

ARCHIE ELLERBEE, Jr.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	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 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 Fee (89-LHC-2835) 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 filed a claim under the Act for benefits for an occupational hearing loss. Claimant underwent audiometric testing on December 30, 1986, which was interpreted by Dr. McClelland as showing an 18.8 percent binaural hearing loss. *See* Cl. Ex. 2. A second audiometric examination on December 17, 1987 was interpreted by Dr. McDill as showing a zero percent binaural impairment. *See* Emp. Ex. 3. Claimant also underwent audiometric testing on March 5, 1987, which revealed a 6.25 percent binaural hearing loss, Emp. Ex. 4, on April 17, 1988, which revealed a 2.82 percent binaural hearing loss, and on September 27, 1988, which revealed a 28.125 percent binaural hearing impairment. *See* Cl. Ex 7.

Employer was notified of the hearing loss on February 23, 1987, and employer did not file a

notice of controversion until April 10, 1987. On October 17, 1988, employer paid claimant permanent partial disability benefits without an award for a 2.82 percent hearing loss at an average weekly wage of \$436.90. Emp. Ex. 8. At the hearing, the parties stipulated that claimant has a 2.82 percent binaural impairment and that his average weekly wage is \$474.35. In his Decision and Order, the administrative law judge found that as employer was notified of the injury on February 23, 1987, and did not file a notice of controversion until April 10, 1987, employer is liable for a penalty pursuant to Section 14(e), 33 U.S.C. §914(e).

Thereafter, claimant's counsel filed a fee petition for work performed before the administrative law judge in which he requested \$2,977.50, representing 23.5 hours of services at \$125 per hour and \$40 in expenses. Employer filed objections. In a Supplemental Decision and Order, the administrative law judge found that as he found that claimant is entitled to an attorney's fee in his original Decision and Order, and this decision was not appealed, employer's contention that claimant had not successfully prosecuted his claim would not be addressed. After reducing the hourly rate requested to \$100 for non-trial work and disallowing 3.75 hours of the 23 hours claimed, the administrative law judge awarded claimant's counsel a fee of \$2,008.75 based on 17.5 hours at \$100 per hour, 1.75 hours at the rate of \$125 per hour, and \$40 for expenses.

On appeal, employer challenges the fee award made by the administrative law judge on various grounds, incorporating by reference the objections it raised below into its appellate brief. Claimant responds, urging that the administrative law judge's award of an attorney's fee be affirmed.

On appeal, employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fee, arguing that as claimant did not receive any additional compensation over that which employer voluntarily paid prior to the case's transfer to the Office of Administrative Law Judges, there was no successful prosecution of the claim.¹ We disagree. Employer is liable for claimant's attorney's fees pursuant to Section 28(b), 33 U.S.C. §928(b). Employer commenced voluntary payment of compensation for a 2.8 percent binaural hearing loss based upon an average weekly wage of \$436.90 prior to the referral of the case to the administrative law judge. After referral, but prior to the hearing, employer accepted liability for medical benefits and stipulated to a higher average weekly wage. In addition, the administrative law judge ordered employer to pay a penalty in accordance with Section 14(e). Therefore, inasmuch as a controversy remained after employer voluntarily paid some benefits and claimant was successful in obtaining additional benefits over those employer initially paid, we affirm the administrative law judge's finding that claimant's attorney is entitled to a fee award to be assessed against employer pursuant to Section 28(b) of the Act. *See generally Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995).

¹Contrary to the administrative law judge's statement, he did not address employer's liability for claimant's attorney's fee in his original Decision and Order. He merely stated that claimant's counsel had 30 days to submit a fee petition to which employer then had 10 days to respond. Decision and Order at 4.

Employer contends that the lack of complexity and the uncontested nature of the instant case mandates a reduction in the amount of the fee awarded 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, Section 702.132, 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). As the administrative law judge specifically accounted for the lack of complexity of case in reducing the \$125 hourly rate sought to \$100 for non-trial work, employer's assertion that the complexity of the case does not warrant the fee awarded is rejected.² Moreover, employer has not established that the administrative law judge abused his discretion in awarding hourly rates of \$100 and \$125, and we accordingly affirm the hourly rates awarded. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Furthermore, the administrative law judge correctly noted that this case was not uncontested and proceeded to a hearing. Supplemental Decision and Order at 2.

We decline to address employer's contention that the fee awarded is not commensurate with the "nominal" award of benefits. Employer did not raise this issue before the administrative law judge and may not raise it for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(Brown and McGranery, JJ., dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in part, mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *see also Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting).

We also reject employer's contention that the time spent in certain discovery-related activities and in document review was either unnecessary or excessive.³ The administrative law judge considered employer's objections, reduced the number of hours requested by 3.75 and found the remaining services rendered by claimant's counsel to be reasonable and necessary. We decline to disturb this rational determination. *Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

²We also reject employer's reliance on the decision of Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (Sept. 5, 1991). The decision of a different administrative law judge in a different case is not binding upon the administrative law judge or the Board in this case. 33 U.S.C. §928(c); 20 C.F.R. §702.132.

³Employer did not contest the fee petition before the administrative law judge on the basis that claimant's counsel's method of minimum increment billing was improper, and thus it may not raise the issue before the Board. *See generally Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

Accordingly, the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fee is affirmed.⁴

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁴We reject claimant's request for interest on the fee award from the date of the entry of the award as interest is not available on attorney's fees granted under Section 28. *See Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995); *Hobbs v. Director, OWCP*, 820 F.2d 1528, 1531 (9th Cir. 1987).