

BRB No. 95-2160

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

Appeal of the Decision and Order on Remand of C. Richard Avery, 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 Decision and Order on Remand (90-LHC-2123) 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).

The administrative law judge's award of an attorney's fee is on appeal to the Board for the second time. Prior to the administrative law judge's award of an attorney's fee in this case, the administrative law judge ordered employer to pay claimant disability compensation in accordance with Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), for an 8.8 percent binaural hearing impairment, converted to a 3 percent whole man impairment, which resulted in a weekly benefit to claimant in the amount of \$6.05. Subsequent to the administrative law judge's award of benefits, claimant's counsel sought an attorney's fee of \$3,512.25, representing 27.5 hours at \$125 per hour, and \$74.75 in expenses, for work performed before the administrative law judge in connection with claimant's hearing loss claim. In his Supplemental Decision and Order Awarding Attorney Fees dated March 23, 1992, the administrative law judge awarded counsel a fee of \$2,860, representing

26 hours at an hourly rate of \$110, plus expenses of \$45. The administrative law judge considered employer's objections in reducing the hourly rate to \$110 and the number of hours by 1.5. However, the administrative law judge found that the billing of legal services in minimum increments of 15 to 30 minutes was permissible and declined to reduce the number of hours on this basis. The Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's award of benefits as the administrative law judge did not provide a date on which claimant's benefits should commence. Employer appealed the administrative law judge's Supplemental Decision and Order, challenging the hourly rate of \$110, the number of hours awarded, and counsel's use of the quarter-hour minimum billing method.

In *Jenkins v. Ingalls Shipbuilding, Inc.*, BRB Nos. 92-0927/A (Apr. 27, 1995)(unpublished), the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge to determine the onset date for the commencement of claimant's benefits in accordance with the holding in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993)(the date of last exposure is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss) since the administrative law judge made no findings as to the date of claimant's last exposure to injurious noise levels. Although the administrative law judge's award of benefits pursuant to Section 8(c)(23) was not explicitly challenged on appeal by any party, the Board also vacated the administrative law judge's award of hearing loss benefits pursuant to Section 8(c)(23) and modified the award to reflect that claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), for an 8.8 percent binaural impairment in light of *Bath Iron Works*, 506 U.S. at 153, 26 BRBS at 151 (CRT) [holding that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) rather than Section 8(c)(23)]. Moreover, the Board affirmed the administrative law judge's award of the hourly rate of \$110, but vacated the administrative law judge's award of fees as the administrative law judge had not ascertained whether the individual tasks billed at the quarter-hour minimum warranted that amount of time. Consequently, the case was remanded to the administrative law judge for further consideration of the fee award in light of *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. Jan. 12, 1995) (table)(generally, attorneys should bill no more than one-eighth hour for review of a one-page letter and one-quarter hour for writing a one-page letter).

In his Decision and Order on Remand dated August 1, 1995, the administrative law judge initially found that claimant's average weekly wage on October 11, 1971, claimant's last date of employment, was \$139.20 with a compensation rate of \$92.80, as these issues were agreed to by the parties. Consequently, the administrative law judge awarded claimant permanent partial disability benefits pursuant to Section 8(c)(13) from October 11, 1971, at a compensation rate of \$92.80, for a total amount of \$1,633.28. Since the parties could not agree on the issue of an attorney's fee, the administrative law judge awarded counsel a fee of \$2,736.25, representing 24.875 hours at an hourly rate of \$110, plus expenses of \$45. The administrative law judge reduced the number of hours awarded previously by 1.125 in light of *Fairley* and *Biggs*. In the current appeal, employer challenges the administrative law judge's fee award on remand, incorporating by reference the arguments made in its Brief on Remand into its appellate brief.¹ Claimant has not responded to this

¹Employer's Brief on Remand also incorporated its initial objections to counsel's fee before the

appeal.

We decline to reconsider employer's objections to the hourly rate and the number of hours awarded, as well as its contention that the fee is excessive in light of the alleged nominal amount awarded and the lack of the complexity of this case, as these issues were addressed and rejected previously by the Board in the first appeal of this case.² See *Wayland v. Moore Dry Dock*, 25 BRBS 53, 58 (1991)(Board's holding constitutes the law of the case).

We note that employer contends that counsel is not entitled to a fee in light of the limited success obtained in this case pursuant to Section 8(c)(13) and that any attorney's fee assessed against employer pursuant to 33 U.S.C. §928(b) must be based solely on the difference between the amount initially paid and the amount that was ultimately awarded. These contentions were not raised below initially or on remand and will not be addressed for the first time in this second appeal of the attorney's fee award. *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); *see also Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(decision on recon.), *appeal dismissed*, No. 94-40920 (5th Cir. Sep. 20, 1995).

administrative law judge.

²In the instant appeal, employer does not object to the administrative law judge's findings on remand regarding the quarter-hour minimum billing method, the sole reason this case was remanded to the administrative law judge on the attorney's fee award. The administrative law judge's award conforms to the criteria of *Fairley* and *Biggs*.

Accordingly, the Decision and Order on Remand 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