

BRB No. 91-1983

M. C. TANNER)
)
 Claimant-Respondent)
)
 v.)
)
 INGALLS SHIPBUILDING,) DATE ISSUED:
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney's Fees of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

John L. Hunter (Cumbest, Cumbest, Hunter and McCormick), Pascagoula, Mississippi, for claimant.

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

Before: STAGE, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Attorney's Fees (89-LHC-1683) of Administrative Law Judge Ben H. Walley rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (the Act). 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 sought benefits under the Act for a work-related hearing loss. On September 30, 1987, employer began making voluntary payments of compensation without an award to claimant pursuant to Section 8(c)(13) of the Act, based on a 22.81 percent binaural hearing impairment. On March 6, 1989, this matter was referred to the Office of Administrative Law Judges.

In his Decision and Order, the administrative law judge determined that claimant sustained a 42.26 percent work-related binaural impairment and awarded claimant benefits pursuant to Section

8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). The administrative law judge further found that claimant is entitled to interest on all past due benefits, future medicals, and an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e). Finally, the administrative law judge determined that employer is liable for claimant's attorney's fees.

Claimant's counsel subsequently submitted a fee petition requesting an attorney's fee of \$1,704.50, representing 13.55 hours of services performed by both counsel and a paralegal before the administrative law judge at \$100 per hour, and \$349.50 in costs. Thereafter, employer filed objections to the fee petition. In his Decision and Order Awarding Attorney's Fees, the administrative law judge, after noting employer's objections to the fee petition, reduced the hourly rate sought for claimant's paralegal's services to \$50, and thereafter awarded claimant's counsel a fee of \$1,562, representing 10.7 hours of services performed by claimant's counsel at an hourly rate of \$100, 2.85 hours of services performed by claimant's paralegal at an hourly rate of \$50, and \$349.50 in costs.

On appeal, employer initially contends that it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), since it accepted liability for the claim and commenced voluntary payments of compensation to claimant prior to receiving formal notice of the claim from the district director's office. Alternatively, employer argues that, under Section 28(b) of the Act, 33 U.S.C. §928(b), the fee awarded to claimant's counsel by the administrative law judge is excessive since any fee should be based upon the difference between the amount employer voluntarily paid to claimant and the amount awarded by the administrative law judge.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. *See* 33 U.S.C. §928(a). Under Section 28(b) of the Act, 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 agreed to by employer. 33 U.S.C. §928(b); *see, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we need not address employer's arguments with respect to liability under Section 28(a), inasmuch as the case at bar is governed by Section 28(b). Specifically, we note that the administrative law judge, in his Decision and Order, awarded claimant permanent partial disability benefits for a 42.26 percent hearing impairment, significantly greater than the benefits for a 22.81 percent impairment voluntarily paid by employer. Additionally, the Board has held that the award of a Section 14(e) assessment against employer constitutes additional compensation for claimant within the meaning of Section 28(b). *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991). Employer is thus liable for claimant's attorney's fee for services performed at the administrative law judge level, pursuant to Section 28(b), since counsel succeeded in obtaining additional benefits for claimant while this case was pending before the Office of Administrative Law Judges. *See* 33

U.S.C. §928(b).

Employer argues that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded by claimant's counsel. We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, 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). Thus, while the complexity of 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). The administrative law judge in this case considered employer's objection in this regard in finding an hourly rate of \$100 proper. Similarly, we reject employer's contention that the fee award should be limited by the amount of additional compensation obtained by claimant. Although the amount of benefits awarded to the claimant is a valid consideration in granting attorney's fees, *see, e.g., Muscella*, 12 BRBS at 272, 20 C.F.R. §702.132, in this case, counsel's efforts before the administrative law judge significantly increased claimant's award over the benefits voluntarily paid.

Next, employer challenges the 1.5 hours requested by claimant's counsel, and approved by the administrative law judge, for the preparation of a response to employer's objections to counsel's fee request. Employer, however, failed to raise objections to specific itemized charges below; we, therefore, will not consider objections to specific services rendered by claimant's counsel not raised before the administrative law judge. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988); *Moore v. Paycor, Inc.*, 11 BRBS 483 (1979).

Lastly, employer objects to the \$100 hourly rate awarded by the administrative law judge for services rendered by claimant's counsel, and \$50 hourly rate awarded for services rendered by claimant's paralegal, contending that hourly rates of \$80 and \$30 are more appropriate. The administrative law judge awarded claimant's counsel an hourly rate of \$100, finding it to be a customary amount in the area for a case of this type, but reduced the requested hourly rate for claimant's paralegal from \$100 to \$50. We affirm these rates, as employer has not shown that the administrative law judge's findings are arbitrary, capricious, or an abuse of his discretion. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Accordingly, the administrative law judge's Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge