BRB No. 92-0820

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

Appeal of the Supplemental Decision and Order Awarding Attorney's 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 (89-LHC-1934) 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 contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer from 1964 to 1973, where he was exposed to loud workplace noise. Claimant underwent audiometric testing on March 23, 1988, which revealed a 5.2 percent binaural hearing loss. On September 14, 1988, claimant filed a claim for occupational hearing loss benefits based on the results of this audiogram and provided employer with notice of his injury. On September 27, 1988, employer filed its notice of controversion. On September 30, 1988, employer received formal notice of the claim from the district director. On January 19, 1989, claimant underwent a second audiogram which showed an 8.44 percent binaural impairment. Employer paid no benefits voluntarily and on March 27, 1989, the case was referred to the Office of Administrative Law Judges for a formal hearing.

The administrative law judge, averaging the results of the two audiograms of record, awarded claimant compensation for a 6.82 percent binaural impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), based upon an average weekly wage of $390.52. He also awarded claimant interest and medical benefits.[1]

Thereafter, claimant's attorney submitted a fee petition for services rendered at the administrative law judge level, requesting $3,987, representing 31.25 hours of services at $125 per hour and $80.75 in expenses. Employer filed objections and claimant replied to employer's objections. In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge reduced the hourly rate requested to $100, and disallowed 1.5 of the 31.25 hours sought and $35.75 of the expenses requested for photocopying and travel expenses as part of office overhead. Accordingly, he awarded claimant's counsel a fee of $3,020, for 29.75 hours of services at $100, plus $45 in expenses.[2]

On appeal, employer challenges the administrative law judge's fee award on various grounds, incorporating the objections it made below into its brief on appeal. Claimant, incorporating his reply brief to employer's objections below, responds, urging that the fee award be affirmed.

Employer initially contends that the fee awarded by the administrative law judge is excessive. Although employer maintains that consideration of the quality of the representation provided, the 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 complexity of the case in determining that the $125 hourly rate requested was excessive and that an hourly rate of $100 is reasonable and appropriate. While employer also argues that the $100 hourly rate awarded by the administrative law judge is excessive, and that an hourly rate of $75 to $80 would be more appropriate, employer has not established an abuse of discretion committed by the administrative law judge in this regard.[3] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989);

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[1]Employer apparently stipulated to liability for claimant's medical benefits immediately prior to the hearing. See Jx. 1.

[2]The administrative law judge also denied claimant's counsel's request for an additional one hour for time spent in defending the fee petition which claimant had requested in his reply brief to employer's objections.

[3]Employer has attached a copy of an article from a Mississippi Defense Lawyers Association

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).

Employer also argues on appeal that time spent in certain discovery and trial-related activity and in preparing and reviewing various legal correspondence and documents was either unnecessary, excessive, or clerical in nature.[4] After evaluating the fee petition in light of employer's objections, the administrative law judge disallowed 1.5 hours and determined that the remaining itemized services claimed were reasonable and necessary. With the exception of the November 22, 1989 and February 8, 1990, entries discussed *infra*, we decline to disturb this rational determination. *See Maddon*, 23 BRBS at 62; *see generally 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). With regard to the November 22, 1989 and February 8, 1990, entries, employer argues that inasmuch as the 3 hours claimed on February 8, 1990, for review of various discovery requests and preparation of answers, final proofing and filing are duplicative of services claimed and awarded for work performed on November 22, 1989, the administrative law judge erred in allowing counsel a fee for these services. Claimant responds that this objection was not raised below, and that, in any event, this was a typographical error. According to claimant, the services claimed on November 22, 1989[5] were for receipt and review of employer's discovery whereas the time billed on February 8, 1990 was for "review of file, preparation, and filing" of these items. Contrary to claimant's assertions, employer did raise this argument below and it appears from the face of the fee petition that a fee was awarded for duplicative services on the dates in question as employer alleges. However, as claimant argues in his reply brief that the fee petition contained a typographical error, rather than modifying the administrative law judge's fee award to reflect the reduction of the duplicative entry, we vacate the fee awarded for the dates in question and remand the case for him to reconsider the compensability of the services claimed.

Lastly, employer objects to counsel's use of the minimum one-quarter hour billing method. Claimant's counsel utilized this method in his fee petition, and the administrative law judge specifically found this method of billing to be permissible as well as reasonable in this instance. The United States Court of Appeals for the Fifth Circuit has 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 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 held that attorneys,

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newsletter to its objections; however, this article merely indicates that fees for defense attorneys in the area range widely. It does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

[4]We also 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 (Sept. 5, 1991), as fees for legal services must be approved at each level of the proceedings 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 27 (1994).

[5]Claimant erroneously refers to this date as April 22, 1989, in his response brief.

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 in quarter-hour increments warranted the time claimed, we must remand the case for reconsideration of the fee award in light of the Fifth Circuit's decisions in *Fairley* and *Biggs*. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge