BRB Nos. 92-0917
and 93-1479

RANDOL SMITH, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order--Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fees of N. Sandra Ramsey, District Director, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax), Pascagoula, Mississippi, for claimant.

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's Fee (89-LHC-2650) of Administrative Law Judge James W. Kerr, Jr., and the Compensation Order Award of Attorney's Fees (No. 6-104976) of N. Sandra Ramsey, District Director, United States Department of Labor, 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 only be set aside if shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On January 17, 1987, claimant, a pipefitter who worked for employer from 1955 until 1966, filed a claim for occupational hearing loss benefits under the Act and provided employer with notice of his injury the same day. Employer filed notices of controversion on April 6, 1989 and November 3, 1989. The parties were unable to resolve the claim administratively, and the case was referred to the Office of Administrative Law Judges for a formal hearing.

Prior to the hearing, the parties stipulated that if the administrative law judge found that claimant was a retiree, the applicable compensation rate for the award of benefits was $50. In his Decision and Order, after averaging the two record audiograms, and finding that claimant was a retiree, the administrative law awarded claimant compensation for a 16 percent whole person impairment under Section 8(c)(23) of the Act, 33 U.S.C. §908(c) (23)(1988), based on the stipulated compensation rate of $50. The administrative law judge further determined that as employer did not timely pay benefits or controvert the claim, employer was liable for an assessment of penalties under Section 14(e) of the Act, 33 U.S.C.§914(e), the exact amount of which was to be determined by the district director. In light of claimant and employer's motions for reconsideration, the administrative law judge issued an Order Correcting Decision on February 11, 1991 which modified the original Decision and Order to reflect claimant's entitlement to compensation based on an 11 percent whole person impairment and a compensation rate of $201.77.

Subsequent to the administrative law judge's Decision and Order, claimant's counsel filed a fee petition for services rendered at the district director level between November 20, 1986 and May 21, 1991, requesting $997 for 9.375 hours of services at $100 per hour plus $59.50 in expenses. Employer filed objections. In a Compensation Order Award of Attorney's Fees, the district director disallowed $14.50 in xeroxing expenses, but otherwise approved the fee as requested. Accordingly, the district director awarded counsel a total fee of $982.50, representing 9.375 hours of services at $100 per hour plus the $59.50 in requested expenses. Claimant was ordered to pay $412.50 of the overall fee, consistent with employer's objection that it was not liable for fees incurred prior to July 21, 1987, the date it received formal notice of the claim from the district director. *See* 33 U.S.C. §928(a),(c). Employer was held liable for the remaining $570, including $45 in expenses. Employer appeals the district director's fee award on various grounds, incorporating the objections raised below into its appellate brief. BRB No. 92-0917. Claimant, incorporating his reply brief before the administrative law judge, responds, urging affirmance of the district director's fee award.

Claimant's counsel also filed a fee petition for work performed at the administrative law judge level, requesting $2,881, representing 22.75 hours of services billed at $125 per hour, plus $37.25 in expenses. Employer filed objections to the fee petition, and claimant's counsel replied to employer's objections. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge, addressing employer's objections to the fee request, reduced the hourly rate sought by claimant's counsel to $110 and disallowed 7.875 of the hours claimed. Accordingly, he awarded counsel a total fee of $1,667.35, representing 14.875 hours of services at $110 per hour, plus $37.25 in expenses. On appeal, employer also challenges the fee awarded by the administrative law judge on various grounds, incorporating its objections below into its appellate brief.[1] BRB No.

[1]Although employer argued below that claimant's counsel's fee petition should be disallowed because it was not filed within the 20 days provided by the administrative law judge in his Decision and Order, it was within the discretion of the administrative law judge to entertain the fee petition despite this fact. *See Bankes v. Director, OWCP*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985), *aff'g* 7 BLR 1-102 (1984).

93-1479. Claimant responds, urging that the fee awarded by the administrative law judge be affirmed.

In both fee appeals, employer argues 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 in the fee awarded. We need not address these arguments, however, as they have been raised by employer for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified 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); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that both the administrative law judge and the district director considered the factors cited by employer in entering their fee awards in this case.

Employer also contends that the $110 hourly rate awarded by the administrative law judge and the $100 hourly rate awarded by the district director are excessive. Employer asserts that an hourly rate of $80 to $85 per hour for attorney Lomax[2] and $70 to $75 per hour for his junior associates would be more appropriate for the work performed before the administrative law judge and that $65 to $70 would be more a appropriate hourly rate for work performed before the district director.[3] We disagree. Employer's unsupported assertions are insufficient to meet its burden of establishing that the hourly rates awarded

[2]We note that no services were performed by Attorney Lomax in the case before the administrative law judge.

[3]Employer attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This article does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

are unreasonable.[4] *See generally Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15, 22 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

In both appeals, employer also objects to counsel's use of the minimum quarter-hour billing method. Although the administrative law judge summarily rejected employer's objection in this regard, he nonetheless reduced the entries claimed for the preparation or review of routine correspondence on October 26, 1989, November 8, 1989, December 19, 1989, April 3, 1990, May 9, 1990, June 25, 1990 and July 16, 1990, from one-quarter to one-eighth of an hour. The administrative law judge's reduction of these entries is consistent with the United States Court of Appeals for the Fifth Circuit's mandate 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]*, 46 F.3d 66 (5th Cir. 1995) (unpublished), that attorneys generally may not charge more than one-eighth hour for review of a one-page letter and one-quarter hour for preparation of a one-page letter. With the exception of the August 9, 1989 and September 21, 1989, entries, the remaining one-quarter hour entries were properly awarded by the administrative law judge. Because the entries in question involved either the preparation of a letter, or the review of a non-routine or multi-page documents, the administrative law judge's allowance of these entries is not inconsistent with *Fairley* and *Biggs*. The time claimed for review of routine correspondence on August 9, 1989 and September 21, 1989, however, appears excessive under the *Biggs* and *Fairley* guidelines. Accordingly, we modify the administrative law judge's fee award to reflect the reduction of these two entries from one-quarter to one-eighth of an hour each. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

With regard to the district director's fee award, although she failed to explicitly address employer's objection to minimum quarter-hour billing, her failure to do so is harmless on the facts presented. Inasmuch as the one-quarter hour entries after July 21, 1987, for which employer was held liable involved either the preparation of a letter, the review of a non-routine or multi-page document, or other services not addressed in *Fairley* and *Biggs*, the district director's allowance of the time claimed is not inconsistent with the Fifth Circuit's decisions.

Finally, we reject employer's contention that the number of hours requested by counsel and approved by the administrative law judge and the district director are excessive. Employer maintains that time spent in certain discovery-related activity, in trial preparation

[4]We reject employer's contention that the unpublished fee order of Administrative Law Judge Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (September 5, 1991) mandates a different result in this case. The determination of the amount of an attorney's fee is within the discretion of the district director or administrative law judge awarding the fee. *See* 20 C.F.R. §702.132.

and attendance, in interviewing claimant, and in preparing and reviewing various legal and medical documents is either unnecessary, excessive, or clerical in nature.[5] We note, however, that after evaluating claimant's fee petition in light of the regulatory criteria of 20 C.F.R. §702.132 and employer's objections, the administrative law judge disallowed 7.875 of the hours sought, and found the remaining itemized services to be reasonable and necessary. We further note that based on her evaluation of the fee petition under the same criteria, the district director found all of the services claimed by counsel to be reasonable and necessary. With the exception in the reduction of the two quarter hour-entries for work claimed before the administrative law judge previously discussed, we decline to disturb these rational determinations. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

[5]Employer also argues that the district director erred in allowing the 2.5 hours claimed after December 10, 1990, when it made payments required by the administrative law judge's compensation award because these services did not result in claimant's obtaining any additional benefits. We need not address this argument, however, as it is being raised by employer for the first time on appeal. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Employer argued below that it was not liable for the services claimed before the district director after July 7, 1987, the date of referral to the administrative law judge. The disputed entries, however, were performed subsequent to the filing of the administrative law judge's initial Decision and Order and appear to have been in the nature of "wind-up" services necessary to secure the payment of the benefits awarded by the administrative law judge. Inasmuch as the administrative law judge can only award a fee for services incurred between the close of the informal proceedings and the issuance of his Decision and Order, these services were properly sought before the district director. *See Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980).

Accordingly, the Compensation Order Award of Attorney's Fee of the district director is affirmed. BRB No. 92-0917. The Supplemental Decision and Order--Awarding Attorney's Fee of the administrative law judge is modified to reflect the reduction of two itemized entries on August 9, 1989 and September 21, 1989 from one-quarter to one-eighth of an hour each. Counsel is therefore entitled to a fee of $ 1,698.75 representing 14.625 hours at $100 per hour plus $37.25 in expenses. In all other respects, the Supplemental Decision and Order-Awarding Attorney's Fee of the administrative law judge is affirmed. BRB No. 93-1479.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge