

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

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

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

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 Fees (88-LHC-3630) 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).

Claimant's counsel sought an attorney's fee of \$3,437.50, representing 27.5 hours at \$125 per hour, 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 \$2,300, representing 23 hours at an hourly rate of \$100 and denied claimant's request for \$28.25 for expenses. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award and has submitted a fee petition for work performed before the Board in BRB No. 90-1258, wherein claimant was held entitled to compensation for a 21.57 percent binaural hearing impairment pursuant to 33 U.S.C.

§908(c)(13)(B).

Initially, we reject employer's assertion that the administrative law judge erred in determining that it should be held liable for an attorney's fee. Employer is liable for an attorney's fee under 33 U.S.C. §928(b). Although employer initiated voluntary payment of compensation on October 28, 1988, for a 10 percent whole person impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), as a result of counsel's efforts before the administrative law judge, and ultimately before the Board, claimant was awarded compensation for a 21.57 percent binaural hearing loss. See *Bardwell v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1258 (June 29, 1994) (unpublished) (decision on recon.). In addition, claimant's counsel was successful in establishing claimant's right to medical benefits, \$909.43 in interest, and an \$870.44 assessment under 33 U.S.C. §914(e). As claimant's counsel was successful in obtaining additional compensation for claimant, the administrative law judge's determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b) is affirmed. See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand).

Employer also objects to counsel's method of billing in minimum increments of one-quarter hour. Although the administrative law judge found this billing method permissible in this case, 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), with the exception of the following entries which we reduce from one-quarter to one-eight hour each: October 27, 1988, April 7, 1989, May 8, 1989. 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).

Lastly, claimant has submitted a fee petition for work performed before the Board in BRB No. 90-1258. Counsel seeks \$987, representing 6.5 hours at an hourly rate of \$150 plus \$12 in expenses for this work. Employer responds, objecting to the fee request.

Employer initially contends that because it paid the compensation due pursuant to the administrative law judge's award under Section 8(c)(13) on April 6, 1990, claimant's counsel should not be awarded any fee because his success before the Board was limited to establishing claimant's right to an assessment pursuant to Section 14(e). In the alternative, employer asserts that inasmuch as the Section 14(e) penalty was paid by employer on February 19, 1992, employer's fee liability should terminate as of that date, arguing that any services performed thereafter were not necessary to establish claimant's entitlement to compensation. We disagree. Inasmuch, as claimant successfully defended against employer's appeal of the award under Section 8(c)(13) and gained additional

compensation by establishing claimant's entitlement to an assessment under Section 14(e), claimant's counsel is entitled to a fee reasonably commensurate with the necessary work performed before the Board through claimant's counsel's review of the Board's June 29, 1994, Decision and Order on Reconsideration on July 5, 1994. *See Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994); 33 U.S.C. §928; 20 C.F.R. §802.203.

Employer also objects to counsel's method of billing in minimum increments of one-quarter hour and to specific entries on April 16, 1990, for review of employer's Notices of Appeal, on June 11, 1990, for review of the Board's Acknowledgment of Appeal, and on October 16, 1991, and December 10, 1992, for review of Board orders holding the case in abeyance. We conclude, however, that the disputed entries, as well as the remainder of counsel's fee petition, conform to the guidelines set forth in *Fairley* and *Biggs*. Inasmuch as we view the time claimed by counsel as reasonable for the necessary work done, we award counsel a fee for 6.5 hours of services.

Lastly, employer objects to the requested hourly rate of \$150 and suggests that hourly rates of \$100 for Attorney Lomax,<sup>1</sup> \$90 for Attorneys Ainsworth and Dillon, and \$70 for Attorney Reid are more appropriate. We reject employer's contention that the fee order of the United States Court of Appeals in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), and the fee award of a different administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (Sept. 5, 1991), mandate that we reduce counsel's requested hourly rate, since 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. Employer also asserts that this rate is excessive because counsel's fee petition states that the hourly billing rate for work performed before September 1, 1993 was \$125 and 6.25 of the 6.5 hours claimed were performed prior to this date. Nonetheless, after consideration of the relevant facts, we find the current rate of \$150 reasonable in this

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<sup>1</sup>We note that Lowry Lomax and Attorney Reid did not perform any of the services claimed before the Board.

case. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); 20 C.F.R. §802.203. Consequently, we award claimant's counsel the requested attorney's fee of \$987, representing 6.5 hours at an hourly rate of \$150, plus \$12 in expenses for the work performed in BRB No. 90-1258.

Accordingly, the Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge is modified as stated herein, and is otherwise affirmed. Claimant's counsel is awarded an attorney's fee of \$987 for services performed before the Board in BRB No. 90-1258.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge