BRB Nos. 00-1027
and 00-1027A

MAX B. STEEVENS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
UMPQUA RIVER NAVIGATION	)	DATE ISSUED: July 17, 2001
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Pfeifer, P.C.), Portland, Oregon, for employer/carrier.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (99-LHC-1137) of Administrative Law Judge Alexander Karst 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). In addition, claimant appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees. 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. *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 & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a voluntary retiree, sought benefits under the Act for a noise-induced hearing loss allegedly sustained during the course of his employment with employer, based on an audiogram dated April 10, 1998, which revealed a 54.06 percent binaural hearing loss. Claimant worked as a crane operator for employer for ten or eleven years prior to his retirement on September 30, 1975. Specifically, he operated a crane on a 75 foot barge in the Umpqua River near Reedsport, Oregon, dredging gravel from the river bed and dumping it into rock crushers. In this work, claimant was exposed to noise from the crane's 275 horsepower diesel engine and from the three 200 horsepower diesel engines which generated power for the rock crushers. Claimant stated that the noise was so bad that after seven years he purchased his own hearing protection, which he wore thereafter about 75 percent of the time. Prior to working with employer, claimant was subjected to combat noise during World War II, and engine noise when he worked at his sawmill and ranch.

The record contains four audiograms. The first, performed at Nu-Ear on September 24, 1985, revealed a 16.26 percent binaural hearing loss, and the second, also performed at Nu-Ear, on March 5, 1992, revealed a 44.37 percent binaural hearing loss. These tests, however, lacked certain measurements required by the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), [1] and did not identify the status of the tester or the testing equipment used. *See* 20 C.F.R. §702.441(b) - (d). The third test, administered by James Kornbau on April 10, 1998, revealed a 54.06 percent binaural hearing loss. Mr. Kornbau, a licensed audiologist, believed that claimant's hearing loss is appropriate for a person with a history of noise exposure. Additionally, Mr. Kornbau stated that, assuming claimant did not wear hearing protection at work, his exposure to excessive noise at work would have played a role in causing his hearing loss. The last audiogram, administered by Dr. Lloyd Ediger on September 15, 1998, measured a 51.55 percent binaural hearing loss. Dr. Ediger, however, opined that based on a "regression analysis" of the 1985 audiogram, claimant's hearing loss in 1975 was at most 2.74 percent.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), based upon Mr. Kornbau's opinion that claimant's occupational exposure to noise played a role in his hearing loss, and that employer did not establish rebuttal of the Section 20(a)

[1]The September 24, 1985, audiogram lacked measurements at the 3,000 Hz level and the March 5, 1992, audiogram lacked measurements at the 3,000 Hz, 6,000 Hz and 8,000 Hz levels.

presumption. With regard to rebuttal, the administrative law judge specifically determined that Dr. Ediger's opinion essentially agreed that excessively high noise at employer's facility contributed to claimant's hearing loss. The administrative law judge also found that employer did not establish a subsequent, intervening event which caused claimant's hearing loss. Accordingly, the administrative law judge determined that claimant sustained a work-related hearing loss associated with his employment with employer. The administrative law judge then calculated the extent of claimant's hearing loss by averaging the results of the two most recent audiograms. In addition, he determined that claimant's compensation rate should be based on his average weekly wage of $299.03 at the time of his retirement, as calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). In so finding, the administrative law judge rejected claimant's contention that his compensation should instead be based on the minimum compensation rate of $225.32 at the time he became aware of his disability in 1998. *See* 33 U.S.C. §906(b)(2). Based on these findings, the administrative law judge concluded that claimant is entitled to permanent partial disability benefits for a 52.81 percent binaural hearing impairment under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), based on an average weekly wage of $299.03, which results in a compensation rate of $199.35.

Claimant's counsel thereafter sought an attorney's fee of $8,368.75, representing 41 hours of attorney work at an hourly rate of $200 and 2.25 hours of work performed by a legal assistant at an hourly rate of $75, plus costs of $179.05. Employer filed objections to this fee request. Claimant's counsel responded to employer's objections, and voluntarily reduced his requested hours of attorney time by 7.5 to 33.5.

In his Supplemental Decision and Order, the administrative law judge summarily sustained employer's objections to the fee petition, and reduced both the hourly rate and the number of hours of attorney time requested. Accordingly, he awarded an attorney's fee totaling $4,197.80, representing 22 hours of attorney time at an hourly rate of $175, plus the requested fees for legal assistant time, and the requested costs.

On appeal, claimant challenges the administrative law judge's refusal to apply Section 6(b)(2) to the calculation of his compensation rate, and the reduction in the number of hours and the hourly rate requested in awarding an attorney's fee. Employer responds, urging affirmance. In its cross-appeal, employer challenges the administrative law judge's finding that claimant had a compensable hearing impairment at the time of his retirement. Claimant responds, urging affirmance.

Extent of Disability

Employer initially contends that, contrary to the administrative law judge's finding, claimant did not meet his burden of proving that he sustained a hearing impairment at the time of his retirement from its employ, and alternatively, that the judge erred in calculating the degree of claimant's impairment. Citing *Bruce v. Bath Iron Works Corp*., 25 BRBS 157 (1991), employer asserts that it was erroneous for the administrative law judge to rely on an

audiometric measure of` claimant's hearing loss in 1998, some 23 years after his covered employment with employer ended, as evidence of claimant's hearing loss at the time of retirement. Employer maintains that in doing so, the administrative law judge inappropriately placed the burden of establishing the degree of compensable loss on employer rather than on claimant. Employer argues that contrary to the administrative law judge's finding, Dr. Ediger's regression analysis is the most appropriate measure of claimant's hearing loss as of 1975.[2]

[2]Part of employer's argument for using Dr. Ediger's regression analysis is due to the fact that he factored out presbycusis in order to arrive at claimant's hearing loss at the time of his retirement in 1975. The possibility that a portion of claimant's hearing loss is attributable to presbycusis does not diminish the size of his award; under the aggravation/combination rule, the entire disability is compensable. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

In *Bruce*, and three earlier cases, *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991), *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991), and *Brown v. Bath Iron Works Corp.* [*Brown I*] 22 BRBS 384 (1989), the Board was faced with the issue of the calculation of benefits for claimants who were exposed to noise in covered employment and then worked in non-covered employment. In addition, in several of the cases, the claimants had been retired for a substantial period at the time they sought benefits for hearing loss. In *Brown I*, the Board held that the aggravation of a covered injury occurring after claimant's longshore employment has terminated is non-compensable, citing *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). The Board vacated the award of benefits based on a 1983 audiogram, and remanded the case for the administrative law judge to determine if claimant had a hearing loss prior to his leaving covered employment, based on earlier audiograms of record. *Brown I*, 22 BRBS at 388. On remand, the administrative law judge determined that the only reliable audiogram was conducted in 1983, and that the 1983 audiogram could not be relied upon as an indicator of Brown's hearing loss at the time of his last covered employment in 1978. The administrative law judge thus concluded that Brown was not entitled to benefits as he did not establish that he suffered a hearing loss prior to leaving his covered employment. On appeal, the Board reversed the administrative law judge's decision, holding that Brown, as a matter of law, was entitled to compensation for his hearing loss as measured in 1983 based on the last covered employer rule.[3] *Brown v. Bath Iron Works Corp.* [*Brown II*], BRB No. 90-1058 (June 16, 1992)(unpub.). The United States Court of Appeals for the First Circuit ultimately upheld the award of benefits. *See Bath Iron Works Corp. v. Brown* [*Brown III*], 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

In *Labbe*, 24 BRBS 159, the Board reconsidered its holding in *Brown I*, 22 BRBS at 388, inasmuch as *Leach*, 13 BRBS at 231, had not been applied to occupational disease cases involving retired employees[4] and *Brown I* did not address the responsible employer rule. *Labbe*, 24 BRBS at 161-162; *see also Dubar*, 25 BRBS 5. The Board relied on the fact that in occupational disease cases the last covered employer or carrier is liable for the totality of claimant's disability resulting from an occupational disease, even if the disability is aggravated by subsequent non-covered employment. *Labbe*, 24 BRBS at 162. The Board held in *Labbe* that the holdings in *Brown* and *Leach* do not necessarily require claimants to

[3]This holding was premised on the Board's intervening decisions in *Labbe*, 24 BRBS 161, and *Dubar*, 25 BRBS 5, discussed *infra*. On reconsideration in *Brown II*, the Board remanded the case to the administrative law judge to determine Brown's average weekly wage. The administrative law judge's subsequent determination on this issue was affirmed by the Board and the case was thereafter appealed to the United States Court of Appeals for the First Circuit. *See Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

[4]Entitlement for retired employees was established by changes to the Act in 1984. *See, e.g.,* 33 U.S.C. §§902(10), 908(c)(13)(D), 908(c)(23), 910(i).

recreate the precise extent of their hearing loss at the date covered employment ended and that, in the absence of credible evidence regarding the extent of hearing loss at the end of covered employment, the administrative law judge may rely on the most credible evidence of record in determining the extent of claimant's work-related hearing loss. *Labbe*, 24 BRBS at 161-162; *see also Dubar*, 25 BRBS at 8.

Contrary to employer's contention, the Board did not require, in *Bruce*, 25 BRBS at 157, that the results from later tests be projected back to determine whether claimant sustained a compensable hearing loss at the time he left covered employment. In that case, claimant left covered employment in 1953, and claimant argued his hearing loss should be based on audiometric tests performed in 1984. However, the record contained an earlier audiogram from testing in 1968. This audiogram was the closest in time to claimant's leaving covered employment, and it reflected either a zero or a 6.5 percent hearing loss depending on the calibration of the equipment. The administrative law judge found that the 1968 audiogram was the most reliable evidence of the claimant's hearing loss as it was performed closest to the time the claimant left covered employment, but concluded it did not support a conclusion that claimant had a compensable loss at the time he left covered employment. Based upon the administrative law judge's evaluation of the record, the Board affirmed the administrative law judge's finding that the claimant did not sustain his burden of establishing the existence of a measurable hearing impairment.[5] *Bruce*, 25 BRBS at 160.

[5]Employer's reading of *Bruce* is based on language from the Board's decision, stating that the administrative law judge "concluded that he could not project the 1968 test values back to 1953 to find that claimant sustained a compensable hearing loss by 1953." 25 BRBS at 160. Considered in context with the Board's earlier discussion of *Labbe,* in which the Board affirmed an award based on a 1988 audiogram where claimant left covered employment in 1971, it is apparent that the Board was not imposing a requirement that claimant produce evidence projecting the degree of hearing loss back to the time of the last covered employment. Rather, since the administrative law judge had found, for valid reasons, that the 1968 audiogram was

the most reliable, and that audiogram could be interpreted as measuring a 0 percent impairment, it did not establish claimant had a measurable hearing loss in 1968. If his loss was 0 percent in 1968, he certainly had no loss in 1953, and any loss after 1968 could not be attributed to covered employment.

The instant case is distinguishable from *Bruce*, as claimant herein retired from all employment in 1975, and was not exposed to noise in subsequent non-covered employment. Moreover, unlike *Bruce*, all audiograms of record reveal a measurable impairment. Claimant therefore is entitled to benefits for the totality of his occupational hearing loss based on the most credible evidence of record. *See Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in pert. part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). The administrative law judge, after finding that the 1985 and 1992 audiograms were not of equal probative value in view of the lack of evidence that these tests were performed in accordance with the procedures set forth in the Act and regulations,[6] calculated the extent of claimant's hearing loss by averaging the results of the two audiograms administered in 1998. *See* 33 U.S.C. §908(c)(13)(E); 20 C.F.R. §702.441. Inasmuch as the audiograms administered in 1985 and 1992 were not in compliance with the appropriate regulations, the administrative law judge rationally questioned the reliability of these tests.[7] It was therefore reasonable for the administrative law judge to conclude that these audiograms are not equal in probative value to the subsequent audiograms administered in 1998. Moreover, the administrative law judge properly rejected Dr. Ediger's regression analysis, finding it was based on a audiogram which did not meet regulatory standards and which the doctor acknowledged lacked credibility. Decision and Order at 6. We hold that the administrative law judge rationally relied on the two audiograms administered in 1998 in determining the extent of claimant's work-related hearing loss. *See Labbe*, 24 BRBS 159. The administrative law judge thus rationally determined claimant's binaural hearing

[6]Under the Act and implementing regulations, an audiogram provides presumptive evidence of the extent of claimant's hearing loss if the following conditions are met: 1) the audiogram was administered by a licensed or certified audiologist or physician; 2) the employee was provided with a copy of the audiogram and the accompanying report within thirty days from the time that the audiogram was administered; 3) no one has provided a contrary audiogram of equal probative value within thirty days of the subject audiogram where claimant continues to be exposed to excessive noise levels or within six months if such exposure ceases; 4) the audiometer used must be calibrated according to current American National Standard Specifications; and, 5) the extent of claimant's hearing loss must be measured according to the most currently revised edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment. See* 20 C.F.R. §702.441(b)(1)-(3) and (d); *West v. Port of Portland*, 20 BRBS 162 (1988), *modified on recon.*, 21 BRBS 87 (1988). The administrative law judge found that both the 1985 and 1992 tests lacked certain requisite measurements, and did not include pertinent information regarding the status of the tester and/or the testing equipment.

[7]Moreover, we note that the administrative law judge is not required to credit the lowest audiogram. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992)(Stage, C.J., dissenting on other grounds).

impairment by averaging the results of these audiograms. Consequently, the administrative law judge's conclusion that claimant's binaural impairment is 52.81 percent is affirmed as it is supported by substantial evidence. *Id.*

Section 6(b)(2)

In his appeal, claimant asserts he is entitled to benefits based on the minimum compensation rate of Section 6(b)(2) of the Act. Claimant initially argues that, contrary to the administrative law judge's decision, the minimum compensation rate should apply to scheduled awards for permanent partial disability because they represent total disability benefits for a limited period of time. Claimant's contention that a scheduled award should be treated as total disability for a fixed period of time, is based on the following facts: an individual who receives two scheduled permanent partial disability awards must do so consecutively and not concurrently; the court will, at times, order the payment of a scheduled award over a longer period of time in a case where claimant's total compensation, as a result of both unscheduled and scheduled injuries, exceeds the total disability rate; and, scheduled awards must be paid at the full compensation rate. In his brief, claimant acknowledges the Board's decision in *Smith v. Paul Brothers Oldsmobile Co.*, 16 BRBS 57 (1983), but argues that the Board therein never discussed whether a scheduled permanent partial disability award may be compensation for total disability and thus fall within Section 6(b)(2).

In *Smith*, 16 BRBS 57, claimant sustained work-related injuries to his knee and leg and the parties agreed that claimant had a 15 percent permanent partial disability under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). The parties, however, could not agree on the proper rate of compensation, with claimant arguing that the minimum rate of compensation provided in Section 6(b)(2) applies to cases of partial disability as well as to cases of total disability. In rejecting claimant's contention, the Board differentiated between Section 6(b)(1),[8] which refers to "compensation for disability," and Section 6(b)(2),[9] which is specifically limited to cases of "total disability." The Board, observing that the plain

[8]Section 6(b)(1), 33 U.S.C. §906(b)(1), in pertinent part, provides that:

> Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage ....

[9]Section 6(b)(2), 33 U.S.C. §906(b)(2), in pertinent part, provides that:

> Compensation for *total disability* shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary . . . .

[emphasis added].

language of the statute cannot be ignored, explicitly concluded that the administrative law judge was correct in finding that the minimum benefit provision of Section 6(b)(2) of the Act is inapplicable to cases involving partial disability. Consequently, as the plain language of the statute specifically limits application of the minimum benefit provision of Section 6(b)(2) of the Act to "compensation for total disability," the administrative law judge herein properly concluded that said provision is inapplicable to claimant's scheduled award for his hearing loss. The schedule defines the level of compensation to which an injured worker is automatically entitled for the injuries enumerated therein, *see* 33 U.S.C. §908(c), and there is no need to look beyond those provisions to Section 6(b)(2), as claimant suggests.

A scheduled award of permanent partial disability is not, for purposes of Section 6(b)(2), tantamount to an award of total disability for a limited period of time. First, the Act clearly delineates between partial disability, including that which arises under the schedule, and total disability, and explicitly contemplates separate and distinct awards for these disabilities. *Compare* 33 U.S.C. §908(a), (b), *with* 33 U.S.C. §908(c),(e). Section 8 identifies four different categories of disability and separately prescribes the method of compensation for each. In the permanent partial disability category, Section 8(c) provides a compensation schedule which covers 20 different specific injuries, 33 U.S.C. § 8(c)(1) - (20), and an additional provision that applies to any injury not included within the list of specific injuries. 33 U.S.C. §908(c)(21). In addition to permanent partial disability, the Act provides for permanent total, temporary total, and temporary partial disability. 33 U.S.C. §§908(a), (b), (e).

Compensation for a permanent partial disability must be determined in one of two ways. First, if the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of his average weekly

wage for a specific number of weeks, regardless of whether his earning capacity has been impaired. *See Henry v. George Hyman Construction Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984). Second, in "all other cases" of permanent partial disability, Section 8(c)(21) authorizes compensation equal to two-thirds of the difference between the employee's pre-injury average weekly wage and his post-injury wage-earning capacity, during the period of disability. Permanent total disability pays two-thirds of the employee's average weekly wage for the duration of the disability. 33 U.S.C. § 908(a). Temporary total disability pays two-thirds of the employee's average weekly wages during the duration of the disability. 33 U.S.C. § 908(b). Lastly, compensation for temporary partial disability is two-thirds of the difference between the employee's pre-injury average weekly wage and his post-injury wage-earning capacity, during the period of disability, up to a maximum of five years. Thus, the Act clearly articulates the four types of disability and specifically provides separate means for calculating compensation for injuries resulting in each of these four forms of disability.[10] In the instant case, it is clear that claimant's entitlement to compensation for

[10]The facts that the payment of permanent partial disability compensation as

his hearing loss is solely derived from Section 8(c)(13), and thus, his recovery is limited to an award of permanent partial disability as provided by that provision in light of the extent of his hearing impairment. 33 U.S.C. §908(c)(13); *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT)(9th Cir. 1991).

Furthermore, the standards for establishing entitlement to a scheduled award of permanent partial disability as opposed to an award for total disability under the Act provide yet another key distinction between these forms of compensation. An employee with a scheduled injury under the Act is presumed to be disabled, even though the injury does not actually affect his earnings. *Bath Iron Works Corp.*, 506 U.S. 153, 26 BRBS 151(CRT). As such, no proof of loss of wage-earning capacity is required in order for a claimant to receive the amount specified in the schedule. In contrast, for non-scheduled injuries, loss of wage-earning capacity is an element of the claimant's case, for without the presumption that accompanies scheduled injuries, a claimant is not "disabled" unless he proves "incapacity because of injury to earn the wages." 33 U.S.C. §902(10); *Bath Iron Works Corp.*, 506 U.S. at 153, 26 BRBS 151(CRT). Consequently, we reject claimant's contentions regarding the application of Section 6(b)(2) and affirm the manner in which the administrative law judge calculated claimant's compensation for his work-related hearing loss; *i.e.*, a straight two-thirds of his average weekly wage at the time of his retirement in 1975, for 105.62 weeks in compliance with Section 8(c)(13) of the Act.

Section 28

Finally, claimant challenges the administrative law judge's attorney's fee award, asserting that the administrative law judge erred in reducing both the hourly rate and the number of hours requested in his petition for an attorney's fee. In particular, claimant contends that contrary to the administrative law judge's finding, there is no basis in the record for the reduction in the hourly rate from $200 to $175, or for his reduction in the

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articulated by Section 8(c) "shall be in addition to compensation for temporary total disability . . . paid in accordance with subsection (b)," and that a scheduled award cannot run concurrently with a temporary total disability award, and that where claimant establishes permanent total disability, the schedules set forth in Section 8(c) are inapplicable, further distinguishes scheduled awards of permanent partial from total disability. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

number of attorney hours requested, as he failed to properly analyze the petition for attorney's fees and employer's resulting objections, and instead merely referred to employer's objections as the basis for his reductions.

The administrative law judge's supplemental decision reads in *toto* as follows:

> Respondent's objections to the attorney fee petition is [*sic*] sustained for the reasons recited in Respondent's filing. Accordingly, Respondents Bohemia, Incorporated, Umpqua River Navigation, and Wausau Insurance Companies are ordered to forthwith pay $4,197.80 to Charles Robinowitz, Esq. as attorney fee and costs.

Supplemental Decision and Order Awarding Attorney's Fees. Given the cursory nature of the administrative law judge's supplemental decision, and in particular his failure to adequately and independently set out and discuss the reasons for his reduction in both the hourly rate and number of hours of attorney work requested, we must vacate the Supplemental Decision and Order Awarding Attorney's Fees and remand this case for further consideration. On remand, the administrative law judge is instructed to reconsider and fully discuss the attorney's fee petition and employer's objections thereto, and he must provide a discussion and adequate rationale for any reduction in the requested attorney's fee.[11]

[11]In particular, the administrative law judge must, on remand, resolve the parties' dispute regarding the number of hours that claimant's counsel spent on the unsuccessful issue of application of the minimum compensation rate.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge