

HERMAN G. MOWDY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED: _____
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order -- Awarding Attorney's Fee of James W. Kerr, Jr., 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's Fee (89-LHC-2936) of Administrative Law Judge James W. Kerr, 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). 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).

On September 1, 1987, claimant filed a claim for compensation under the Act for a noise-induced work-related hearing impairment. Employer controverted the claim. The administrative law judge found that claimant has a 1.9 percent binaural hearing impairment and converted this impairment to a one percent impairment of the whole man. The administrative law judge refused, however, to award claimant compensation for his hearing loss on the rationale that a one percent impairment is *de minimis*. He further determined that as no compensation was due, Section 14(e), 33 U.S.C. §914(e), was inapplicable. The administrative law judge, however, awarded claimant medical expenses pursuant to Section 7, 33 U.S.C. §907.

Claimant and the Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's denial of disability compensation under Section 8(c)(23), 33

U.S.C. §908(c)(23). Claimant also appealed the administrative law judge's failure to award an assessment under Section 14(e). The Board reversed the administrative law judge's denial of permanent partial disability benefits, and modified the award to reflect claimant's entitlement to permanent partial disability benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13), pursuant to *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993). The Board also reversed the administrative law judge's denial of a Section 14(e) assessment and modified the administrative law judge's decision to reflect employer's liability for a Section 14(e) penalty on the entire award of compensation. See *Mowdy v. Ingalls Shipbuilding, Inc.*, BRB Nos. 91-2050/A (June 29, 1993)(unpublished).

Claimant's counsel sought an attorney's fee of \$4,062.50, representing 32.5 hours of services at \$125 per hour, plus \$43.75 in expenses, for work performed before the administrative law judge in connection with this hearing loss claim. Employer filed objections to the fee. In a Supplemental Decision and Order, the administrative law judge reduced the number of hours sought in the fee petition by 8, reduced the hourly rate sought to \$110, and awarded claimant's counsel an attorney's fee of \$2,695, plus \$43.75 in expenses.

On appeal, employer challenges the administrative law judge's fee award, incorporating by reference the objections it made below into its appellate brief. Claimant has not responded to this appeal.

Employer initially challenges its liability for the fee awarded to claimant's counsel by the administrative law judge, asserting that the administrative law judge awarded no disability benefits and thus counsel did not successfully prosecute the claim. We disagree. Pursuant to the Board's modification of the administrative law judge's decision, claimant has succeeded in obtaining both a permanent partial disability award as well as a Section 14(e) penalty. These benefits constitute compensation on which to base an attorney's fee award payable by employer. See *Ingalls Shipbuilding, Inc. v. Director, OWCP (Baker)*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991). Accordingly, claimant's counsel is entitled to an attorney fee payable by employer.

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). Employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected, as the administrative law judge's 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. 89-4459 (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. 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's Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge