

HENRY L. TONEY)	BRB Nos. 88-3789 and
)	88-3789A
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	
)	
)	
HENRY L. TONEY)	BRB No. 88-4188
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

The Director, Office of Workers' Compensation Programs (the Director), has filed a motion for clarification in the captioned case. In this motion, the Director requests that the Board clarify that portion of its decision holding that claimant is entitled to a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e), on all benefits due and unpaid November 20, 1986 through February 5, 1988, the date the case was referred for a formal hearing. The Director asserts that in this case the penalty is properly assessed on claimant's entire hearing loss award under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), citing *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76, 78-79 (1993) (the onset

date of permanent partial disability for occupational hearing loss for retirees is the date of last exposure to injurious noise levels) and *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993) (order on reconsideration) (the Section 14(e) penalty applies to all benefits due from the date of injury which were unpaid on the 28th day after employer received notice).

The Director's Motion for Clarification is granted. The Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 699-700, 26 BRBS 151, 154 (CRT) (1993), establishes that the date of last exposure is the relevant time of injury for determining a retiree's benefits for occupational hearing loss. Thus, the Director correctly asserts that claimant's injury occurred, at the latest, as of the time he stopped working for employer in 1979. Claimant was awarded compensation for a 37.8 percent binaural hearing loss pursuant to Section 8(c)(13), entitling him to compensation for 75.6 (37.8 percent of 200) weeks from the date of his injury. The Section 14(e) assessment in the present case accordingly applies to the entire award of compensation, as employer failed to pay benefits or controvert the claim in a timely manner, and these benefits were "due and unpaid" on the 28th day after employer received notice of claimant's injury. See *Pullin*, 27 BRBS at 45; *Browder v. Dillingham Ship Repair*, 25 BRBS 88, *aff'g on recon.* 24 BRBS 216 (1991). We, therefore, modify the Board's decision to reflect that the Section 14(e) penalty applies to the entire award of benefits.

Claimant's counsel has filed a petition for an attorney's fee

for work performed before the Board, requesting a fee for 7 hours of services at \$150 per hour, plus expenses of \$72. Employer has filed objections to the fee petition.

Contrary to employer's contention that claimant's only success before the Board was obtaining a Section 14(e) penalty, claimant was fully successful in defending his award of benefits pursuant to Section 8(c)(13) and his attorney's fee awarded by the administrative law judge.¹ See generally *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Thus, the partial success issues raised by employer are not relevant to our consideration of counsel's fee petition.

Employer next objects to counsel's quarter-hour billing method, and to specific entries on March 20, 1989, for review of employer's notice of appeal, on November 9, 1989, for preparation of the Petition for Review and brief, and on November 17, 1989, for preparation of the response to employer's Petition for Review and brief. We reject the contention that counsel's billing method is impermissible in this case, as the fee petition conforms to the guidelines set forth in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished). With regard to the one-quarter hour requested for review of employer's notice of

¹It is immaterial that employer voluntarily paid claimant benefits pursuant to Section 8(c)(13) prior to the administrative law judge's entry of an award. If the award had been improper, employer would have been entitled to a credit against its future liability. 33 U.S.C. §914(j).

appeal, we agree that the charge is excessive and we reduce it to one-eighth of an hour. The remaining services are reasonably commensurate with the necessary work performed before the Board, and we award a fee for 6.875 hours of services.

Lastly, employer contends that the requested hourly rate of \$150 is excessive.² Employer notes that the fee petition states that counsel's hourly rate before September 1, 1993 was \$125, and further avers that an hourly rate of \$90 is appropriate for the attorneys who performed the services in this case. We agree that the requested rate of \$150 is excessive for services performed when the hourly rate in effect was \$125. We find, however, that the rate of \$125 is appropriate for services performed before September 1, 1993, and that the rate of \$150 is appropriate thereafter. Thus, we award a fee of \$865.63, representing 6.625 hours at \$125 per hour and .25 hours at \$150, plus expenses of \$72.

Accordingly, we modify the Board's decision to clarify that employer is liable for a Section 14(e) assessment on the entire award of compensation in this case. Claimant's counsel is entitled to an attorney's fee of \$865.63, plus expenses of \$72, for services performed before the Board to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

²We reject employer's reliance on the decision of Judge Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (Sept. 5, 1991), for the reasons stated in *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, 159 (1994) (decision on recon.).