BRB No. 91-1394

RHODNEY DICKERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Joshua T. Gillelan II (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

STAGE, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-3551) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and the conclusions of law of the administrative law judge that are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1969); 33 U.S.C. §921(b)(3). An attorney's fee determination 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 and Dry Dock Co., 12 BRBS 272 (1980).

Claimant was exposed to work-related noise while employed at employer's facility from 1952 to the present. Claimant sought benefits under the Act for a noise-induced occupational hearing loss based on an audiometric examination performed on March 28, 1988, which revealed a 16.8 percent hearing impairment to his left ear, a zero percent impairment to his right ear, and an overall binaural impairment of 2.7 percent. Thereafter, on October 5, 1988, a second audiometric procedure was performed which revealed a 24 percent hearing impairment to his left ear and a zero percent impairment to his right ear, resulting in a 4 percent binaural hearing impairment overall.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffered either a 20.4 percent monaural hearing loss or a 3.35 percent binaural hearing loss, and that claimant was exposed to noise which caused the loss while working for employer. The administrative law judge awarded claimant compensation for a 20.4 percent monaural hearing impairment at the rate of $300 per week for 10.6 weeks. Decision and Order at 3-4; 33 U.S.C. §908(c)(13)(A).

Claimant's counsel subsequently submitted an attorney's fee petition to the administrative law judge in which he requested a fee in the amount of $2,904, representing 23 hours of services rendered at an hourly rate of $125, and $29 in expenses. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, addressing employer's objections to the fee requested, reduced the hourly rate sought by claimant's counsel to $110, and disallowed 6.25 of the 23 hours requested by claimant's counsel;[1] the administrative law judge thus awarded claimant's counsel a fee of $1,842.50, representing 16.75 hours of services performed at the hourly rate of $110, plus expenses in the amount of $29.

[1] The 6.5 hours disallowed by the administrative law judge involved reduction of a 2 hour charge on July 30, 1990, for claimant's deposition to 1.5 hours, a 3.5 hour charge on November 11, 1989 and December 23, 1989, for receipt and review of employer's responses to discovery propounded by claimant to .25 hour each, a .50 hour charge on May 1, 1991, for review of the administrative law judge's Decision and Order to .25 hour, a 2.5 hour charge for attendance at the formal hearing and 2 hour charge for trial preparation to 1 hour each.

On appeal, employer challenges the administrative law judge's award of disability benefits on a monaural basis, as well as the administrative law judge's decision to award claimant's counsel a fee. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance.

Employer initially contends that the administrative law judge erred in determining the extent of claimant's disability. Specifically, employer argues, based on the Board's decision in Garner v. Newport News Shipbuilding and Dry Dock Co., 24 BRBS 173 (1991) (en banc) (Smith and Dolder, JJ., dissenting) (Garner II), that the administrative law judge erred in awarding claimant compensation for a monaural hearing impairment pursuant to Section 8(c)(13)(A) of the Act instead of compensation for a binaural impairment pursuant to Section 8(c)(13)(B).[2] 33 U.S.C. §908(c)(13)(A), (B). We agree, although we note that in the time since employer filed its brief on appeal, the Garner case has been appealed to the United States Court of Appeals for the Fourth Circuit. See Garner, 24 BRBS at 173, vacating on recon., 23 BRBS 345 (1990), rev'd mem., No. 91-1423, 25 BRBS 122 (CRT) (4th Cir. February 21, 1992).

In its decision on reconsideration in Garner II, the Board, sitting en banc, concluded that occupational hearing loss, even if measurable in only one ear, is a binaural impairment; therefore, compensation should be determined on a binaural basis under Section 8(c)(13)(B). The majority reasoned that, because Section 8(c)(13)(E) of the Act, 33 U.S.C. §908(c)(13)(E), mandates the use of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides), which direct that monaural hearing impairment be converted into binaural hearing impairment percentages, the question of compensation for a monaural versus a binaural impairment is a medical issue and not a legal one. The dissenting Board members disagreed, reasoning that the AMA Guides provide a method for measuring hearing loss while the Act provides a formula for compensating hearing loss and that, thus, the question of whether a claimant has a monaural or binaural hearing loss is a legal issue. The Board's decision in Garner II was appealed to the United States Court of Appeals for the Fourth Circuit which, in an unpublished opinion, reversed Garner II and

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[2] Section 8(c)(13)(A), (B) of the Act states as follows:

> (A) Compensation for loss of hearing in one ear, fifty-two weeks.
>
> (B) Compensation for loss of hearing in two ears, two hundred weeks.

33 U.S.C. §908(c)(13)(A), (B).

reinstated the administrative law judge's decision.[3]

Subsequent to the Fourth Circuit's decision in Garner, the Board reexamined the issues raised in Garner II. See Tanner v. Ingalls Shipbuilding, Inc., 26 BRBS 43 (1992) (en banc)(Smith and Dolder, JJ., dissenting), appeal pending, No. 92-4974 (5th Cir. Sept. 23, 1992). In Tanner, the Board's majority reiterated its opinion that the extent of a claimant's occupational, noise-induced hearing loss is to be determined on a binaural basis. See Tanner, 26 BRBS at 47. Specifically, the majority opinion noted that conversion to a binaural impairment rating is consistent with the congressional mandate in Section 8(c)(13)(E) that determination of hearing loss be made in accordance with the AMA Guides and that, thus, occupational noise-induced hearing loss is to be determined under Section 8(c)(13)(B) and not Section 8(c)(13)(A). Id. Accordingly, for the reasons set forth in Tanner, we vacate the administrative law judge's award of permanent partial disability pursuant to Section 8(c)(13)(A). The administrative law judge accepted the parties' stipulation that claimant has sustained a 20.4 percent monaural hearing impairment or a 3.35 percent binaural impairment under the AMA Guides. The administrative law judge's award is therefore modified to provide that claimant is entitled to compensation under Section 8(c)(13)(B) for a 3.35 percent binaural hearing impairment.

Employer additionally contends that the administrative law judge erred in awarding an attorney's fee to claimant's counsel. Specifically, employer avers that there is no basis for the administrative law judge's assessment of an attorney's fee against employer since, pursuant to the Board's decision in Garner, 24 BRBS at 173, claimant's counsel has not successfully prosecuted the claim. Our review of employer's objections to claimant's counsel's fee petition before the administrative law judge reveals that employer did not contest its liability for a fee; we, therefore, decline to consider this issue as it is raised for the first time on appeal. See Moore v. Paycor, Inc., 11 BRBS 483, 492 (1979). Alternatively, employer argues that if it is responsible for claimant's attorney's fee, the awarded fee is excessive and should be reduced. Employer first challenges the amount of the awarded fee based upon the complexity of the case. We reject this contention, as complexity is only one of the factors to be considered under the regulations. 20 C.F.R. §702.132. Similarly, we reject employer's assertion that the awarded fee should be governed by the amount of benefits awarded. While the amount of benefits is a factor to be considered under the regulations, an

[3] The Fourth Circuit has explicitly stated that its opinion is not binding precedent before that court; subsequent to the issuance of its unpublished decision, the court, on March 12, 1992, denied a motion to publish its opinion in Garner.

attorney's fee is not necessarily limited to or by the amount of compensation gained. See Jarrell v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 883 (1982).

Moreover, we reject employer's contention that a number of the hours claimed by counsel should be disallowed or reduced. The administrative law judge considered employer's objections, disallowed 6.25 hours sought by counsel, and found the remaining services rendered by claimant's counsel to be reasonable and necessary. We decline to disturb this rational determination. See Maddon v. Western Asbestos Co., 23 BRBS 55 (1989); Cabral v. General Dynamics Corp., 13 BRBS 97 (1981). We further reject employer's assertion that the $110 hourly rate awarded by the administrative law judge is excessive, and hold that employer's mere assertion that the rate of $110 per hour does not conform to reasonable and customary charges in the area is insufficient to meet employer's burden of proving that the awarded rate is excessive. See Maddon, 23 BRBS at 55; see generally Welch v. Pennzoil Co., 23 BRBS 395 (1990). Lastly, we reject employer's assertion that the administrative law judge erred in awarding a fee based upon a fee petition which billed in minimum hour increments, for the reasons stated in Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), aff'd on recon. en banc, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). Thus, we hold that the administrative law judge's determinations regarding the fee sought by claimant's counsel are neither arbitrary, capricious, nor an abuse of discretion.[4] We, therefore, affirm the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees.

[4] We note that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, merely indicates that the fees for defense attorneys in the area range widely. This document does not support employer's contention that the fee requested in the instant case was unreasonable, given the risk of loss factor inherent in the type of work performed by claimant's counsel.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is modified to provide that claimant is entitled to compensation pursuant to Section 8(c)(13)(B) of the Act, consistent with this opinion. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, concurring:

I concur in the result reached by my colleagues in this case, based on the Board's en banc decision in Tanner v. Ingalls Shipbuilding, Inc., 26 BRBS 43 (1992) (en banc) (Smith and Dolder, JJ., dissenting), appeal pending, No. 92-4974 (5th Cir. Sept. 23, 1992). I agree with my colleagues that the attorney fee award must be affirmed. However, I continue to believe, for the reasons set forth in my dissents in Tanner and Garner v. Newport News Shipbuilding and Dry Dock Co., 24 BRBS 173 (1991) (en banc) (Smith and Dolder, JJ., dissenting)(Garner II), vacating on reconsideration 23 BRBS 345 (1990) (Garner I), rev'd mem., No. 91-1423, 25 BRBS 122 (CRT)(4th Cir. February 21, 1992), that claimants who incur noise-induced occupational hearing loss in one ear only should be compensated for a monaural hearing impairment pursuant to Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A)(1988). In further support of the position set forth in my dissents, I note that, subsequent to the Board's decision in Tanner, the United States Supreme Court issued its decision in Bath Iron Works Corp. v. Director, OWCP, U.S. , 61 U.S.L.W. 4049 (U.S. Jan. 12, 1993), in which the Court utilized the "plain language" and "unambiguous" text of the Act in concluding that claims for hearing loss under the Act must be compensated pursuant to Section 8(c)(13), rather than Section 8(c)(23), of the Act. Thus, as the Court has indicated that the Act must be applied as written, and as Section 8(c)(13)(A) plainly and unambiguously states that it is to be used to calculate the permanent partial disability compensation

due for loss of hearing in one ear, I continue to believe that Section 8(c)(13)(A) must be used to compensate claimants who have incurred a noise-induced occupational hearing loss in one ear only. However, as this issue has been resolved by the Board sitting en banc, I concur in the result.

NANCY S. DOLDER
Administrative Appeals Judge