

BRB No. 93-1119

JOE FAIRLEY)
)
 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 Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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 Fees (89-LHC-2566) of Administrative Law Judge Richard D. Mills 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's counsel sought an attorney's fee of \$3,688, representing 28.75 hours at \$125 per hour plus \$94.25 in costs 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 \$2,873.75, representing 26.125 hours at an hourly rate of \$110 plus \$94.25 in costs. 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 this appeal.

Employer's objections to the number of hours and 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, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Further, the administrative law judge considered employer's objection to counsel's method of billing in minimum increments of one-quarter hour, reduced the number of hours accordingly, and his award 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for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4559 (5th Cir. July 25, 1990)(unpublished) and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995)(unpublished).¹

In its objections below, employer contended that claimant's attorney is entitled to a fee only upon the successful prosecution of a claim, and at the time the fee award was entered, an appeal on the merits was pending before the Board. We note that the administrative law judge's underlying decision was affirmed by the Board in *Fairley v. Ingalls Shipbuilding, Inc.*, BRB No. 91-0838 (Aug. 18, 1992). Moreover, the administrative law judge properly found that he may issue an award of an attorney's fee while an appeal is pending. Such an award does not become effective and is not enforceable until all appeals are exhausted. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987).

¹Employer also contends that because the administrative law judge, in the Decision and Order Awarding Benefits, found that claimant had a zero percent hearing loss, and awarded only future medical benefits, the attorney's fee awarded by the administrative law judge is excessive as it does not account for claimant's limited success. Further, employer contends that the attorney's fee award should be reduced because this was a routine hearing loss claim and the issues were neither complex nor novel. Employer, however, did not raise these contentions below, and we will not address them 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 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 administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge