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|--------------------------|---|--------------------|
| JUANITA WILSON (Widow of | ) |                    |
| ROBERT H. WILSON)        | ) |                    |
|                          | ) |                    |
| Claimant-Respondent      | ) | DATE ISSUED:_____  |
|                          | ) |                    |
| v.                       | ) |                    |
| INGALLS SHIPBUILDING,    | ) |                    |
| INCORPORATED             | ) |                    |
|                          | ) |                    |
| Self-Insured             | ) |                    |
| Employer-Petitioner      | ) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, 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-2416) of Administrative Law Judge Quentin P. McColgin 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 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).

Decedent, who worked for employer as a shipfitter from 1979 until 1982, sought compensation under the Act for a 56.8 percent binaural hearing impairment calculated pursuant to 33 U.S.C. §908(c)(13)(B) based on the results of a December 27, 1986, audiogram. On October 9, 1987, employer initiated voluntary payment for a 56.8 percent binaural impairment based on a compensation rate of \$201.77. Ex. 6. On October 27, 1987, however, employer modified its voluntary payments to reflect claimant's entitlement to compensation based on a 40.6 percent binaural impairment consistent with the results of a September 29, 1987, audiogram. Ex. 7. On February 10, 1988, employer notified claimant that it would commence paying claimant based on the conversion of his 40.6 percent binaural hearing loss to a 14 percent whole person impairment pursuant to 33 U.S.C. §908(c)(23)(1988), entitling claimant to \$28.25 per week, and informed him that in light of its \$3,361.86 overpayment under the schedule, no compensation would be due until

June 20, 1989. EX. 8. On February 24, 1989, however, while the claim remained in overpayment status, employer filed another LS-206, Payment of Compensation Without Award, form which reflected that claimant was entitled to compensation for a 17 percent whole person impairment based on the average of claimant's December 27, 1986, and September 29, 1987, audiograms. Ex. 9. On May 19, 1989, the case was referred to the Office of Administrative Law Judges for a formal hearing. On February 7, 1990, decedent died, and his widow was substituted as the claimant in the case.

In his Decision and Order, the administrative law judge awarded claimant compensation for a 14 percent whole person impairment based upon an average weekly wage of \$302.66 under Section 8(c)(23),<sup>1</sup> interest, medical benefits,<sup>2</sup> and an assessment under Section 14(e), 33 U.S.C. §914(e).

Claimant's counsel sought an attorney's fee of \$3,007, representing 23.88 hours at \$125 per hour plus \$22 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 \$1,562.59, representing 15.625 hours at an hourly rate of \$100, plus expenses of \$22. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant has not responded to employer's appeal.

Employer initially contends that it is not liable for an attorney's fee. As of the time the case was referred by the district director to the Office of Administrative Law Judges, employer's voluntary payment of compensation under Section 8(c)(13)(B) had resulted in a substantial overpayment and employer had conceded that claimant was entitled to compensation based on a higher percentage of whole person impairment than that ultimately awarded by the administrative law judge. As a result of counsel's efforts before the administrative law judge, however, claimant's counsel was ultimately successful in establishing claimant's right to an assessment under Section 14(e), and to medical benefits. *See* 33 U.S.C. §907.<sup>3</sup> As claimant's counsel was ultimately successful in obtaining additional compensation for claimant, we affirm the administrative law judge's determination that employer is liable for claimant's attorney's fees pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand).

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<sup>1</sup>No party challenges the award of 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 BRBS 151 (CRT)(1993)(all hearing loss properly compensated under 33 U.S.C. §908(c)(13)).

<sup>2</sup>Employer accepted liability for claimant's medical expenses immediately prior to the hearing.

<sup>3</sup>Employer's liability for medical benefits is not offset by the overpayment of disability compensation. *See Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 15, 1991).

Employer's contention that the fee awarded under Section 28(b) should be limited by the amount of additional compensation must fail. The Board has consistently rejected the notion that the amount of a fee awarded under Section 28(b) must be limited in the manner urged by employer. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting) (decision on recon.), *appeal dismissed*, No. 94-40920 (5th Cir. Sept. 20, 1995).

Employer's objections to the number of hours and the hourly rate awarded are rejected, as it has not shown that the administrative law judge abused his discretion in this regard. *See Ross v. Ingalls Shipbuilding Co.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected. Although the administrative law judge found this billing method permissible, the fee he awarded conforms to the criteria set forth in 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]*, 46 F.3d 66 (5th Cir. 1995) (table).

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

NANCY S. DOLDER  
Administrative Appeals Judge