BRB No. 92-0821

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

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for the self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-2778) 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 only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant was employed as a carpenter at employer's shipyard from 1971 until 1977 where he was exposed to loud workplace noise. An audiogram performed by Dr. James Wold on July 19, 1988, revealed a zero percent hearing loss in claimant's right ear, a 3.7 percent hearing loss in his left ear, or a binaural hearing loss of .6 percent. On August 2, 1988, claimant filed a claim under the Act for a 3.7 percent monaural occupational noise-induced hearing loss based on the results of the July 19, 1988, audiogram and provided employer with notice of the injury the same day. Employer filed its Form LS-207, Notice of Controversion, on August 18, 1988. A subsequent audiogram performed on March 31, 1989, was interpreted by Dr. Gordon Stanfield as indicating a 5.63 percent hearing loss in claimant's right ear, a zero percent loss in his left ear, or a binaural hearing loss of .93 percent. On May 1, 1989, claimant amended his claim to reflect the he was seeking compensation for a 5.63 percent monaural hearing loss based on the results of the March 13, 1989, audiogram. The case was referred to the Office of Administrative Law Judges for a formal hearing on June 13, 1989. As of the time of the formal hearing, the timeliness of the claim, the nature and extent of disability, and whether claimant's award should be calculated on a monaural or binaural basis remained in dispute.

In his Decision and Order, the administrative law judge found that the claim was timely filed pursuant to Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D)(1988), and awarded claimant compensation for a 3.7 percent monaural impairment pursuant to Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A), based upon an average weekly wage of $666.61. In addition, the administrative law judge held employer liable for interest and past and future medical benefits. *See* 33 U.S.C. §907.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting $3,377.75, representing 26 hours of services at $125 per hour, plus $127.75 in expenses. Employer submitted objections to counsel's fee request. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge reduced the hourly rate from $125 to $100, and disallowed 1.5 hours of the 26 hours claimed. The administrative law judge also denied $32.75 requested for photocopying and travel costs, finding them to be a normal part of office overhead. In addition, the administrative law judge denied claimant the additional one hour requested in his reply brief for time expended in defending the fee petition. The administrative law judge, thus, awarded claimant's counsel a fee of $2,545, representing 24.50 hours of services at $100 per hour plus $95.00 in expenses.

On appeal, employer challenges the fee award made by the administrative law judge on various grounds, incorporating the objections it raised below into its appellate brief. Claimant responds, urging that the administrative law judge's fee award be affirmed.

On appeal, employer initially contends that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the fee awarded. We decline to address these arguments which have been raised by employer 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); *Watkins v. Ingalls Shipbuilding, Inc.* 26 BRBS 179 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that the administrative law judge specifically considered the complexity of the issues presented in determining that an hourly rate of $100 was reasonable and appropriate. We further note that as employer paid no benefits voluntarily and claimant ultimately prevailed in establishing his right to compensation on a monaural basis, interest, and past and future medical benefits,[1] the fee award made by the administrative law judge is not inconsistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).[2]

Employer also asserts that the hourly rate awarded by the administrative law judge is excessive and that an hourly rate of $75 to $80 would be more appropriate. We disagree. Employer's assertion is insufficient to meet its burden of establishing that the hourly rate awarded in this case is unreasonable.[3] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Moreover, for the reasons stated in *Watkins*, 26 BRBS at 182, we reject employer's challenge to counsel's minimum quarter-hour billing method.[4]

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[1]Employer accepted liability for claimant's medical expenses including the cost of the initial evaluation on the date of the hearing. Employer, however, disputed the timeliness of the claim and urged that any award of compensation be calculated on a binaural basis.

[2]Employer cites *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished) in support of its assertion that the fee awarded is excessive. The Board has held that unpublished cases should not be cited or relied upon by the parties as they lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990).

[3]Employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

[4]We reject employer's argument that the fee order of United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, Nos. 89-4459, 89-4468, 89-4469 (5th Cir. July 25, 1990)(unpublished), mandates a different result. In that fee order, the court declined to award fees for work before it based on a quarter-hour minimum billing method. However, the determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

Finally, we reject employer's contention that the time spent in certain discovery-related activity, in trial preparation, and in preparing and reviewing various correspondence and legal documents was either unnecessary or excessive. After evaluating claimant's fee petition in light of the regulatory criteria of 20 C.F.R. §702.132 and employer's objections, the administrative law judge disallowed 1.5 hours of the 26 hours claimed, finding the remaining itemized services to be reasonable and necessary. Employer's unsupported assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus, we decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Accordingly, employer's arguments are rejected, and the administrative law judge's fee award is affirmed.[5]

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[5]We reject claimant's assertion in his response brief that he is entitled to interest on the attorney's fee award pursuant to *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82 (CRT) (5th Cir. 1990) for the reasons enunciated in *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 65 (1991)(decision on remand). Although claimant's counsel also requests that an additional fee be assessed against employer for services rendered in connection with this appeal, in order to receive a fee for work performed before the Board, counsel must file an fee petition which conforms to the requirements of 20 C.F.R. §802.203.