

RAY A. PATRICK)	BRB Nos. 93-2025
)	and 93-2025A
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING, INCORPORATED)	DATE ISSUED: _____
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
)	
RAY A. PATRICK)	BRB No. 95-1793
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING, INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order on Remand and the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, and the Supplemental Decision and Order Awarding Additional Attorney Fees of Kenneth A. Jennings, Administrative Law Judges, United States Department of Labor.

Rebecca J. Ainsworth (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:

Claimant appeals the Decision and Order on Remand and employer appeals the Supplemental Decision and Order Awarding Attorney Fees of Administrative Law Judge C. Richard Avery and the Supplemental Decision and Order Awarding Additional Attorney Fees of Kenneth A. Jennings, (88-LHC-2370) 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).¹ 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 the initial decision rendered on claimant's claim for compensation under the Act, Administrative Law Judge Jennings (the administrative law judge) granted claimant's motion for summary judgment and found that claimant, a retiree, should be compensated for his noise-induced binaural hearing loss of 2.5 percent 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. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded claimant's counsel an attorney's fee of \$760.25.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge requesting an additional attorney's fee of \$411.25, representing 3.25 hours of services rendered at a rate of \$125 per hour, plus \$5.00 in expenses. Employer filed objections to this second fee request. In a Supplemental Decision and Order Awarding Additional Attorney Fees dated July 14, 1989, the administrative law judge, after addressing employer's specific objections, found that time spent in defense of the fee request was compensable, reduced the hourly rate sought by claimant's counsel to \$100, and thereafter awarded claimant's counsel an attorney's fee of \$325, plus the requested expenses.

Employer appealed the administrative law judge's award of benefits to claimant and the award of an attorney's fee to claimant's counsel to the Board. The Board, pursuant to 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) rather than Section

¹In an Order dated February 6, 1996, the Board consolidated claimant's appeal of the administrative law judge's Decision and Order on Remand, BRB No. 93-2025, employer's cross-appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, BRB No. 93-2025A, and employer's appeal of the administrative law judge's Supplemental Decision and Order Awarding Additional Attorney Fees, BRB No. 95-1793, for purposes of decision. 20 C.F.R. §802.104.

8(c)(13), modified the administrative law judge's award to reflect claimant's entitlement to compensation under Section 8(c)(23). *Patrick v. Ingalls Shipbuilding, Inc.*, BRB No. 89-573 (Sept. 28, 1992)(unpublished). The Board further remanded the case for the administrative law judge to consider claimant's entitlement to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e). Lastly, the Board affirmed the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees.

In the Decision and Order On Remand, Administrative Law Judge Avery found that claimant was entitled to a penalty under Section 14(e) for all late payments due as of March 6, 1987, when claimant filed his Notice of Injury, until December 27, 1987, when employer controverted the claim. Next, Judge Avery, after acknowledging 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), declined to apply the holding in that case to the claim before him in the absence of instructions that he do so; thus, Judge Avery's compensation order directed employer to pay claimant's benefits pursuant to Section 8(c)(23).

Subsequent to the issuance of Judge Avery's decision on remand, claimant's counsel submitted a fee petition requesting a fee of \$285.25, representing 2.25 hours of services rendered at a rate of \$125 per hour, plus \$4.00 in expenses. Employer filed objections to the requested fee. In a Supplemental Decision and Order Awarding Attorney Fees dated August 9, 1993, Judge Avery addressed employer's specific objections, reduced the hourly rate sought by claimant's counsel to \$110, denied reimbursement of the requested expenses, and thereafter awarded claimant's counsel an attorney's fee of \$247.50.

On appeal, claimant requests that the Board modify Judge Avery's Decision and Order on Remand to provide 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*. Claimant further argues that he is entitled to a Section 14(e) penalty on the entire award of benefits since he retired in 1983 and the award of five weeks of benefits accrued prior to the filing of his claim in 1987. Employer responds, assenting to claimant's request that *Bath Iron Works* be applied to the instant case. BRB No. 93-2025. In its cross-appeal, employer challenges Judge Avery's fee award on remand, incorporating by reference the objections it made below into its appellate brief. BRB No. 93-2025A. Employer additionally appeals the administrative law judge's Supplemental Decision and Order Awarding Additional Attorney Fees dated July 14, 1989, contending that Judge Jennings erred in awarding an attorney's fee for time spent in defense of counsel's fee request.

We will first address claimant's appeal. BRB No. 93-2025. The decision of the United States Supreme Court in *Bath Iron Works* is dispositive of the initial issue presented by claimant in this case. 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 Judge Avery's award of hearing loss benefits under Section 8(c)(23). Inasmuch as it is uncontroverted that claimant has sustained a 2.5 percent binaural hearing loss, we modify the award on remand to reflect that claimant is entitled to receive permanent partial disability benefits for his hearing loss pursuant to Section 8(c)(13) of the Act. Further, pursuant to the holding in *Bath Iron Works* that the relevant time of injury for calculating a retiree's hearing loss benefits commences on the date of his last exposure to injurious noise, we hold that claimant's benefits must commence on the date of his last exposure to injurious noise levels while working for employer. See *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). In the instant case, claimant, who retired in 1983, filed a notice of injury in March 1987; accordingly, as the award under Section 8(c)(13) is for five weeks and this period ended before either the commencement of any voluntary payments or the controversion of the claim, the penalty awarded by Judge Avery applies to the entire award. Judge Avery's award of a Section 14(e) assessment is thus modified to provide that employer is liable for an additional 10 percent penalty assessed on the entire award of compensation in this case. See *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993).

In its cross-appeal, employer challenges the fee awarded on remand by Judge Avery to claimant's counsel on remand. BRB No. 95-2025A. Having fully considered employer's objections to the number of hours and hourly rate awarded on remand, we reject those objections, as employer has not shown that Judge Avery 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). Further, 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).

Employer additionally appeals the Supplemental Decision and Order Awarding Additional Attorney Fees issued by Judge Jennings. BRB No. 95-1793. Contrary to employer's contention, the successful defense of a prior fee award is sufficient to justify a fee. *Jarrell v. Newport News Shipbuilding and Dry Dock Co.*, 14 BRBS 883 (1982). Further, the administrative law judge's fee award is reasonable and 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). We therefore affirm Judge Jennings' award of an additional fee to claimant's counsel.

Accordingly, the Decision and Order on Remand is modified to reflect claimant's entitlement to permanent partial disability benefits for his hearing impairment pursuant to Section 8(c)(13), and to reflect employer's liability for an additional ten percent penalty assessed on the entire award of compensation in this case. In all other respects, the administrative law judge's Decision and Order on Remand is affirmed. The Supplemental Decision and Order Awarding Attorney Fees of Judge Avery and the Supplemental Decision and Order Awarding Additional Attorney Fees of Judge Jennings are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge