BRB No. 92-476

JAMES O. JOSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
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.

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

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

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (90-LHC-2071) 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim for his work-related hearing loss, and the case was transferred to the Office of Administrative Law Judges on May 4, 1990. Prior to a formal hearing, employer paid claimant benefits for a 1.25 percent binaural impairment, and claimant and employer filed a Joint Motion to Remand which was granted by the administrative law judge on July 19, 1991. Subsequently, claimant's counsel filed a petition for an attorney's fee of $2,745.50, representing 21.63 hours of services at a rate of $125 per hour, plus $41.75 in expenses. The administrative law judge agreed with employer that a rate of $125 per hour is excessive, and he reduced the hourly rate to $110. He also disallowed photocopying costs of $16.75. Supp. Decision and Order at 2.

Accordingly, he held employer liable for an attorney's fee in the amount of $2,379.30, plus expenses. *Id.* at 3. Employer appeals the fee award, incorporating the arguments it raised below, and claimant responds, urging affirmance.

Initially, employer contends the fee award should be reduced because counsel's efforts before the administrative law judge resulted in only a nominal award. Additionally, employer asserts that the doctrine of *de minimis non curat lex.* applies to this case. We decline to address these arguments as employer failed to raise these issues before the administrative law judge and cannot raise them now for the first time on appeal.[1] *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *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), *aff'd in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (table); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting).

Next, employer argues that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. 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 the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, 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). While the complexity of the 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 this case, the administrative law judge agreed with employer's objection that the requested hourly rate of $125 was too high in light of the lack of complex issues, and he awarded an hourly rate of $110. We reject employer's argument on appeal that the fee should be further reduced based on this criterion. Employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of $110, and we affirm the administrative law judge's finding.[2] *Ross*, 29 BRBS at 43-44; *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1992), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979).

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[1]Employer's argument regarding the doctrine of *de minimis non curat lex.* relies on an unpublished Board decision which cannot serve as authority because unpublished decisions lack precedential value. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n. 2 (1990).

[2]Additionally, we reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (September 5, 1991), as fees for legal services must be approved at each level of the proceedings by the tribunal before which work was performed. 33 U.S.C. §928(c); *Ross*, 29 BRBS at 44 n.4; *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

Employer also objects to counsel's use of the quarter-hour minimum billing method. Claimant's counsel utilized this method in his petition for a fee, and the administrative law judge specifically found that minimum billing in increments of one-quarter or one-half hour is permissible. The United States Court of Appeals for the Fifth Circuit has recently held that its unpublished fee order rendered in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), is considered circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (table). In *Fairley*, the court held that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for preparing a one-page letter. *See Fairley*, slip op. at 2. As the administrative law judge did not ascertain whether the individual tasks billed at the quarter-hour minimum warranted that amount of time in this case, we must remand the case for reconsideration of the fee award in light of the Fifth Circuit's decisions in *Fairley* and *Biggs*. *See Ross*, 29 BRBS at 44.

Finally, employer makes specific contentions regarding time allowed for review of the file, medical reports, and orders, for preparation, filing and review of discovery documents, and for preparation and attendance at a deposition. The administrative law judge approved the requested time. Because employer has failed to show an abuse of discretion by the administrative law judge in awarding a fee for these services, having specifically considered employer's objections, we reject these item-specific contentions. *See generally Watkins*, 26 BRBS at 182; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Accordingly, the administrative law judge's Supplemental Decision and Order is vacated and the case is remanded for further consideration in accordance with this opinion.[3]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[3]The administrative law judge specifically disallowed photocopying costs, yet his order awarded counsel the full amount of expenses requested. On remand, the administrative law judge must amend his decision to account for this error.