

BRB Nos. 92-1257
and 92-1257A

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

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

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

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

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Supplemental Decision and Order Awarding Attorney's Fees (90-LHC-2933) 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). 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, who was exposed to loud noise while working in employer's shipyard as a welder from 1965 to 1974, sought occupational hearing loss benefits under the Act. The case was referred to

the Office of Administrative Law Judges for a formal hearing on August 10, 1990. Prior to the convening of the formal hearing, however, the parties entered into a proposed Section 8(i), 33 U.S.C. §908(i), settlement. The proposed settlement resolved all contested issues with the exception of claimant's entitlement to an attorney's fee which was to be determined by the administrative law judge in a supplemental decision after receipt of claimant's fee petition and employer's objections. Pursuant to the parties' agreement, employer was to pay claimant a lump sum of \$5,202.95 for his hearing loss, \$1,163.64 in interest, and \$520.30 in penalties. Employer also agreed to accept liability for claimant's future medical expenses which related to his occupational hearing loss. Employer, however, disavowed liability for medical expenses associated with claimant's slag burn injury to his ear drum which had occurred in approximately 1969 and which was the subject of a separate claim. The proposed agreement ultimately was approved by the administrative law judge in a Decision and Order dated September 30, 1991.

On July 25, 1991, claimant's counsel filed a fee petition requesting \$2,507.20 representing 19.5 hours of services at \$125 per hour and \$70 in expenses for work performed before the administrative law judge. On August 14, 1991, employer filed objections. On August 29, 1991, claimant replied to employer's objections, and in addition requested a fee for an additional one hour of time spent in defending his fee petition. On September 16, 1991, however, claimant wrote a letter to the administrative law judge in which he requested that the July 25, 1991, fee petition be disregarded. In this letter, claimant also informed the administrative law judge that a new fee petition would be submitted along with the settlement papers. On September 24, 1991, the parties submitted the Petition to Approve the Compromise Settlement along with the claimant's second fee petition and employer's objections thereto to the administrative law judge. In the second fee petition, claimant's counsel requested \$2,875 representing 23 hours of services billed at \$125 per hour plus \$70 in expenses.

In a Supplemental Decision and Order Awarding Attorney's Fees dated February 5, 1992, the administrative law judge reduced the hourly rate sought to \$110 and disallowed 8.125 of the 23 hours claimed. Accordingly, the administrative law judge awarded claimant's counsel the sum of \$1,636.25, representing 14.875 hours at \$110 per hour plus the \$70 in requested expenses. Employer appeals the administrative law judge's attorney's fee award on various grounds, incorporating the objections it made below into its appellate brief. BRB No. 92-1257. Claimant responds, urging affirmance.

Claimant also appeals the administrative law judge's fee award, arguing that the administrative law judge erred in failing to consider the request for a fee for an additional one hour for time spent in defending the July 25, 1991, fee petition which was made in claimant's August 29, 1991 reply to employer's objections to the July 25, 1991 fee petition. Claimant urges the Board to modify the administrative law judge's fee award to reflect his entitlement to this additional one hour of services. BRB No. 92-1257A. Employer responds that the administrative law judge did not err in failing to award this additional hour because claimant withdrew the July 25, 1991, fee petition to which the reply brief related. In the alternative, employer argues that even if the request for the additional one hour was properly before the administrative law judge, it was within his discretion to

disallow this request because claimant's counsel filed the same form response brief to employer's objections both before the district director in this case and in numerous other cases.

Initially, we reject employer's argument that the amount of the fee award is 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 in the \$1,636.25 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*, BRBS , BRB Nos. 90-194/A (February 15, 1994); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993), *aff'd mem.*, No. 93-4367 (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 involved in reducing the \$125 hourly rate sought to \$110. We further note that as a result of claimant's counsel's efforts before the administrative law judge, claimant was successful in establishing his right to \$5,202.95 in disability compensation, \$1,163.64 in interest and \$520.30 in penalties. In addition, claimant was successful in establishing his right to future medical benefits. On these facts, employer has not met its burden of establishing that the \$1,636.25 fee awarded by the administrative law judge was unreasonable.

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 \$75 to \$80 would be more appropriate, we reject this argument.¹ Employer's unsupported assertion is insufficient to meet its burden of establishing the hourly rate awarded by the administrative law judge was unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer additionally contests the number of hours requested by counsel and approved by the administrative law judge, contending that time spent in various discovery-related activities, in trial preparation and attendance, and in reviewing and preparing various legal documents was either unnecessary, excessive, or clerical in nature. In entering the fee award, the administrative law judge considered the totality of employer's objections, disallowed 8.125 hours, or approximately 35 percent to the total time claimed, and found the remaining itemized services to be reasonable and necessary. We decline to further reduce or disallow the hours rationally approved by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Finally, we reject employer's challenge to counsel's quarter-hour billing method; the Board has previously determined that this method is reasonable and comports with the requirement of the applicable regulation, 20 C.F.R. §702.132. *See Snowden v. Ingalls Shipbuilding*,

¹Employer attached a copy of an article from a 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.

Inc., 25 BRBS 245, 252 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds).² Accordingly, we reject employer's arguments on appeal.

Turning to claimant's appeal, we agree with employer that the administrative law judge did not err in failing to award the one hour fee which claimant requested in his August 29, 1991, reply to employer's objections. As this reply brief related to the July 25, 1991, fee petition which claimant ultimately withdrew as evidenced by claimant's September 16, 1991, correspondence, the fee request contained in this reply brief was also withdrawn from the administrative law judge's consideration. Accordingly, claimant's argument is also rejected and the fee award made by the administrative law judge is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

²We 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.