

BRB Nos. 93-571
and 93-571A

JERRY W. WHITLEY)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
) DATE ISSUED: _____
INGALLS SHIPBUILDING,)
INCORPORATED)
)
Self-Insured)
Employer-Respondent)
Cross-Petitioner) DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), 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:

Claimant appeals the Decision and Order on Remand Awarding Benefits and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-2994) of Administrative Law Judge A. A. Simpson, 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time this case has come before the Board. To recapitulate, claimant was exposed to injurious noise during the course of his employment with employer. He underwent an

audiometric evaluation on December 31, 1986, which revealed a zero percent impairment in the right ear and a 13.1 percent impairment in the left ear, resulting in a binaural impairment of 2.2 percent. On May 12, 1989, claimant underwent another evaluation which revealed a zero percent impairment in the right ear and a 9.4 percent impairment in the left ear, resulting in a binaural impairment of 1.6 percent. The administrative law judge found that claimant has an 11.25 percent monaural impairment to the left ear, and he awarded benefits pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A) (1988). Decision and Order at 2. Employer appealed the decision to the Board.

For the reasons set forth in its decision in *Garner v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 173 (1991) (on recon. *en banc*) (Smith and Dolder, JJ., dissenting), *rev'd mem.*, 955 F.2d 41 (4th Cir. 1992), the Board vacated the administrative law judge's award of benefits and remanded the case for reconsideration of claimant's hearing loss on a binaural basis pursuant to Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B) (1988). *Whitley v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1649 (Dec. 17, 1991), *recon. denied* (June 26, 1992). On remand, the administrative law judge concluded that claimant has a 1.6 percent binaural impairment, and he awarded claimant benefits pursuant to Section 8(c)(13)(B). Decision and Order on Remand at 1. Additionally, the administrative law judge awarded claimant's counsel an attorney's fee totalling \$1,478.05. Supp. Decision and Order. Claimant appeals the award of benefits, and employer responds, presenting no opposition to claimant's appeal. BRB No. 93-571. Employer appeals the administrative law judge's fee award. Claimant has not responded to employer's appeal. BRB No. 93-571A.

Claimant contends the administrative law judge erred in awarding benefits pursuant to Section 8(c)(13)(B) for a binaural impairment instead of pursuant to Section 8(c)(13)(A) for a monaural impairment. Employer responds, agreeing that *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993), is controlling. Subsequent to the issuance of Board's Decision and Order in this case, the United States Court of Appeals for the Fifth Circuit issued its decision in *Tanner*, in which the court held that compensation for a claimant who suffers from a monaural impairment should be calculated under Section 8(c)(13)(A) rather than Section 8(c)(13)(B). As the instant case arises within the jurisdiction of the Fifth Circuit, the court's holding in *Tanner* is dispositive of the issue presented by claimant. Thus, in accordance with *Tanner*, we vacate the administrative law judge's Decision and Order on Remand, and we reinstate his original award of permanent partial disability benefits pursuant to Section 8(c)(13)(A) of the Act. Because no party challenges the administrative law judge's finding that claimant sustained a work-related 11.25 percent monaural impairment, claimant is entitled to receive permanent partial disability benefits pursuant to Section 8(c)(13)(A) for that degree of impairment.

Claimant's counsel filed a fee petition for \$3,159.30, reflecting 23.75 hours of time at the hourly rate of \$125, plus expenses of \$190.55, for work performed before the administrative law judge. The administrative law judge awarded a total fee of \$1,287.50, plus expenses, for 13.25 hours of services at variable rates. Supp. Decision and Order. Employer appeals this decision,

incorporating by reference the arguments it made below.

Employer first contends it should not be held liable for such an "exorbitant" fee because the ultimate amount of benefits awarded in this case was nominal. Because employer did not raise this contention below it 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 recon. en banc*, 28 BRBS 102 (1994), *aff'd and modified 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).

After considering employer's remaining objections to the number of hours and hourly rates awarded, we reject employer's contentions, as it has not shown an abuse of discretion by the administrative law judge in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits pursuant to Section 8(c)(13)(B) is vacated, and his initial decision awarding benefits pursuant to Section 8(c)(13)(A) is reinstated. Additionally, the administrative law judge's Supplemental Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge