

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

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

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

Paul M. Franke, Jr. and 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:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (90-LHC-1823) 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). 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 of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who retired in 1979, sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered on December 12, 1986, which revealed a 21.8 percent binaural impairment. On June 14, 1988, claimant underwent a second audiometric evaluation, which revealed a 7 percent binaural impairment. A third

*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).

audiometric evaluation, conducted on May 4, 1990, revealed a 12.7 percent binaural loss. A formal hearing was held on June 11, 1991, wherein the parties disputed the issues of the nature and 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.¹ After averaging the results of the two most recent audiograms, the administrative law judge found that claimant suffers from a binaural impairment of 9.85 percent, and awarded claimant permanent partial disability benefits for a 3 percent whole man impairment under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Next, the administrative law judge found that inasmuch as employer did not file a timely notice of controversion, employer is liable for an assessment under Section 14(e), the exact amount to be determined by the district director.²

Claimant's counsel subsequently submitted a fee petition for work performed before the administrative law judge in which he requested an attorney's fee of \$3,548.25, representing 27.75 hours of legal services performed at an hourly rate of \$125, and \$79.50 in expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order, the administrative law judge considered employer's specific objections to the fee request, reduced the hours sought by counsel to 26.25, reduced the hourly rate to \$110, and thereafter awarded claimant's counsel an attorney's fee of \$2,887.50, plus \$45 in expenses.

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

Employer first 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.³ 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, 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*

¹Employer conceded at the formal hearing that it was liable for a Section 14(e) penalty. *See* transcript at 10-11.

²Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

³Employer additionally challenges the amount of the attorney's fee approved by the administrative law judge on the basis that the benefits ultimately received were nominal. Employer, however, failed to raise this contention in its objections to the fee petition which it filed with the administrative law judge; thus, we will not address this contention since it is raised 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), modified on other grounds on recon. en banc, 28 BRBS 102 (1994); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

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 hourly rate from \$125 to \$110. We therefore reject employer's contention that the awarded fee must be reduced on this basis. Moreover, we reject employer's assertion that the awarded hourly rate does not conform to the reasonable and customary charges in the area where the claim arose. Employer's mere assertion in this regard is insufficient to meet its burden of proving that the awarded hourly rate is excessive; we therefore affirm the rate awarded to counsel by the administrative law judge.⁴ See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

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 employer's specific objections to the number of hours requested by claimant's attorney for certain services, and thereafter reduced the number of hours requested by counsel by 1.5. 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 or disallow the hours approved by the administrative law judge. See *Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Lastly, in awarding claimant's counsel an attorney's fee, the administrative law judge viewed counsel's billing method as permissible. We hold that the administrative law judge acted within his discretion in doing so.⁵ *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).

⁴We 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 hourly rate awarded in the instant case was unreasonable.

⁵We reject employer's contention that the fee order of the 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) and the fee award of Administrative Law Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (September 5, 1991), mandates a different result in this case. 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.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge