must be remanded for a determination as to the date claimant's benefits should commence; specifically, the Director argues that the date claimant's compensation should begin is the date of claimant's retirement, since "if the onset date is found to be after retirement, the claimant will not receive any compensation for a period which he definitely did have an employment-related hearing impairment." Director's Brief at 5-6. Since the parties filed their briefs on appeal in the instant case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), which is dispositive of the issue raised by the Director. In *Bath Iron Works*, the Court found that a worker who sustains a work-related hearing loss suffers disability simultaneously with his or her exposure to excessive noise. As a loss of hearing occurs simultaneously with the exposure

[3]We deny claimant's motion to strike portions of employer's arguments concerning Section 14(e); claimant's argument in the motion will be considered as part of his response to employer's cross-appeal.

to excessive noise,the injury is complete when the exposure ceases, and the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss. *See Bath Iron Works*, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT). Based on this analysis, the court stated that hearing loss cannot be considered "an occupational disease which does not immediately result in disability," *see* 33 U.S.C. §910(i), and held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23).

Pursuant to the Supreme Court's decision in *Bath Iron Works* that the relevant time of injury for calculating a retiree's hearing loss benefits is the date of his last exposure to injurious noise levels, we hold that claimant's benefits must commence on the date of his last exposure to injurious noise levels while working for employer. *Moore v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 91-1598 (June 30, 1993). In the instant case, the administrative law judge made no findings as to the date of claimant's last exposure to injurious noise levels.[4] Accordingly, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to determine, in accordance with the holding of *Bath Iron Works*, the onset date for the commencement of claimant's benefits.

In *Moore*, the Board held that as the Supreme Court's decision in *Bath Iron Works* is dispositive of the Director's appeal of the issue of the onset date for claimant's award, it would be incongruous to commence a Section 8(c)(23) award on the date of claimant's last exposure with employer and ignore the Supreme Court's holding that claims for hearing loss benefits under the Act, whether filed by current employees or retirees, must be compensated pursuant to Section 8(c)(13) of the Act. Thus, although no party on appeal has explicitly challenged the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23), in accordance with the holding of *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23), and we modify that award to reflect that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(13) of the Act for a 24.4 percent binaural impairment.

[4]We note that the claim for compensation alleges exposure to repeated noise during claimant's employment with employer from 1965 to 1966 and from 1972 to 1973, noting that employer was claimant's last maritime employer and that claimant is retired. Claimant's Social Security records for the period from January 1973 through December 1986 list earnings from Litton Systems, Inc. for the first three quarters of 1973.

The Director additionally contends that the administrative law judge's Decision and Order is unclear as to whether the stipulated average weekly wage is in accordance with *Ingalls Shipbuilding*. In his Decision and Order, the administrative law judge accepted the parties' stipulation that the applicable average weekly wage for calculating claimant's compensation is $302.66. As neither claimant nor employer has appealed the administrative law judge's decision to accept their stipulation, we hold that the administrative law judge committed no reversible error in accepting that stipulation and using the average weekly wage of $302.66 to calculate claimant's compensation rate. *See Bath Iron Works*, 113 S.Ct. at 698 n.12, 26 BRBS at 153 n.12 (CRT). On remand, in view of the change in law, the administrative law judge may exercise his discretion to permit the parties to reopen this issue.

In its appeal, employer initially contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Specifically, employer asserts that the administrative law judge erred in finding that the "excuse" granted by the district director is invalid. Employer further contends that the instant case is distinguishable from *Ingalls v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), because the excuse was granted prior to the date claimant notified employer of his injury rather than retroactively. Additionally, employer contends that even if it had not been excused, the concept of "replacement income" is not applicable in this case, so the Section 14(e) penalty should not apply.

The precise arguments raised by employer regarding the excuse granted by the district director, the inapplicability of *Fairley, supra*, and the concept of "replacement income," have been rejected by both the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934 (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *see also Ingalls Shipbuilding, Inc.*, 898 F.2d at 1095, 23 BRBS at 67 (CRT). We therefore reject these specific allegations of error raised by employer, and affirm the administrative law judge's finding that employer is liable for a Section 14(e) assessment.

Lastly, we address employer's appeal of the administrative law judge's award of an attorney's fee. An award of an attorney's fee 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).

Employer initially contends that the lack of complexity of the instant case does not warrant the fee awarded by the administrative law judge. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Thus, while the complexity of issues should be considered by the administrative law judge pursuant to 20 C.F.R. §702.132, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge considered this specific objection in

reducing counsel's requested hourly rate from $125 to $100; we therefore reject employer's contention that the awarded fee must be reduced on this basis.

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge. In considering counsel's fee petition, the administrative law judge set forth each objection made by employer below and thereafter reduced the number of hours requested by 1.5. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion by merely reducing the hours requested by counsel; thus, we decline to reduce further or disallow the hours approved by the administrative law judge.[5] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

We further hold that the administrative law judge acted within his discretion in viewing counsel's billing method as permissible. *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); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Lastly, we reject employer's assertion that the awarded hourly rate of $100 is excessive. The administrative law judge determined that the hourly rate of $125 sought by claimant's counsel was excessive, and thereafter awarded claimant's counsel an hourly rate of $100, finding that rate to be fair and reasonable in the region where this case was tried. As employer's mere assertion that the awarded rate does not conform to the reasonable and customary charges in the area is insufficient to meet its burden of proving that the rate is excessive, we affirm the rate awarded by the administrative law judge to counsel.[6] *See Maddon*, 23 BRBS at 55; *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, in accordance with the Supreme Court's holding in *Bath Iron Works*, the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(23) is vacated and modified to reflect claimant's entitlement to an award pursuant to Section 8(c)(13), and the case is remanded to the administrative law judge for determination of the onset date for the commencement of claimant's benefits. The administrative law judge's award of a Section 14(e) assessment and his Supplemental Decision and Order Awarding Attorney's Fees are affirmed.

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[5]We will not address employer's contention that the fee awarded by the administrative law judge is excessive when compared to the "nominal" amount of benefits awarded to claimant, since this contention is raised for the first time on appeal. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261, 265-266 (1988). We note, however, that employer did not voluntarily pay benefits to claimant and that claimant was awarded benefits only after, with the assistance of counsel, he prevailed on the contested issues of the nature and extent of his disability, medical benefits, and the applicability of Section 14(e).

[6]We note that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, does not support employer's contention that the fee requested in the instant case was unreasonable.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge