

BRB No. 00-0271

MICHAEL STOINOFF)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JACKSONVILLE SHIPYARDS,)	DATE ISSUED: <u>Nov. 17, 2000</u>
INCORPORATED)	
)	
and)	
)	
ST. PAUL FIRE AND MARINE)	
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees of Stuart A. Levin,
Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

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

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fees (94-LHC-2978) of Administrative Law Judge Stuart A. Levin 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 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).

On August 26, 1988, claimant, an outside machinist, injured his low back, hips, and hands at work when he fell off a gangway onto a dry dock. In his Decision and Order, the administrative law judge awarded claimant total disability benefits through May 13, 1997, and continuing permanent partial disability benefits based on a wage-earning capacity of

\$320 per week commencing May 14, 1997. The administrative law judge denied claimant's motion for reconsideration. The administrative law judge also remanded this case to the district director upon construing claimant's submission of new evidence with his motion for reconsideration as a request for modification. *See* 33 U.S.C. §922.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$4,727.55, representing 24.7 hours of attorney services performed at \$190 per hour, and \$34.55 in expenses. In his Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel the sum of \$4,517.05 representing .1 hours of attorney services performed in 1996 at \$175 per hour, and 23.5 hours of attorney services performed in 1997 and 1998 at \$190 per hour, and \$34.55 in expenses.

On appeal, claimant's counsel asserts that it would be useful if the Board were to issue "guidelines" regarding fee awards. Counsel specifically questions whether a different hourly rate can be awarded by the district director and the administrative law judge in the same case, whether interest is awardable on unpaid attorney's fees, and how counsel is to be compensated for the delay in payment of an attorney's fee. Employer did not file a response brief.

Initially, we hold that claimant's counsel has not alleged specific error in the administrative law judge's fee award in this case, and thus we decline to review it. *See Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); 20 C.F.R. §§802.211, 802.301. The administrative law judge's fee award therefore is affirmed. With regard to claimant's counsel's inquiries concerning the awarding of different hourly rates in the same case, interest, and enhancement, we note that the law is settled in each of these areas.

The amount of a fee award is within the discretion of the body awarding the fee. Thus, the district director and an administrative law judge in the same case may award a fee at differing hourly rates, which the Board is bound to affirm unless the party challenging the award shows it to be arbitrary, capricious or an abuse of discretion. *See generally Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999). However, the administrative law judge may not award different hourly rates for trial and non-trial work as there is no basis for such a distinction. *See Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*)(Brown, J., concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990).

Next, the courts and the Board have held that there is no legal authority under the Act,

its regulations, or 28 U.S.C. §1961,¹ for awarding interest on a fee award in a case arising under the Act. *Hobbs v. Director, OWCP*, 820 F.2d 1528, 1531 (9th Cir. 1987), *aff'g Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n. 3, 30 BRBS 67, 69 n. 3 (CRT)(9th Cir. 1996); *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995), *aff'g* 24 BRBS 84 (1990).

With regard to an enhancement of the fee award to compensate for the delay between the time the services were rendered and the fee award becomes final and enforceable, and thus payable, the Board has held that enhancement for the delay in payment is appropriate for fees awarded under Section 28 of the Act, 33 U.S.C. §928. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). In so holding, the Board in *Nelson* relied upon two Supreme Court decisions, *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992). In *Jenkins*, the Court stated that, “enhancement for delay in payment is, where appropriate, part of a ‘reasonable attorney’s fee.’” *Jenkins*, 491 U.S. at 282. In *Dague*, the Court stated that what is a reasonable fee under the various federal fee-shifting statutes, such as Section 28(a), (b) of the Act, applies uniformly to all of them. *Dague*, 505 U.S. at 562. The courts and the Board have held that when enhancement for delay in payment of the attorney’s fee award is timely raised, the administrative body awarding the fee must address this factor. *See, e.g., Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). The courts and the Board also have held that the administrative body awarding the fee has jurisdiction to consider a request for enhancement of an attorney’s fee award to account for delay in payment if such request is made within a reasonable time after the fee award becomes final and enforceable. *See Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112 (CRT)(9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

¹The Act itself does not provide for interest on compensation awards, but its assessment is mandatory. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991). The calculation of the rate of interest is made pursuant to 28 U.S.C. §1961. *Grant v. Portland Stevedoring Co.*, 17 BRBS 20 (1985). The Ninth Circuit held in *Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987), that 28 U.S.C. §1961 cannot provide a basis for interest on fee awards in cases arising under the Act.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge