BRB No. 89-3365

CHARLES R. GOODE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (88-LHC-1748) of Administrative Law Judge Kenneth A. Jennings 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 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).

Claimant sustained a noise-induced hearing loss during the course of his employment with employer. On March 18 and November 3, 1987, he underwent audiometric evaluations, the results of which revealed binaural impairments of 10 percent and 8.8 percent, respectively. Based on these results, employer tendered payment of permanent partial disability benefits for an 8.8 percent impairment. Because the parties disputed the extent of disability, the case was referred to the Office of Administrative Law Judges. Prior to any formal hearing, the parties agreed to split the difference between the two results, and on July 25, 1988, employer paid claimant benefits for a 9.4 percent binaural impairment. On December 9, 1988, the administrative law judge granted claimant's request

to remand the case to the district director to allow an appeal to the Board of certain legal issues.[1] Thereafter, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. The administrative law judge approved 5.5 hours of services at a rate of $100 per hour for a total fee of $550. Supp. Decision and Order. Employer appeals the fee award, and claimant responds urging affirmance.

Employer first contends that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). While the complexity of the issues should be considered by the administrative law judge, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In this case, the administrative law judge considered the complexity of the case and approved the requested hourly rate of $100. We reject employer's argument on appeal that the fee should be reduced based on this criterion because employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on an hourly rate of $100. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979).

[1]On November 23, 1990, the Board granted claimant's motion to withdraw his appeal, BRB No. 88-4198.

Employer next contends it is not liable for a fee under Section 28(b) of the Act, 33 U.S.C. §928(b), because it paid claimant's benefits in full prior to any hearing on the matter. Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In this case, employer accepted liability for an 8.8 percent binaural impairment. After negotiations, the parties agreed that claimant is entitled to benefits for a 9.4 percent binaural impairment, and employer accepted liability for medical benefits. Contrary to employer's assertion, payment of benefits prior to a hearing does not relieve employer of its liability for a fee once claimant obtains additional compensation above the amount tendered by employer. *See Brown v. General Dynamics Corp.*, 12 BRBS 528 (1980); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). As claimant obtained additional benefits while this case was pending before the administrative law judge, employer is liable for an attorney's fee pursuant to Section 28(b).[2] *See Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987); *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1982), *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989).

Employer also avers that claimant obtained only a nominal increase in benefits and that this must be taken into consideration in awarding a fee. The Board has consistently rejected employer's contention that the amount of the fee awarded must be based solely on the monetary difference between the amount of benefits tendered and the amount of benefits awarded. *See, e.g., Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (Decision on Recon.), *appeal dismissed*, No. 94-40920 (5th Cir. Sept. 20, 1995); *Watkins*, 26 BRBS at 179. As claimant obtained additional benefits over that which employer tendered, and as the administrative law judge considered the amount of benefits awarded in entering a reasonable fee award, we reject employer's contention that the fee must be reduced based on this criterion.

Employer also challenges counsel's use of the quarter-hour minimum billing method. The United States Court of Appeals for the Fifth Circuit has recently held that its unpublished fee order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), is considered circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP*

[2]Employer correctly contends that Section 28(a) is inapplicable in this case. Under Section 28(a), if an employer declines to pay compensation within 30 days after receipt of written notice of the claim from the district director, it is liable for a reasonable attorney's fee incurred thereafter by the claimant in pursuit of his claim. 33 U.S.C. §928(a). Contrary to claimant's response, the 30-day time period begins to run after employer receives formal notice from the district director and not from the date claimant filed his claim for compensation. *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). As employer tendered payment of benefits six days after it received formal notice of the claim, employer is not liable for an attorney's fee under the provisions of Section 28(a).

[Biggs], 46 F.3d 66 (5th Cir. 1995) (table). In *Fairley*, the court held that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for preparing a one-page letter. *See Fairley*, slip op. at 2. In light of these decisions, we reduce the entries dated March 29 and April 21, 1988, for the review of routine letters, to .125 hour each. The remaining charges accord with the mandate of the Fifth Circuit.

Next, employer contends that claimant is not entitled to a fee for work performed after July 25, 1988, when it made full payment of benefits to claimant. Contrary to employer's assertion, counsel is entitled to reasonable "wind-up" charges, and it was not erroneous for the administrative law judge to approve the amounts requested for services rendered after July 25, 1988. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Finally, employer makes specific contentions regarding time allowed for preparation and review of correspondence and for preparation of discovery documents. The administrative law judge agreed with several of the objections and reduced the requested fee by 1.25 hours. Because employer has failed to show an abuse of discretion by the administrative law judge in awarding time for these services, having specifically considered employer's objections, we reject these item-specific contentions and decline to further reduce the administrative law judge's award on this basis.[3] *See generally Watkins*, 26 BRBS at 182; *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Accordingly, the administrative law judge's decision is modified to reflect counsel's entitlement to an attorney's fee of $525, representing 5.25 hours of services at a rate of $100 per hour.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[3]We also decline to augment the award as claimant requests. Although counsel may be compensated for a delay in the payment of an attorney's fee, the adjudicatory body awarding the fee may only take the issue of delay into consideration where it has been properly raised. In this case, claimant first raised the issue of delay in payment in his response brief before the Board, and the Board will not consider new issues raised for the first time on appeal. *Nelson*, 29 BRBS at 97; *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge