

WILLIAM R. BUNNER)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:_____
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (88-LHC-2988) of Administrative Law Judge Ben H. Walley 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, Inc.*, 12 BRBS 272 (1980).

Claimant, a retired painter who had worked at employer's shipbuilding facility from August 1975 to October 1981, excluding a six month lay-off period in 1979 to 1980, sought occupational hearing loss benefits under the Act pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). An audiological evaluation performed on February 6, 1987, revealed a binaural hearing loss of 2.8 percent. A second audiometric examination administered on April 11, 1987, revealed a binaural hearing impairment of 11.8 percent. A third audiometric examination administered on December 29, 1988, indicated binaural hearing impairment of 13.4 percent.

In his Decision and Order, the administrative law judge, discounting the first audiogram because of the large discrepancy between its results and that of the latter two audiograms, determined that claimant sustained a binaural hearing loss of 12.6 percent based on the average of the April 11, 1987 and December 29, 1988, audiograms. Converting claimant's hearing loss to a whole person impairment, the administrative law judge awarded claimant compensation for a 5 percent whole person impairment pursuant to Section 8(c)(23) of the Act consistent with *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990).¹ The administrative law judge further determined that claimant was entitled to medical expenses, *see* 33 U.S.C. §907, and that employer was not liable for an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e).

Employer appealed the administrative law judge's decision, contending that he erred in rejecting the results of the February 6, 1987, audiogram. In an unpublished decision, the Board affirmed the administrative law judge's award of benefits, finding that the decision to disregard this audiogram was a credibility determination within his discretion. *Bonner v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1820 (March 30, 1992)(unpublished).

On July 19, 1991, claimant's counsel filed a petition for an attorney's fee of \$2,067, representing 16 hours of services at \$125 per hour, plus \$67 in costs, for work performed before the administrative law judge. Employer filed objections and claimant replied to employer's objections.

After considering employer's objections, the administrative law judge reduced the \$125 hourly rate to \$100 for the work performed by claimant's lead counsel and to \$90 for the work performed by his associate counsel. He also disallowed 5.25 of the 16 hours claimed. Accordingly, he awarded counsel a fee of \$1,122, representing 4.25 hours of services at \$100 per hour and 6.5 hours at \$90 per hour, plus the requested costs. Employer appeals the fee award on various grounds, incorporating the objections it made below into its appellate brief. Claimant, incorporating his rely brief below, responds, urging affirmance.

On appeal, employer initially contends that the fee award made by the administrative law judge is premature, arguing that there has been no successful prosecution because the disability claim on which the fee award is based is currently on appeal. This issue has been rendered moot by the Board's prior decision in this case. The administrative law judge nonetheless did not err in considering counsel's fee petition while the case was pending on appeal before the Board; it is well-established that to further the goal of administrative efficiency an administrative law judge may render an attorney's fee determination when he issues his decision. Such an award, however, does not become effective, and thus is not enforceable, until all appeals are exhausted. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Bruce v. Atlantic Marine, Inc.*, 12 BRBS 65 (1980), *aff'd*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

Employer's next argues that consideration of the quality of the representation provided, the

¹No party challenges the administrative law judge's award of benefits pursuant to Section 8(c)(23). *Cf. Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993)(benefits for all occupational hearing loss are to be calculated pursuant to Section 8(c)(13)).

complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the fee award. We decline to address these arguments which have been raised by employer for the first time on appeal. *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); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). We note, however, that the administrative law judge did consider the factors cited by employer in determining the appropriate hourly rates. While employer also asserts that the hourly rates awarded by the administrative law judge are excessive and that an hourly rate of \$75 to \$80 would be more appropriate, employer has not established an abuse of discretion in this regard. *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.² In evaluating counsel's fee petition, the administrative law judge specifically considered employer's objections to itemized entries and disallowed 5.25 of the requested hours. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion, and we decline to further reduce the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Finally, employer objects to counsel's use of the quarter-hour minimum billing method. Although the administrative law judge reduced two itemized entries claimed for review of routine correspondence on February 6, 1989 and June 6, 1989, from one-quarter to one-eighth hour, he failed to otherwise address employer's specific objections in this regard. The United States Court of Appeals for the Fifth Circuit, in which circuit this case arises, recently held that its unpublished fee order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), is considered to be circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (unpublished). In *Fairley*, the court stated that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one quarter-hour for writing a one-page letter. Because the administrative law judge failed to fully consider employer's objections regarding minimum quarter-hour billing, we remand for him to do so consistent with *Fairley* and *Biggs*.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed in part and is vacated in part, and the case is remanded for further proceedings consistent with this opinion.

²Additionally, 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). Fees for legal services must be approved at each level of the proceeding by the tribunal before which the work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 271 (1994).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge