

BRB Nos. 93-1073
and 93-1073A

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| FLOYD HATHOREN |) | |
| |) | |
| Claimant-Respondent |) | |
| Cross-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: |
| |) | |
| INGALLS SHIPBUILDING, |) | |
| INCORPORATED |) | |
| |) | |
| Employer-Petitioner |) | |
| Cross-Respondent |) | DECISION AND ORDER |

Appeal of the Decision and Order on Remand Awarding Benefits of Richard D. Mills,
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 self-insured
employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand Awarding Benefits (88-LHC-3178) of Administrative Law Judge Richard D. Mills 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 rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). 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).

This case is before the Board for the second time. In his initial decision in this case, the administrative law judge granted claimant's motion for summary judgment and found that claimant,

a retiree, suffered a noise-induced binaural hearing loss of 10.9 percent and that claimant's benefits should be calculated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), rather than Section 8(c)(23), 33 U.S.C. §908(c)(23), of the Act.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of \$854.50, representing 6.75 hours of services rendered at a rate of \$125 per hour, and \$10.75 in expenses. Employer filed objections to the requested fee, challenging both the requested hours and the requested rate. The administrative law judge addressed each of employer's specific objections, reduced the hourly rate sought by claimant's counsel to \$100, reduced the number of hours sought to 6.25, and awarded claimant's counsel an attorney's fee of \$625, plus the requested expenses. *See* Supplemental Decision and Order Awarding Attorney Fees.

Employer appealed, and claimant cross-appealed, the administrative law judge's decision awarding claimant benefits. Employer subsequently moved to remand the case to the administrative law judge for further action consistent with the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), in which the court held that a retiree's hearing loss benefits are to be calculated pursuant to Section 8(c)(23). In an Order dated September 12, 1991, the Board granted the motion to remand. *Hathoren v. Ingalls Shipbuilding, Inc.*, BRB Nos. 89-577/A (Sept. 12, 1991)(order). The Board further directed the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

On remand, consistent with the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), the administrative law judge awarded claimant benefits pursuant to Section 8(c)(23) for a 10.9 percent binaural loss converted to a 4 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. The administrative law judge further found that employer is liable for a Section 14(e) penalty. Lastly, taking into consideration his decision on remand, the administrative law judge reaffirmed the attorney's fee previously awarded to claimant's counsel.

On appeal, employer challenges the administrative law judge's fee award, incorporating by reference the objections it made below into its appellate brief. Claimant, in his cross-appeal, requests that the Board vacate its prior order and reinstate the administrative law judge's original determination that benefits are payable under Section 8(c)(13) of the Act, consistent with the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993); employer responds, assenting to claimant's request.

We will first address claimant's cross-appeal. BRB No. 93-1073A. The United States Supreme Court's decision in *Bath Iron Works* is dispositive of the issue presented by claimant in his cross-appeal. In *Bath Iron Works*, the Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13). Specifically, the Court stated that a worker who sustains a work-

related hearing loss suffers disability simultaneously with his or her exposure to excessive noise and, thus, the hearing loss cannot be considered "an occupational disease which does not immediately result in disability." See 33 U.S.C. §910(i). Since Section 8(c)(23) only applies to retirees with such occupational diseases, it is inapplicable to hearing loss injuries.

Consequently, pursuant to the Supreme Court's holding in *Bath Iron Works*, we vacate the administrative law judge's award of hearing loss benefits under Section 8(c)(23). Inasmuch as the administrative law judge's finding that claimant has a 10.9 percent binaural hearing loss is unchallenged, we modify the award to reflect that claimant is entitled to receive permanent partial disability benefits for this hearing loss pursuant to Section 8(c)(13) of the Act.

In its appeal, employer challenges the fee awarded to claimant's counsel by the administrative law judge on remand.¹ BRB No. 93-1073. Having fully considered employer's objections to the number of hours and hourly rate awarded by the administrative law judge, we reject those objections, as employer 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 specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected, as the administrative law judge considered the this specific objection and his award conforms to the criteria set forth in 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).

Employer's contentions which were not raised below will not be addressed 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).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is modified to reflect that claimant is entitled to permanent partial disability benefits for his hearing impairment pursuant to Section 8(c)(13). In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

¹Claimant responds, arguing that since employer did not appeal the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, it is now precluded from appealing the fee award rendered by the administrative law judge on remand. We disagree. On remand from the Board, the administrative law judge, in light of his award of compensation under Section 8(c)(23) and a Section 14(e) assessment, reaffirmed employer's liability for the previously awarded fee of \$625. As the underlying basis for this award changed on remand, employer's appeal of the administrative law judge's award, which implicitly incorporates his initial fee order, is timely.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge