BRB No. 95-1725

DONALD FORMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER, INCORPORATED	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order (on Remand) and the Supplemental Decision and Order Granting Attorney Fees of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen, P.C.), Hoboken, New Jersey, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (on Remand) and the Supplemental Decision and Order Granting Attorney Fees (91-LHC-1255) of Administrative Law Judge Robert D. Kaplan 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 administrative law judge's findings of fact and conclusions of law 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time this case has come before the Board. To reiterate, claimant, who has worked various jobs for employer at its facility in New Jersey, testified he was exposed to injurious noise. In 1990, he underwent two audiometric evaluations which revealed binaural impairments of 41.3 percent and 4.6 percent, respectively. Cl. Ex. 1; Emp. Ex. 2. Claimant filed a claim for benefits.

In his initial decision, the administrative law judge denied benefits, finding that claimant failed to establish conditions at work which could have caused his hearing loss. The administrative law judge credited the opinions of employer's witnesses which indicated that noise levels at employer's facility where claimant worked did not exceed 90 decibels and based upon this information in conjunction with the pattern of claimant's hearing loss, the administrative law judge found that claimant did not have a noise-induced hearing loss. Decision and Order at 5-6. On appeal, the Board reversed the administrative law judge's conclusion that claimant failed to establish a *prima facie* case and to invoke the Section 20(a), 33 U.S.C. §920(a), presumption. It held that claimant's testimony alone invoked the Section 20(a) presumption, and that conformance with Occupational Safety and Health Administration (OSHA) standards has never been sufficient to rebut the presumption of causation. It also held that Dr. Katz's opinion is insufficient rebuttal evidence because it relies in part on the OSHA standards and because his deposition testimony conflicts with his earlier report regarding the type of loss shown by claimant's audiometric pattern.[1] As this is the only rebuttal evidence of record, the Board held that claimant's hearing loss is work-related as a matter of law. Therefore, the Board remanded the case to the administrative law judge for him to determine the extent of claimant's hearing loss and to resolve any remaining issues. *Forman v. Global Terminal & Container, Inc.*, BRB No. 92-1551 (Oct. 26, 1994) (unpublished).

On remand, the administrative law judge issued an Order which rejects, in part, employer's motion for modification based on mistakes of fact. The administrative law judge denied employer's request to conduct a hearing and admit new evidence to disprove the Board's "findings of fact," stating that he has no authority to review the Board's decision. However, the administrative law judge granted employer's motion to submit new evidence regarding claimant's average weekly wage. Order (Feb. 14, 1995). In his Decision and Order (on Remand), the administrative law judge declined to revisit the question of average weekly wage because employer, after requesting permission to do so, did not submit evidence to refute the previously stipulated average weekly wage of $1,341.38. Decision and Order on Remand at 3-4. The administrative law judge then credited Dr. Katz's opinion and awarded claimant benefits for a 4.6 percent binaural impairment based on the stipulated average weekly wage. *Id.* at 5; *see* 33 U.S.C. §908(c)(13)(B) (1988).

Because the stipulated average weekly wage resulted in a compensation rate which exceeded

[1]At his deposition, Dr. Katz stated claimant's audiogram was consistent with hearing loss caused by aging and was not due to noise exposure. Emp. Ex. 4 at 71-72. In his earlier report, however, Dr. Katz stated that the audiometric evaluation indicated a "sloping sensorineural hearing loss with a typical noise exposure pattern," and he stated that part of claimant's impairment is due to the normal aging process. Emp. Ex. 2.

the maximum compensation rate allowed by the Act in 1989, *see* 33 U.S.C. §906(b), the administrative law judge amended his decision on employer's motion for reconsideration. He awarded claimant benefits based on the maximum compensation rate of $660.62. Claimant then filed a motion for reconsideration, disputing not the $660.62 figure but challenging the implication that the date of injury was 1989. Claimant stated he did not stipulate that the date of injury was 1989 even though he agreed to use his 1989 earnings to calculate his average weekly wage. The administrative law judge denied claimant's motion, finding that the parties are in agreement as to average weekly wage and because this is a scheduled loss, compensable under Section 8(c)(13)(B), the date of injury is not otherwise relevant. Order (June 6, 1995). Employer appeals the award of benefits, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in awarding claimant benefits for his hearing loss. It asserts that the Board exceeded its scope of review and improperly made findings of fact in reversing the administrative law judge's determinations that the noise study and Dr. Katz's opinion were credible and erred in holding that claimant's hearing loss is work-related. As the Board addressed this issue previously, its conclusion on the matter is considered the law of the case, and we will not address employer's contentions. *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

Employer next contends that the administrative law judge erred in denying employer's request for modification proceedings to submit new evidence. To reopen an award under Section 22, 33 U.S.C. §922, the moving party must allege and prove a mistake of fact or a change in conditions, economic or physical. The administrative law judge must then determine whether modification would render justice under the Act. *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). Although the administrative law judge properly held that he does not have authority to review the Board's decision, employer did not seek a review of the Board's decision via modification proceedings. Instead, it sought to modify the facts underlying the Board's legal conclusions that the Section 20(a) presumption was invoked and not rebutted. Employer submitted an engineer's report regarding the noise survey previously introduced and a new report from Dr. Katz. Emp. Exs. 4-5 (rejected). Any evidence not previously submitted to the administrative law judge can only receive consideration pursuant to a Section 22 motion for modification, as neither the Board nor the courts of appeals may consider new evidence. 33 U.S.C. §921(b),(c). Therefore, in this case it was an abuse of discretion for the administrative law judge to deny employer the opportunity to submit new evidence in a modification proceeding. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985). Consequently, we reverse his order denying the motion for modification, and we remand this case for him to conduct appropriate modification proceedings.[2] *See Dobson*, 21 BRBS at 176; *Kellis v. Newport News Shipbuilding &*

[2]We note however, that the evidence regarding the noise survey cannot, as a matter of law, prevent the Section 20(a) presumption from being invoked because it does not address the levels of noise to which claimant was exposed over his entire period of employment with employer. Nor can it rebut the Section 20(a) presumption as it does not address the cause of claimant's hearing

Dry Dock Co., 17 BRBS 109 (1985).

Employer also contends the administrative law judge erred in using the date of the September 1990 audiogram as the date of injury for purposes of determining average weekly wage. It argues that pursuant to the Supreme Court's holding in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT) (1993), the date of injury is the date claimant was last exposed to injurious stimuli and, as the evidence of record shows there was no exposure to injurious stimuli, claimant has failed to present evidence of the date of injury; therefore, his claim fails. The administrative law judge noted that, in this scheduled injury hearing loss case, the only purpose served by the date of injury is to determine claimant's average weekly wage. As the parties stipulated to claimant's average weekly wage, the administrative law judge, acting within his discretion, accepted the stipulation and held employer bound by it. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994); *Brown v. Maryland Shipbuilding & Dry Dock Co.*, 18 BRBS 104 (1986). Moreover, when given the opportunity to refute the stipulation, employer failed to present any additional evidence. Therefore, we reject employer's contention, and we affirm the administrative law judge's decision awarding benefits based on the maximum allowable compensation rate.

Claimant's counsel submitted a petition to the administrative law judge for an attorney's fee of $11,187.50, representing 44.75 hours of services rendered before him at a rate of $250, plus $662.55 in expenses. Employer filed its objections. The administrative law judge reduced the requested time by 2.25 hours and awarded a fee of $10,625, representing 42.5 hours at a rate of $250 per hour, plus expenses. Employer appeals this award, and claimant responds, urging affirmance.

Employer first challenges the $250 hourly rate as excessive. It argues that the administrative law judge erred in denying its request for a hearing to cross-examine claimant's attorney about rates and credentials and, thereby, violated the Administrative Procedure Act and denied it the right to offer proof that $250 per hour exceeds the prevailing rates. Alternatively, it argues that, as counsel is the proponent of the hourly rate, he has the burden of proving that $250 is within the prevailing rates of the community. The administrative law judge noted he has previously awarded counsel the same rate in other cases.

Contrary to employer's arguments, failure to hold a hearing on the attorney's fee issue is not a violation of employer's due process rights because the fee request was made to the administrative body before whom the work was performed, and the mere assertion that the fee is excessive is insufficient to warrant an evidentiary hearing. *Carroll v. Hullinghorst Industries, Inc.*, 12 BRBS 401 (1980), *aff'd*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982);

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impairment. Dr. Katz's opinion is relevant to the cause of claimant's hearing loss, and it can rebut the Section 20(a) presumption if it unequivocally rules out claimant's employment as the cause of or contributor to claimant's hearing loss. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

McCloud v. George Hyman Construction Co., 11 BRBS 194 (1979). We also reject employer's burden of proof argument. The administrative law judge has discretion to award a fee based on his consideration of the elements set forth in the Section 28 of the Act and 20 C.F.R. §702.132 of the regulations, and in this case, the administrative law judge concluded that an hourly rate of $250 is reasonable. Employer has not shown that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of $250. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

We also reject employer's remaining arguments. Fees for travel time may be awarded only where, as the administrative law judge found in this case, the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *See Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). Additionally, the Board has upheld use of a quarter-hour minimum billing method. *See Neeley*, 19 BRBS at 138; *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982). *Cf. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995) (table); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished order). Consequently, we affirm the fee award.[3]

[3]We note, however, that attorney's fee awards are not enforceable until the compensation order becomes final. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

Accordingly, the administrative law judge's denial of employer's motion for modification is reversed, and the case is remanded for further proceedings. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge