BRB No. 92-2535

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

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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-1610) 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 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, seeking benefits for an occupational noise-induced hearing loss. Prior to the hearing, the parties stipulated that claimant's hearing loss was causally related to his employment with employer and that claimant's average weekly wage is $555.85. After considering the evidence relating to the nature and extent of claimant's disability, the administrative law judge awarded claimant compensation for a 22.5 percent binaural impairment pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B).

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting $2,431.50, representing 19.25 hours of services at an hourly rate of $125 and $25.25 in expenses. Employer filed objections. Claimant replied, and sought an additional fee for time spent

in defending the fee petition. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge reduced the hourly rate sought from $125 to $100, and disallowed 1.5 of the 19.25 hours claimed as well as the requested traveling and photocopying expenses, finding them to be a part of office overhead. Accordingly, he awarded claimant's counsel a total fee of $1,775 representing 17.75 hours of services at $100 per hour. Employer appeals the fee award made by the administrative law judge on various grounds, incorporating the objections it made below into its appellate brief. Claimant has not responded to employer's appeal.

On appeal, employer initially contends that it should not be held liable for claimant's attorney's fee under Section 28(a) of the Act, 33 U.S.C. §928(a), because it accepted liability for the claim and commenced voluntary payments of compensation on December 10, 1987, within thirty days of receiving formal notice from the district director on December 1, 1987. Employer further asserts that there is no fee liability under Section 28(b) because the amount of compensation awarded by the administrative law judge was only a fractional increase over the amount voluntarily tendered by employer prior to referral. In the alternative, employer contends that any fee awarded under Section 28(b) should be based solely upon the difference between the $15,213.60 in benefits tendered to claimant prior to referral and the $16,675.65 ultimately awarded by the administrative law judge. Finally, employer contends that the consideration of the quality of the representation provided and the amount of benefits obtained mandates a complete reversal, or at least a substantial reduction, of the $1,775 fee awarded. We need not address these arguments, however, as they 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 pert. 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).

Employer also asserts that the fee awarded is excessive in light of the lack of complexity of the issues involved. Inasmuch, however, as the administrative law judge specifically considered the complexity of the case in reducing counsel's requested hourly rate from $125 to $100, we reject employer's assertion that the awarded fee should be further reduced on this basis. *See generally Parrot v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Employer also contends that the $100 hourly rate awarded does not conform to reasonable and customary charges in the area and that an hourly rate of $80 to $85 for claimant's lead counsel and $70 to $75 for claimant's associate counsel would be more appropriate. We reject this contention as employer's unsupported assertions are insufficient to meet its burden of establishing that the hourly rate awarded was unreasonable.[1] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55, 62 (1989); *see generally Welch v. Pennzoil Co.,* 23 BRBS 395, 402 (1990).

[1]Employer has attached part 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 does not support employer's contention that the hourly rate requested by claimant's counsel is unreasonable.

Employer also contests the number of hours requested by counsel and approved by the administrative law judge, contending that time spent in certain discovery-related activity, in trial preparation and attendance, and in preparing and reviewing various legal documents was either unnecessary, excessive, or clerical in nature.[2] In entering the fee award, after considering the totality of employer's objections, the administrative law judge disallowed 1.5 hours and the requested expenses, and found the remaining itemized entries claimed to be reasonable and necessary. We decline to further reduce or disallow the hours approved by the administrative law judge.[3] *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).[4]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2]Additionally, 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 proceedings by the tribunal before which 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).

[3]Employer argues that the administrative law judge erred in allowing the one hour claimed on May 14, 1990 for preparation of claimant's Motion for Reconsideration and the one-half hour claimed on June 5, 1990 for reviewing the administrative law judge's Order Denying Reconsideration. We will not address these arguments which are being raised for the first time on appeal. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

[4]Employer also challenges the propriety of claimant's counsel's practice of minimum quarter-hour billing, citing the fee order 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), as controlling authority. The Fifth Circuit recently held that its unpublished fee order in *Fairley*, which held that attorneys generally may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for preparation of a one-page letter, 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). We need not address employer's argument, however, because it is being raised 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).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge