

WILLIE B. MILLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
AETNA CASUALTY)	
AND SURETY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier appeals the Supplemental Decision and Order - Awarding Attorney's Fee (88-LHC-1505) of Administrative Law Judge James W. Kerr, Jr., 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, a retiree, 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 22.4 percent binaural impairment. A second audiogram, administered on July 9, 1987, revealed that claimant suffered from a 33.13 percent binaural impairment. On October 2, 1987, employer voluntarily paid permanent partial disability compensation to claimant for a 22.4 percent binaural impairment. On March 3, 1988, the case was referred to the Office of Administrative Law Judges for a formal hearing. Both parties subsequently filed motions for summary judgment with the administrative law judge, alleging that since the parties had agreed to average the results of the two audiometric evaluations, there was no genuine issue of material fact; thus, the only issue to be decided was whether claimant should be compensated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), or Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23).

In his Decision and Order, the administrative law judge granted claimant's motion for summary judgment and, thereafter, awarded claimant permanent partial disability benefits, the amount to be calculated pursuant to Section 8(c)(13). Thereafter, employer paid additional permanent partial disability compensation to claimant in accordance with Section 8(c)(13) of the Act. In a subsequent order, the administrative law judge denied a motion for reconsideration filed by the Director, Office of Workers' Compensation Programs.

Claimant's counsel subsequently filed a fee petition for work performed before the administrative law judge in which he requested an attorney's fee of \$923, representing 7.25 hours of legal services performed at an hourly rate of \$125, and \$16.75 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 number of hours sought by counsel to 4.25, reduced the requested hourly rate to \$100, denied counsel's request for expenses, and thereafter awarded claimant's counsel an attorney's fee of \$425.

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

Employer initially contends that it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), since it accepted liability for the claim and voluntarily began paying permanent partial disability benefits prior to receiving formal notice of the claim from the district director's office. Alternatively, employer argues that under Section 28(b) of the Act, 33 U.S.C. §928(b), the fee awarded to claimant's counsel 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.

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), 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 the 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 need not address employer's argument with respect to liability under Section 28(a), inasmuch as the instant case is governed by Section 28(b). Specifically, we note that employer voluntarily paid claimant permanent partial disability compensation based on a binaural impairment of 22.4 percent; subsequent to the administrative law judge's award of benefits pursuant to Section 8(c)(13), employer paid additional permanent partial disability benefits to claimant based upon the average of the two audiometric evaluations. Employer is thus liable for claimant's attorney's fees for services performed at the administrative law judge level, pursuant to Section 28(b), since claimant's counsel succeeded in obtaining additional benefits for claimant.

Employer also challenges the amount of the fee award. Employer's contention that the fee award should be limited by the amount of additional compensation obtained by claimant is without merit. A fee of \$425 is clearly reasonable in relation to the additional benefits awarded to claimant by the administrative law judge. Employer further 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, 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 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 employer's 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 3, a reduction of approximately 41 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 further reduce or disallow the hours approved by the administrative law judge on this basis. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer next objects to counsel's use of a minimum quarter-hour billing method. In *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), the United States Court of Appeals for the Fifth Circuit stated that, generally, attorneys should charge no

more than one-quarter of an hour for preparation of a one-page letter, and one-eighth of an hour for review of a one-page letter. *See also Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished). Counsel's fee petition generally conforms to these guidelines. However, the one-quarter hour entry claimed on April 2, 1989, is excessive under these guidelines. Accordingly, we modify the administrative law judge's award to reflect the reduction of this entry from one-quarter hour to one-eighth of an hour consistent with *Biggs* and *Fairley*.

Lastly, we reject employer's assertion that the awarded hourly rate 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. The administrative law judge found the hourly rate of \$100 to be fair and reasonable for the issues involved in this case and in the region where this case originated. As employer's mere 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 the rate is excessive, we affirm the rate awarded by the administrative law judge to counsel. *See Maddon*, 23 BRBS at 55; *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, the Supplemental Decision and Order - Awarding Attorney's Fees of the administrative law judge is modified to reflect the reduction of one one-quarter hour entry to one-eighth of an hour. Counsel is therefore entitled to a fee of \$412.50, representing 4.125 hours at \$100 per hour. In all other respects, the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge