BRB No. 91-1790

LILLIE B. WALLACE (Widow of LESTER WALLACE, JR.) and MARILYN M. WALLACE (dependent child) Claimants-Respondents v. INGALLS SHIPBUILDING, INCORPORATED Self-Insured Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED:_____ DECISION and ORDER

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

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

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees (88-LHC-2946) 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 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 applicable 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Decedent worked for employer as a chipper from 1964 until 1973. During the course of his employment, decedent was exposed to injurious noise. Decision and Order at 2. On December 8, 1986, he underwent an audiological evaluation, the results of which revealed a 21.88 percent binaural impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*. Cl. Ex. 2. Decedent notified employer of his injury and filed a claim for compensation on February 27, 1987. Cl. Exs. 3-4; Jt. Ex. 1. Employer filed its First Report of Injury (LS-202 form) on March 18, 1987, stating "no injury admitted" in response to several questions, and it responded to the claim on March 30, 1987, stating it would not controvert the claim based on the evidence available, and unless it discovered contrary evidence, the claim was accepted. Cl. Ex. 5; Emp. Ex. 2. Employer filed its first notice of controversion on July 22, 1987 and its second on July 25, 1989. Cl. Exs. 7-8.

A hearing was held on March 8, 1991, wherein claimant[1] and employer stipulated that the date of injury was December 8, 1986, and they stipulated as to the various filing and notice dates. Decision and Order at 2. Employer disputed its designation as the responsible employer and its liability for compensation, medical expenses, a Section 14(e), 33 U.S.C.

[1]Decedent died on May 22, 1989 due to lung cancer. Emp. Ex. 5 at 6-7. Thereafter, his wife and dependent child were substituted as claimants; however, they will be referred to in the singular in this decision.

*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).

§914(e), penalty, and an attorney's fee. *Id.* The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking decedent's injury to his employment, and found that employer failed to rebut the presumption, or to establish that decedent was exposed to injurious noise in employment subsequent to his employment with employer. *Id.* at 2-3. Further, he determined that claimant is entitled to benefits for decedent's 21.88 percent binaural impairment, pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B) (1988), based on an average weekly wage of $365.06, for a period of 43.76 weeks. *Id.* at 4-5. Additionally, the administrative law judge concluded that employer failed to file a timely notice of controversion and, therefore, is liable for a 10 percent penalty in accordance with Section 14(e) of the Act, 33 U.S.C. §914(e). *Id.* Employer appeals the decision, contending that the administrative law judge erred in finding it to be the responsible employer and in holding it liable for a Section 14(e) penalty. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

Following the issuance of the Decision and Order, claimant's counsel filed a petition for approval of an attorney's fee. He requested 38.75 hours for services rendered at a rate of $125 per hour, plus $41.25 in expenses. The administrative law judge awarded counsel a fee for 34.75 hours of service, at a rate of $110 per hour, for a total fee of $3,822.50 and he denied expenses. Supp. Decision and Order. Employer appeals the award of an attorney's fee, incorporating the objections it made below into its appellate brief, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in finding it to be the responsible employer. Employer argues that decedent was employed by two maritime employers subsequent to his employment with employer, and that claimant is unable to produce conclusive evidence showing that decedent was not exposed to noise during that subsequent employment. Although claimant does not dispute this fact, as the administrative law judge recognized, employer's argument is legally erroneous. Under the Act, if a claimant establishes the liability of one covered employer, by presenting facts which would invoke the Section 20(a) presumption, he need not also establish that another employer is not liable. *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Once the Section 20(a) presumption linking an employee's injury with his employment is invoked, the employer has the burden of rebutting the presumption. To do so in this case, employer must present facts to show that decedent's hearing loss is not related to exposure to noise. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Employer also may escape liability by showing that it is not the responsible employer because decedent was exposed to injurious stimuli while employed by a subsequent, covered employer prior to the date on which he became aware of his occupational disease. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff*, 19 BRBS at 150-151; *see also General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991).

In this instance, the responsible employer is the last maritime employer to expose decedent to injurious noise stimuli prior to the stipulated date of injury, December 8, 1986. Although it is undisputed that decedent was employed in maritime employment subsequent to his work for

employer, proof of subsequent maritime employment establishes only half of the requirement for determining that another employer is responsible. Employer bears the burden of establishing that decedent was exposed to injurious stimuli while working for those later employers. *See Avondale Industries*, 977 F.2d at 190-192, 26 BRBS at 113-115 (CRT); *Lins*, 26 BRBS at 64; *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). In this case, the administrative law judge properly found that employer failed to make such a showing, as the record is devoid of any evidence on this subject. Establishing claimant's inability to disprove subsequent workplace exposure to injurious stimuli does not satisfy employer's burden. *See, e.g., Avondale Industries*, 977 F.2d at 190-192, 26 BRBS at 113-115 (CRT); *Susoeff*, 19 BRBS at 151-152.

Additionally, employer argues that it should be entitled to invoke the Section 20(a) presumption on its behalf against decedent's subsequent maritime employers, and that claimant must make a claim for disability benefits against potentially liable employers in the reverse order of decedent's employment, beginning with the most recent employer and proceeding backwards. For the reasons set forth in *Lins*, 26 BRBS at 65, we reject employer's contentions. *See also General Ship Service*, 938 F.2d at 962, 25 BRBS at 25 (CRT); *Susoeff*, 19 BRBS at 151 n. 2. Consequently, we affirm the administrative law judge's finding that employer is the responsible employer and is liable to claimant for decedent's 21.88 percent binaural impairment.

Employer next contends it is not liable for a Section 14(e) penalty because it controverted the claim in a timely manner by filing its LS-202 form on March 18, 1987. Section 14(e) provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely controversion under Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director after a showing that, owing to conditions beyond its control, employer could not pay such installment within the prescribed period. Section 14(d) requires an employer controverting the right to compensation to file a notice of controversion "on or before the fourteenth day after he has knowledge of the alleged injury or death. . . ." 33 U.S.C. §914(d). A notice of controversion must contest the right to compensation, and it must include the grounds on which the controversion is based.

In this instance, employer had notice of the injury on February 27, 1987, but it did not file a notice of controversion until July 22, 1987. Employer contends that its March 18, 1987 LS-202 form constitutes a notice of controversion. The administrative law judge rejected this contention, finding that employer's LS-202 form is not the equivalent of a notice of controversion. In *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting), the Board held that employer's LS-202 form, which was filled out in a manner identical to the one in the instant case, is insufficient as a matter of law to constitute a notice of controversion pursuant to Section 14(d). For the reasons stated in *Snowden*, we affirm the administrative law judge's finding that employer is liable for a Section 14(e) penalty.[2]

[2]For the reasons stated in *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*), *aff'd in pertinent part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23

Finally, employer challenges the administrative law judge's award of an attorney's fee. Initially, we reject employer's assertion that the attorney's fee award is premature because claimant has not successfully prosecuted this claim, as the case is on appeal. It is well established that an administrative law judge may render an attorney's fee determination when he issues his decision, and that such award is not effective or enforceable until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). Therefore, we hold that the administrative law judge committed no error in awarding a fee while the case was pending appeal.

Employer next contends the administrative law judge's award based on an hourly rate of $110 is excessive, and it argues that a rate of $75 or $80 would be more appropriate given the lack of complexity of this case. As the administrative law judge specifically considered the complexity of the case and employer's objection to the hourly rate in reducing the rate to $110 per hour from $125, and as employer has offered no support for its assertion that the rate awarded is excessive, we affirm the hourly rate determination.[3] *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993); *Snowden*, 25 BRBS at 252.

We also reject employer's challenge to counsel's use and the administrative law judge's approval of the minimum billing method. The Board has previously held that this method is reasonable and complies with the applicable regulation, 20 C.F.R. §702.132, and use of it is not an abuse of discretion. *Watkins*, 26 BRBS at 182; *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

Next, employer argues that the administrative law judge erred in awarding three hours for preparation and filing of discovery documents on July 28, 1988. Employer submitted the affidavit of Barbrea Dorsey, an employee of F. A. Richard & Associates, employer's claims administrator, attesting to the fact that claimant's counsel previously billed time for 28.5 hours for the date in question, not including the time billed for this case.[4] The administrative law judge acknowledged

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BRBS 61 (CRT) (5th Cir. 1990), employer's March 30, 1987 response to the claim also does not constitute a notice of controversion under the Act.

[3]We decline to address employer's argument concerning the amount of the fee in relation to the benefits awarded, as this issue is raised for the first time on appeal. *See, e.g., Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that employer paid no benefits voluntarily, and that claimant was awarded disability benefits under Section 8(c)(13) in the amount of $10,649.87, plus interest, medical expenses, and a 10 percent penalty, having prevailed on all contested issues before the administrative law judge. Thus, claimant was fully successful in obtaining benefits, and the awarded fee is not unreasonable in light thereof. *Bullock v. Ingalls Shipbuilding, Inc.*, __ BRBS __, BRB Nos. 90-194/A (July 16, 1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting).

[4]The affidavit states that the affiant has personal knowledge of the itemized fee petitions in

the objection and stated:

> Lastly, as to the one hour sought by Claimant's counsel on July 28, 1988, inasmuch as the work claimed for that day had been previously billed in reference to other claims as shown by Employer's objections, I find that the time cannot be again recovered in this instance.

Supp. Decision and Order at 3. The administrative law judge's reference to the "one hour sought" on the date is clearly erroneous as counsel requested three hours for services performed that day. Based on the administrative law judge's reasoning, we agree with employer, and we reduce the fee by an additional two hours.

Employer also contests the administrative law judge's award of one hour on January 7, 1991 for preparation and filing of a Motion to Substitute, as being duplicative of the service provided on July 18, 1990 for which the administrative law judge awarded one hour of time. Employer failed to raise this issue before the administrative law judge and cannot raise it for the first time on appeal. *See, e.g., Watkins*, 26 BRBS at 182; *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

In its remaining contentions, which were rejected by the administrative law judge, employer asserts that various services were unnecessary or that the time approved for them is excessive. Because employer has failed to show that the administrative law judge abused his discretion in allowing time for these services, having specifically considered employer's contentions, we reject them. *See generally Watkins*, 26 BRBS at 182; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991); *see also Maddon v. Western Asbestos Co.*, 23 BRBS 55, 62 (1989). Therefore, the attorney's fee award is modified to reflect employer's liability to claimant's counsel for a fee of $3,602.50, representing 32.75 hours of services at a rate of $110 per hour.

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question, and that such petitions are in the files of F.A. Richard & Associates.

Accordingly, the Decision and Order Awarding Benefits is affirmed, and the Supplemental Decision and Order Awarding Attorney's Fees is modified in accordance with this decision. In all other respects, the Supplemental Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge