BRB Nos. 91-1520

GERALD D. DOSSETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees (89-LHCA-3558) of Administrative Law Judge Richard D. Mills 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 which 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 has worked as a pipefitter at employer's shipyard since 1971, where he has been exposed to loud industrial noise. An audiometric evaluation performed by Dr. K.D. McClelland on January 22, 1987, revealed a 13.1 percent hearing loss in the right ear, a zero percent loss in the left ear, or a binaural hearing loss of 2.2 percent. On February 23, 1987, claimant filed a claim for occupational hearing loss benefits under the Act based on the results of the January 22, 1987, audiogram and provided employer with notice of his injury that same day. CX 4, 5. On March 6, 1987, employer filed its Form LS-202, First Report of Injury. Employer filed its LS-207, Notices of Controversion, on April 13, 1987, and July 22, 1987. On May 14, 1987, Assistant District Director[1] Robert 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 from making payments in regard to those claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of a claim from the district director. A second audiogram performed on December 13, 1988, was interpreted by Dr. Gordon Stanfield, Ph.D., as indicating a 13.2 percent right ear hearing loss, a zero percent loss in the left ear, or a binaural loss of 2.2 percent.

The case was referred to the Office of Administrative Law Judges for a formal hearing on August 21, 1989. Prior to the formal hearing, the parties stipulated that claimant suffered an occupationally-related hearing loss due to noise exposure while working for employer, and that the audiograms of record established a binaural hearing loss of 2.2 percent, or a monaural right ear hearing loss of 13.1 percent. Accordingly, the only unresolved issues before the administrative law judge were whether claimant's hearing loss should be compensated on a monaural or binaural basis, whether employer is liable for a ten percent penalty under Section 14(e), and the amount of, and employer's liability for, an attorney's fee.

The administrative law judge awarded claimant compensation for a 13.1 percent monaural right ear impairment pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c) (13)(A), based upon the stipulated compensation rate of $337.65. The administrative law judge also awarded claimant medical benefits pursuant to 33 U.S.C. §907, and interest. Finally, the administrative law judge held employer liable for an assessment under Section 14(e), rejecting employer's argument that its LS-202, First Report of Injury form, filed on March 6, 1987, was the functional equivalent of a timely filed notice of controversion.

Thereafter, claimant's attorney filed a fee petition for work performed before the administrative law judge, in which he requested $3,344.25, representing 26.25 hours of services at $125 per hour plus $65 in expenses. Employer filed objections to the petition. In a Supplemental Decision and Order Awarding Attorney Fees dated March 16, 1993, the administrative law judge, addressing employer's objections, disallowed 6.75 of the 26.25 hours claimed and reduced the hourly rate sought to $110. Accordingly, he awarded claimant's counsel a fee of $2,145, representing 19.5

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

hours of services rendered at $110 per hour plus the $65 in requested expenses.

On appeal, employer contends that the administrative law judge erred in awarding claimant compensation for his occupational hearing loss under Section 8(c)(13)(A), rather than Section 8(c)(13)(B), citing the Board's decision in *Tanner v. Ingalls Shipbuilding, Inc.*, 26 BRBS 43 (1993)(*en banc*)(Smith and Dolder, JJ., dissenting), *rev'd*, 2 F.3d 143, 27 BRBS 113 (CRT)(5th Cir. 1993), as controlling authority. Employer further contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Employer also appeals the administrative law judge's fee award on various grounds, incorporating the objections it made below into its appellate brief. Claimant responds, urging that the administrative law judge's award of compensation under Section 8(c)(13)(A) be affirmed inasmuch as the Board's decision in *Tanner* was subsequently reversed by the United States Court of Appeals for the Fifth Circuit. In addition, claimant urges that the administrative law judge's award of a Section 14(e) assessment and award of an attorney's fee be affirmed.

We initially reject employer's contention that claimant's hearing loss benefits in the present case should be awarded on a binaural basis pursuant to Section 8(c)(13)(B), rather than on a monaural basis pursuant to Section 8(c)(13)(A). As claimant states, in the time since employer filed its brief on appeal, the United States Court of Appeals for the Fifth Circuit issued its decision in *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT)(5th Cir.1993), *rev'g* 26 BRBS 43 (1992)(*en banc*)(Smith and Dolder, JJ., dissenting). In *Tanner*, the court, reversing the Board's *en banc* decision, held that compensation for a claimant who suffers from a monaural impairment should be calculated under Section 8(c)(13)(A) rather than Section 8(c)(13)(B). As this case arises within the jurisdiction of the Fifth Circuit, the court's decision in *Tanner* is dispositive of employer's argument on appeal. Because the administrative law judge's award of compensation for a 13.1 percent monaural hearing loss pursuant to Section 8(c)(13)(A) in this case is consistent with the Fifth Circuit's decision in *Tanner*, it is affirmed.

The next issue to be addressed is whether the administrative law judge properly held employer liable for a Section 14(e) assessment. Employer asserts that the "excuse" granted by the district director was valid, and that even if it had not been excused, the Section 14(e) penalty should not apply because the concept of "replacement income" is not applicable in hearing loss cases. In the alternative, employer contends that the administrative law judge erred in finding that its March 6, 1987, First Report of Injury form was not the functional equivalent of a timely filed notice of controversion.

The precise arguments raised by employer regarding the excuse granted by the district director 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, 26 BRBS 107 (CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *see also Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). Employer's assertion

that its March 6, 1987, First Report of Injury form is the functional equivalent of a timely filed notice of controversion similarly must fail. The arguments raised by employer regarding the notice of controversion have also been previously addressed by the Board 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). In *Snowden*, the Board held that an employer's First Report of Injury form, which was filled out identically to the one in the present case, was not the functional equivalent of a notice of controversion because it did not contain all of the information required by Section 14(d), 33 U.S.C. §914(d). Thus, for the reasons stated in *Snowden*, we affirm the administrative law judge's determination that employer's LS-202 form does not constitute a notice of controversion for purposes of Section 14(e). Accordingly, the administrative law judge's determination that employer is liable for a Section 14(e) assessment is also affirmed.

Turning to employer's appeal of the administrative law judge's attorney's fee award, employer initially contends that since it tendered benefits to claimant prior to the transfer of the claim to the Office of Administrative Law Judges, and the administrative law judge's award of compensation for a monaural hearing loss is certain to be reversed on appeal, it is not liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), because there ultimately will have been no successful prosecution of the claim. Employer alternatively argues that because it voluntarily paid claimant benefits prior to referral, any fee awarded should be based solely upon the difference between the amount of voluntary benefits initially paid to claimant and the amount ultimately awarded by the administrative law judge in accordance with Section 28(b) of the Act, 33 U.S.C. §928(b).

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by employer. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we note that the basic premise underlying employer's Section 28(a) argument is incorrect inasmuch as the administrative law judge's award of compensation on a monaural basis has been affirmed on appeal; thus, we need not address employer's argument with respect to liability under Section 28(a), inasmuch as the case at bar is governed by Section 28(b). Specifically, we note that although employer made voluntary payments of compensation to claimant prior to referral for a 2.2 percent binaural hearing impairment, claimant continued to assert, and employer actively disputed, claimant's right to compensation on a monaural basis and his entitlement to an assessment under Section 14(e). As claimant's counsel was ultimately successful in establishing claimant's right to additional compensation while the case was before the administrative law judge, his determination that employer is liable for claimant's attorney's fee under Section 28(b) is affirmed. *See Rihner v.*

Boland Marine and Manufacturing Co., 24 BRBS 84 (1990). Moreover, we reject employer's argument that, under Section 28(b), the amount of the fee is limited to the amount of additional compensation gained for the reasons stated in *Hoda v. Ingalls Shipbuilding, Inc.*, BRBS , BRB Nos. 88-3187/A (Aug. 12, 1994)(Decision and Order on Reconsideration)(McGranery, J., dissenting).

We also reject employer's argument that the amount of the fee award is, in any event, excessive. Although employer asserts that a consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the $2,145 fee awarded, we need not address these arguments which employer has raised for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on recon. en banc*, 28 BRBS 102 (1994); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993), *aff'd mem.*, No 93-4357 (5th Cir. Dec. 9, 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that the administrative law judge specifically considered the complexity of the issues in reducing counsel's requested hourly rate from $125 to $110. Moreover, we note that claimant did prevail over employer's objections in establishing his right to disability compensation on a monaural basis, medical benefits, and a Section 14(e) assessment. Thus, the fee award made by the administrative law judge is not, contrary to employer's assertions, inconsistent 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). *See Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting).

Although employer also asserts that the $110 hourly rate awarded does not conform to reasonable and customary charges in the area and that an hourly rate of $80 to $85 for claimant's senior attorney and a rate of $70 to $75 for the junior associates would be more appropriate, we reject this argument.[2] Employer's assertions are insufficient to meet its burden of establishing that the $110 hourly rate awarded is unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Moreover, for the reasons stated in *Watkins*, 26 BRBS at 182, we reject employer's challenge to counsel's minimum quarter hour billing method.[3]

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[2]Employer attached a copy from the Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

[3]We reject employer's argument that the fee order of United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, Nos. 89-4459, 89-4468, 89-4469 (5th Cir. July 25, 1990)(unpublished), mandates a different result. In that fee order, the court declined to award fees for work before it based on a quarter-hour minimum billing method. However, the determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

Employer additionally contests the number of hours requested by counsel and approved by the administrative law judge, contending that time spent in certain discovery-related activity, in trial preparation and attendance, and in reviewing and preparing various legal documents was either unnecessary or excessive. In entering the fee award, the administrative law judge considered the totality of employer's objections, disallowed 6.75 of the total hours claimed as excessive, and found the remaining itemized entries to be reasonable and necessary. We decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon,* 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge