BRB No. 92-0490
and 92-0490A

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| ANTHONY J. POLITE | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| INGALLS SHIPBUILDING, INCORPORATED | ) | DATE ISSUED: |
| | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | |
| Cross-Petitioner | ) | DECISION and ORDER |

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax), Pascagoula, Mississippi, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-2410) of Administrative Law Judge Quentin P. McColgin 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse

*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).

of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was exposed to injurious noise levels during the course of his employment for employer from 1971 to 1977. On October 14, 1986, claimant underwent an audiometric examination conducted by Dr. Roberts, which revealed a 3.2 percent binaural impairment. Thereafter, on December 24, 1986, claimant filed a claim for benefits under the Act for a work-related 3.2 percent binaural hearing loss. At employer's behest, claimant underwent another audiometric examination, conducted by Dr. Stanfield, on May 4, 1989, which revealed a 6.88 percent binaural impairment. A formal hearing was held on June 19, 1990, at which the parties disputed the extent of claimant's disability, the applicability of Section 14(e) of the Act, 33 U.S.C. §914(e), and employer's liability for an attorney's fee. At the hearing, claimant's attorney requested that Dr. Roberts' audiogram be invalidated on the basis that this physician's testing did not include a measurement at the 3000 hertz (Hz) level, as mandated by the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides).* Claimant thus urged that the sole remaining audiogram of record, conducted by Dr. Stanfield, be accepted as the most valid indication of claimant's degree of impairment; in the alternative, claimant argued that the results of these two audiograms should be averaged.

In his Decision and Order, the administrative law judge considered and rejected claimant's attempt to impeach Dr. Roberts' assessment of claimant's hearing loss and determined that Dr. Stanfield's higher assessment does not reflect the extent of hearing loss sustained by claimant during his employment with employer. Thus, having found determinative Dr. Roberts' audiometric evaluation which revealed a 3.2 percent binaural impairment, the administrative law judge ordered employer to pay claimant compensation for a 3.2 percent binaural impairment pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), as well as an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

Thereafter, claimant's counsel submitted a fee petition requesting a fee of $3,494.50, representing 27.75 hours of services rendered at an hourly rate of $125, and $25.75 in expenses. Employer filed objections to the fee request. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge considered employer's specific objections to the fee request, reduced the number of hours sought to 17.125, reduced the hourly rate to $100, allowed the additional hour claimed for defending the fee request, and awarded claimant's counsel a fee of $1,712.50, plus $25.75 in expenses.

On appeal, claimant challenges the administrative law judge's decision to credit and rely upon the audiometric evaluation conducted by Dr. Roberts over the audiometric evaluation conducted by Dr. Stanfield. Employer responds, urging affirmance of the administrative law judge's Decision and Order. Employer, in its appeal, challenges the attorney's fee awarded by the administrative law judge.

Claimant, in challenging the administrative law judge's determination regarding the extent of

claimant's hearing impairment, initially contends that the administrative law judge erred by not rejecting the results of the audiogram conducted by Dr. Roberts. In support of his contention, claimant asserts that this audiogram does not comport with the AMA *Guides*.

Section 8(c)(13)(E) of the Act provides that:

> Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

33 U.S.C. §908(c)(13)(E); *see also* 20 C.F.R. §702.441(d). Pursuant to the AMA *Guides*, an evaluation of binaural impairment is to include testing of each ear separately at the frequencies of 500 Hz, 1000 Hz, 2000 Hz, and 3000 Hz. *See* AMA *Guides*, (3d ed.) p. 166-169. These four decibel values are then to be totalled for each ear separately, and the percentage of binaural impairment is to be determined by consulting a table included in the AMA *Guides*. *Id.*

In the instant case, the administrative law judge, in crediting Dr. Roberts' audiometric evaluation, fully set forth his reasons for rejecting claimant's argument that Dr. Roberts' assessment of claimant's hearing loss failed to comport with the requirements of the AMA *Guides*. Specifically, the administrative law judge found probative the statement in Dr. Roberts' narrative report that his impairment rating is "according to AMA standards." CX-2. The administrative law judge further determined that the absence of evidence on the attached audiogram's worksheet to confirm that claimant's hearing had been measured at the 3000 Hz level is insufficient to show that Dr. Roberts' calculation of claimant's hearing impairment does not comply with the AMA *Guides*. It is well-established that an administrative law judge, in adjudicating a claim, is entitled to evaluate the credibility of all witnesses, including doctors, and to draw his own inferences from the evidence. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Based on the record before us, we cannot say that the administrative law judge's decision to credit the written report of Dr. Roberts which affirmatively states that he calculated claimant's impairment in accordance with the AMA *Guides*, and his interpretation of Dr. Roberts' audiogram worksheet, is inherently incredible or patently unreasonable. Accordingly, we reject claimant's contention that the administrative law judge committed error by crediting Dr. Roberts' evaluation of the extent of claimant's hearing impairment.

Claimant alternatively contends that, in evaluating the probative value of the two audiometric evaluations of record, the administrative law judge erred in failing to accord determinative weight to Dr. Stanfield's test results. We disagree. In declining to credit Dr. Stanfield's assessment that claimant has a 6.88 percent hearing loss, the administrative law judge specifically found that during the 30-month interval between Dr. Roberts' audiological examination

and Dr. Stanfield's examination, claimant sustained exposure to injurious noise levels while in the course of his self-employment working with motorized pleasure craft that could account for the increase in hearing impairment revealed by the subsequent audiometric evaluation. Our review of the record evidence reveals no basis for overturning the administrative law judge's determination that claimant's subsequent non-work-related noise exposure could account for the increase in hearing loss reported in the second test. *See generally Avondale Shipyards, Inc.,* 914 F.2d at 88, 24 BRBS at 46 (CRT)*; Cordero*, 580 F.2d at 1331, 8 BRBS at 744. We therefore affirm the administrative law judge's determination that Dr. Roberts' calculation is the most reliable measure of the extent of the hearing loss caused by claimant's employment with employer. *See generally Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991). The administrative law judge's finding that claimant is entitled to permanent partial disability compensation for a 3.2 percent binaural impairment is therefore affirmed.

In its appeal, employer, incorporating the objections it made below, challenges the fee awarded to claimant's counsel by the administrative law judge. Claimant responds, urging affirmance of the fee awarded.

Initially, we reject employer's contention that the fee award should be reduced because the amount of benefits awarded to claimant was nominal. This contention was not raised below, and need not be addressed for the first time on appeal. *See Hoda v. Ingalls Shipbuilding, Inc.,* BRBS , BRB Nos. 88-3187 and 88-3187A (Aug. 12, 1994) (McGranery, J., dissenting)*; Bullock v. Ingalls Shipbuilding, Inc.,* 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Employer next contends that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded by the administrative law judge to claimant's counsel. We disagree. 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, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *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, 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 further 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 10.625, a reduction of approximately 33 percent. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in

this regard; thus, we decline to reduce further or disallow the hours approved by the administrative law judge. *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 reducing counsel's minimum charge from one-quarter hour to one-eighth hour. *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 originated. As employer's assertion that the awarded rate does not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that this rate is excessive, we affirm the rate awarded by the administrative law judge to counsel.[1] *See Maddon*, 23 BRBS at 55; *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[1]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 awarded in the instant case was unreasonable.