

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

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Ben H. Walley, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-218) 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 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a retired machine installer, worked at employer's facility where he was exposed to loud workplace noise. On January 10, 1987, claimant filed a claim for occupational hearing loss benefits based on an audiogram of the same date which reflected a binaural hearing impairment of 23.1 percent and provided employer with notice of his injury. A subsequent audiogram performed on June 15, 1987, reflected an 18.75 percent binaural hearing impairment. On August 18, 1987, employer initiated voluntary payment of compensation under 33 U.S.C. §908(c)(13)(B) for an 18.75 percent binaural hearing impairment based upon an average weekly wage of \$297.62. Thereafter, on April 19, 1988, employer made a voluntary lump sum payment of \$8,444.08 for a 20.925 percent binaural hearing loss calculated under Section 8(c)(13)(B), based on the average of the two audiograms and an average weekly wage of \$302.66. The case was referred to the Office of

Administrative Law Judge for a formal hearing on October 27, 1989.

In his Decision and Order, the administrative law judge averaged the two audiograms and determined that claimant suffered from a 20.925 percent binaural impairment. He then determined that as claimant was a retiree, and his case arose within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit, pursuant to *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *rev'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), his benefits must be calculated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). Accordingly, he converted claimant's 20.925 percent binaural hearing impairment to a 7 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), which entitled claimant to a continuing award of \$14.12 per week based upon the stipulated compensation rate of \$201.77. He also awarded claimant future medical benefits, interest, and an assessment under Section 14(e), 33 U.S.C. §914(e).

Claimant's counsel sought an attorney's fee of \$1,527.25, representing 12 hours at \$125 per hour, and \$27.25 in expenses for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of \$1,227.25, representing 12 hours at an hourly rate of \$100, plus expenses of \$27.25. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fees. Employer argues that there has been no successful prosecution of the claim because the \$8,444.08 it voluntarily paid claimant pursuant to Section 8(c)(13)(B) prior to referral resulted in an overpayment such that at the \$14.12 weekly rate awarded under Section 8(c)(23), no benefits will be due until August 23, 1998.

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, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under 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 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), as the case at bar is governed by Section 28(b). Although at the time the case was referred by the district director to the Office of Administrative Law Judges on March 13, 1990, employer had completed payment for a 20.925 percent binaural hearing impairment calculated under Section 8(c)(13)(B), while the case was before the administrative law judge claimant received a continuing award of benefits, an inchoate right to greater compensation than that voluntarily paid by employer.¹

¹No party has challenged the award of compensation benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). *Cf. Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26

In addition, claimant was awarded medical benefits and an assessment under Section 14(e).² As claimant's counsel was ultimately successful in obtaining additional compensation for claimant while the case was before the administrative law judge, we affirm his determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b). See *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

Employer objects to counsel's method of billing in minimum increments of one-quarter hour. Consistent with the decisions of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director (OWCP) [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished), we reduce the August 21, 1989, entry from one-half to one-quarter hour. After considering employer's remaining objections to the number of hours awarded, and to the hourly rate, we reject these contentions, as it has not shown that the administrative law judge abused his discretion in this regard. See *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer's contentions which were not raised below will not be addressed 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 mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BRBS 151 (CRT)(1993)(all hearing loss is properly compensated pursuant to 33 U.S.C. §908(c)(13)).

²The fact that the 10 percent assessment awarded under 33 U.S.C. §914(e) may be subsumed by virtue of employer's large overpayment is not determinative as employer's credit may one day run out and employer will once again be required to make weekly payments of compensation. See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64-65 (1991)(decision on remand).

NANCY S. DOLDER
Administrative Appeals Judge