

JERALD D. PHILLIPS)	
)	
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 Fee and Approval of Attorney's Fee on Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

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 Supplemental Decision and Order - Awarding Attorney's Fee and Approval of Attorney's Fee on Remand (88-LHC-3430) of Administrative Law Judge James W. Kerr, Jr., 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel sought an attorney's fee of \$2,851.75, representing 22.5 hours at \$125 per hour plus \$39.25 in costs for work performed before the administrative law judge in connection with claimant's hearing loss claim, and an additional attorney's fee of \$475.25 representing 3.75 hours at \$100 an hour plus \$6.50 in costs for work performed before the administrative law judge on remand. The administrative law judge awarded counsel a fee of \$2,408.25, representing 16.375 hours at an hourly rate of \$100, \$312.50 for 2.5 hours of trial time at \$125 an hour, 1 hour at \$100 an hour for defense of the fee petition, and \$412.50 representing 3.75 hours at \$110 an hour plus \$6.50 in costs

for work performed on remand.¹ 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 award.

On appeal, employer contends that it should not be liable for any attorney's fee under Section 28(a), 33 U.S.C. §928(a), or Section 28(b), 33 U.S.C. §928(b), because it voluntarily commenced payment of benefits for a 4.4 percent binaural loss on December 23, 1987, within 30 days of November 30, 1987, the date employer received notice of the claim from the district director. Employer also contends that the award of an attorney's fee should be based solely upon the difference between the amount awarded and the amount tendered or paid pursuant to Section 28(b).

Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee award payable by employer. 33 U.S.C. §928(a). Under Section 28(b), 33 U.S.C. §928(b), employer is liable for a fee after it voluntarily tenders or pays benefits if claimant thereafter is successful in obtaining greater benefits than those tendered or paid.

We need not address employer's contentions regarding Section 28(a), as this case is governed by Section 28(b). In this regard, this case must be remanded because we are unable to determine from the record whether claimant obtained greater compensation as a result of prosecuting his claim than employer voluntarily paid. *See Ingalls Shipbuilding, Inc. v. Director, OWCP (Baker)*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991). On December 23, 1987, within 30 days of receiving formal notice, employer paid a total of \$1,775.58 for a 4.4 percent binaural loss based on an average weekly wage of \$302.66. In the Decision and Order and Decision and Order on Remand, the administrative law judge awarded claimant benefits for a 5.1 percent binaural loss based on an average weekly wage of \$158.95, plus interest and a Section 14(e), 33 U.S.C. §914(e), penalty. Since claimant was awarded benefits based on a lower average weekly wage on remand, it is unclear whether claimant actually obtained greater benefits as a result of prosecuting his claim even with the additional awards for a greater binaural loss, interest and a Section 14(e) penalty. It also is unclear whether claimant obtained an award of medical benefits over employer's contention that claimant was not so entitled. *See Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987). We therefore remand the case to the administrative law judge to determine whether claimant actually obtained a greater award. If, on remand, the administrative law judge determines that claimant did not obtain a greater award than employer voluntarily paid, employer is not liable for claimant's attorney fee under the provisions of Section 28(b).

We reject, however, employer's contention that the attorney's fee award must be limited

¹In *Phillips v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1472 (Nov. 14, 1991)(unpublished), the Board held that inasmuch as claimant was not a voluntary retiree, the administrative law judge erred in basing claimant's compensation on the national average weekly wage on January 14, 1987, claimant's date of injury, and remanded for the administrative law judge to determine claimant's average weekly wage pursuant to Section 10(a), (b), or (c), 33 U.S.C. §910(a), (b), and (c), as appropriate.

solely to the monetary difference between the amount voluntarily paid and the amount ultimately awarded. The Board has consistently held that although the amount of benefits awarded is a factor to be considered in awarding an attorney's fee, the amount of the fee award is not limited solely to the amount of compensation gained since to do so would drive competent counsel from the field. *See Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting), *appeal dismissed*, No. 94-40920 (5th Cir. Sept. 20, 1995).

Employer contends that any award of an attorney's fee is premature because the claim on which the fee award is based is on appeal, and therefore there had been no successful prosecution of the claim. Although the substantive claim is no longer on appeal, the administrative law judge properly determined at the time the case was before him that it was proper to issue an award while the appeal was pending, as the fee award would be stayed pending the outcome of the appeal. *See Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*)(Brown, J., concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 89 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987).

Employer also objects to counsel's use of the quarter-hour minimum billing method. The administrative law judge considered employer's objection and concluded that quarter-hour minimum billing is an acceptable practice for longshore claims based on *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). The law has changed since the administrative law judge's decision. In *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 90-4559 (5th Cir. July 25, 1990)(unpublished), the United States Court of Appeals for the Fifth Circuit stated that attorneys, generally, may not bill more than one-eighth hour for review of a one-page letter and one-quarter hour for preparation for a one-page letter. The Fifth Circuit subsequently stated in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(table) that its fee order in *Fairley* is considered to be circuit precedent. On remand, if applicable, the administrative law judge should consider counsel's fee petition in light of employer's objections and circuit precedent. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Employer's other objections to the number of hours and hourly rate awarded are rejected, as it has not shown that the administrative law judge abused his discretion in this regard.² *See Ross*, 29 BRBS at 42; *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Supplemental Decision and Order - Awarding

²Employer contends that because this was a routine and uncontested hearing claim and the issues were neither complex nor novel, the amount of the attorney's fee should be reduced. Additionally, employer contends that the attorney's fee award is excessive because claimant's counsel achieved only partial or limited success. Employer, however, did not raise these contentions below, and we will not address them 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), *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).

Attorney's Fee and Approval of Attorney's Fee on Remand is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge