BRB No. 91-1957

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

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

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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

Marianne Demetral Smith (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-667) 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). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 worked for employer as a pipefitter for nine months in 1969 and as a shipfitter from 1971 to September 20, 1974, where he was exposed to injurious noise. Claimant subsequently worked as a stevedore for various maritime employers in Pascagoula, Mississippi. On August 21, 1987, claimant filed a claim under the Act against Ryan-Walsh, Incorporated (Ryan-Walsh), for a 5.9 percent noise-induced binaural hearing loss based on the results of a May 22, 1987, audiometric evaluation performed by James H. Wold, Ph.D. In a Decision and Order issued on October 26, 1989, Administrative Law Judge A. A. Simpson, Jr., denied the claim based on his finding that claimant was not exposed to injurious noise levels at Ryan-Walsh's Pascagoula facility. Claimant thereafter notified employer of his injury and filed a claim for compensation on December 15, 1989. Employer filed its Notice of Controversion on December 20, 1989. The case was referred to the Office of Administrative Law Judges for a formal hearing on March 7, 1991.

In his Decision and Order, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's injury to his employment, and found that employer failed to rebut the presumption, or to establish that claimant was exposed to injurious noise in employment subsequent to his employment with employer. Accordingly, the administrative law judge concluded that employer is liable for claimant's 5.9 percent binaural hearing loss, and awarded claimant permanent partial disability benefits pursuant to 33 U.S.C. §908(c)(13)(B), based on the stipulated average weekly wage of $410.69. He also found employer liable for claimant's medical benefits as well as interest and attorney's fees. Employer appeals the administrative law judge's finding that it is liable as the responsible employer. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

Following the issuance of the Decision and Order, claimant's counsel submitted a fee petition, requesting $3,094.25, representing 24.5 hours of services at $125 per hour, plus $31.75 in expenses 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 $2,530.00, representing 23 hours of services at an hourly rate of $110, and he denied expenses. Employer appeals the award of an attorney's fee, incorporating the objections it made below into its appellate brief, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in finding it to be the responsible employer. Employer argues that because it is undisputed that claimant was employed by multiple maritime employers subsequent to his employment with employer, and claimant testified he was exposed to some degree of noise during that subsequent employment, it cannot be held liable for compensation until all subsequent maritime employers have been exonerated from liability. As the administrative law judge recognized, employer's argument is legally erroneous. Under the Act, if a claimant establishes the liability of one covered employer, by presenting facts which would invoke the Section 20(a) presumption, he need not also establish that another employer is not liable. *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Once the Section 20(a) presumption linking an employee's injury with his employment is invoked, the employer has the burden of rebutting the presumption. Inasmuch as employer conceded that claimant's hearing loss is work-related and that it exposed claimant to injurious stimuli, employer can only escape liability by showing that claimant was exposed to injurious stimuli while employed by a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff*, 19 BRBS at 150-151; *see also General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991).

In this case, employer asserts that it is not the responsible employer because claimant testified he was exposed to some degree of noise while working for subsequent maritime employers prior to May 22, 1987, the stipulated date of injury. The administrative law judge, however, rationally inferred from claimant's deposition testimony, Ex. 11 at 35, that the noise levels were about the same with these employers as they had been with Ryan-Walsh, and that the subsequent noise exposure claimant received was not injurious, noting that the work had been performed at the same facility and that claimant's claim against Ryan-Walsh was denied based on dosimetry studies showing non-injurious noise levels. *See* Cx. 4. By contrast, the administrative law judge found that claimant testified that while working for employer he was exposed to noise seven hours per day from chipping guns, rust machines and other loud equipment. Ex. 11 at 33-34.

Additionally, employer argues that it should be entitled to invoke the Section 20(a) presumption on its behalf against claimant's subsequent maritime employers, and that claimant must make a claim for disability benefits against potentially liable employers in the reverse order of his employment, beginning with the most recent employer and proceeding backwards. For the reasons set forth in *Lins*, 26 BRBS at 65, we reject employer's contentions. *See also General Ship Service*, 938 F.2d at 962, 25 BRBS at 25 (CRT); *Susoeff*, 19 BRBS at 151 n. 2. Inasmuch as the administrative law judge's finding that claimant was last exposed to injurious levels of industrial noise while working for employer is rational and supported by substantial evidence, his determination that employer is the responsible employer is affirmed. *See Avondale Shipyards*, 977 F.2d at 191-192, 26 BRBS at 114-115 (CRT).

Turning to employer's appeal of the administrative law judge's fee award, employer objects to counsel's method of billing in minimum increments of one-quarter hour. The administrative law

judge found this billing method permissible in this case. Although the fee he awarded is generally consistent with 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), the following entries are reduced from one-quarter hour to one-eighth hour each: July 27, 1990, for review of claimant's change of address form, and February 15, 1991, for review of a one-page letter from employer regarding an independent medical evaluation. After considering employer's remaining objections to the number of hours awarded, and to the hourly rate, we reject these contentions, 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 contentions which were not raised below will not be addressed for the first time on appeal. *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 Decision and Order Awarding Benefits is affirmed. The Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge is modified as stated herein, and is otherwise affirmed.

SO ORDERED.

BETTY JEAN SMITH, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge