

BRB Nos. 03-0830  
and 04-0311

DARLETTE MAUMAU )  
(Widow of FINEFEUIAKI MAUMAU) )

Claimant-Respondent )

SHELLY DAGGETT )  
(Mother of SALESI and MAIKA MAUMAU) )

Claimant-Respondent )

v. )

HEALY TIBBITTS BUILDERS, )  
INCORPORATED )

and )

HAWAII EMPLOYER'S MUTUAL )  
INSURANCE COMPANY )

Employer/Carrier-Petitioners )

JOHN M. MANNERING )

Employer-Respondent )

DATE ISSUED: Sept. 8, 2004

DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney's Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor, and the Compensation Order Approval of Attorney Fee Application of Philip G. Williams, District Director, United States Department of Labor.

Preston Easley (Law Offices of Preston Easley), San Pedro, California, for claimant Darlette Maumau.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for Healy Tibbitts Builders, Inc., and Hawaii Employer's Mutual Insurance Co.

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

PER CURIAM:

Healy Tibbitts Builders, Incorporated (employer) appeals the Supplemental Decision and Order Awarding Attorney's Fees (2002-LHC-0938) of Administrative Law Judge Daniel F. Sutton and the Compensation Order Approval of Attorney Fee Application (OWCP No. 15-045582) of District Director Philip G. Williams rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. *See, e.g., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). This case is before the Board for a second time.

Finefeuiaki Maumau (decedent) was fatally injured while working as a laborer for John M. Mannering (Mannering), a subcontractor hired by Healy Tibbitts, the general contractor, to work on the P-123 Berthing Wharves Project at the United States Naval Submarine Base at Pearl Harbor, Hawaii. Decedent's surviving spouse, Darlette Maumau, filed a claim for death benefits under the Act. Shelley Daggett, in her capacity as the mother of decedent's two minor children, Salesi and Maika Maumau, also filed a claim on their behalf. 33 U.S.C. §909.

In his decision, the administrative law judge found that the situs and status requirements of the Act were satisfied, 33 U.S.C. §§902(3), 903(a), and that decedent was an employee of an uninsured subcontractor, Mannering. Thus, the administrative law judge found that Healy Tibbitts is liable for all compensation payable under the Act pursuant to Section 4(a), 33 U.S.C. §904(a). The administrative law judge awarded death benefits to decedent's widow, claimant Maumau, and to claimant Daggett, on behalf of decedent's two minor children. 33 U.S.C. §909(b). The administrative law judge also awarded claimant Maumau funeral expenses of \$3,000. 33 U.S.C. §909(a). Healy Tibbitts, Mannering, and claimant Daggett all filed appeals of the administrative law judge's decision. The Board affirmed the administrative law judge's Decision and Order Awarding Benefits in its entirety. *Maumau v. Healy Tibbitts Builders, Inc.*, BRB Nos. 03-0239/A/B (Dec. 8, 2003) (unpub.).

Claimants' counsel submitted petitions for attorney's fees to the administrative law judge and district director. Specifically, before the administrative law judge, counsel for

claimant Maumau, Preston Easley, sought a fee of \$55,427.82, representing 182.25 hours of attorney time at an hourly rate of \$250, plus costs of \$9,115.32. Counsel for claimant Daggett, Steven Birnbaum, sought a fee of \$12,313.07, representing 38.15 hours of attorney time at an hourly rate of \$295, 3.35 hours of attorney time at an hourly rate of \$150, and 1.9 hours of law clerk time at an hourly rate of \$95, plus expenses of \$375.82. Before the district director, Mr. Easley sought an attorney's fee totaling \$9,625, representing 38.5 hours of attorney work at an hourly rate of \$250. Employer filed objections to all three fee petitions, arguing, among other things, that pursuant to Section 4(a) of the Act, it cannot be held liable for the payment of an attorney's fee under Section 28, 33 U.S.C. §928.

In his supplemental decision, the administrative law judge rejected employer's Section 4(a) argument and awarded a fee to Mr. Easley totaling \$43,971.08, and to Mr. Birnbaum totaling \$5,303. In his Compensation Order, the district director awarded Mr. Easley an attorney's fee totaling \$8,625.

On appeal, employer challenges the attorney's fee awards of the administrative law judge and the district director (respectively assigned BRB Nos. 03-0830 and 04-0311), reiterating its argument that Section 4(a) precludes its liability for such fees. Claimant Maumau responds, urging affirmance of both attorney's fee awards. In addition, claimant Maumau's counsel seeks an attorney's fee totaling \$13,125, for work performed before the Board in the prior appeals, BRB Nos. 03-0239/A/B. Employer has filed objections to counsel's fee petition.

Employer asserts that, contrary to the findings of the administrative law judge and district director, its liability for compensation as the statutory "employer" pursuant to Section 4(a) does not include liability for claimants' attorney's fees pursuant to Section 28. In this regard, employer avers that the specific liabilities of an employer are denoted in Section 4(a) in a restrictive manner by the actual listing of those benefits that the employer must pay, stating "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title." Employer therefore argues that absent the assignment of the specific statutory obligation for an attorney's fee under Section 28 in Section 4(a), it cannot be liable for such fees, and that liability therefore must remain with the actual employer in this case, Mannering. Employer also asserts that the district director failed to adequately discuss employer's objection in this regard.

In addressing employer's contention, the administrative law judge initially observed that while Section 4(a) mentions only "compensation," it must be read in conjunction with Section 5(a), 33 U.S.C. §905(a), under which employer, as the general contractor, is liable for the benefits awarded to claimants because its subcontractor, Mannering, failed to secure the payment of compensation for its employees under Section 4(a). The administrative law judge found that since Mannering failed to comply with the insurance coverage requirements of the Act, Healy Tibbitts must be treated as the "employer" for compensation purposes. The

administrative law judge concluded that, as is the case with any employer liable for compensation under the Act, it is additionally liable for an award of an attorney's fee if the provisions of Section 28(a) or (b) are satisfied. The administrative law judge therefore rejected employer's contention and held employer liable for the payment of an attorney's fee under Section 28. The district director similarly acknowledged employer's contention and concluded, based on the same logic employed by the administrative law judge, that employer is liable for claimant Maumau's attorney's fee in this case.

We affirm the administrative law judge's conclusion, as his analysis and interpretation of the pertinent provisions of the Act are rational and consistent with the statutory language. Section 4(a) of the Act provides in pertinent part:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation.

33 U.S.C. §904(a). This provision must be read in conjunction with Section 5(a), as the two sections together provide the statutory basis for the liability of employer, a general contractor, where its subcontractor, Mannering, failed to secure the payment of compensation for its employees as required by Section 4(a). Specifically, Section 5(a) of the Act provides:

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer . . . For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. §905(a) (emphasis added). In this case, since Mannering failed to secure the payment of compensation, Healy Tibbitts became "the employer." Thus, all provisions of the Act pertaining to an "employer" are fully applicable to it, including the attorney's fee provision of Section 28.

Given the statutory framework, it is not necessary for Section 4(a) to list every possible form of liability in order for it to apply to employer. Section 4(a) explicitly states that every employer shall be liable for "compensation payable under sections 907, 908, and 909 of this title." 33 U.S.C. §904(a). These enumerated sections represent the forms of benefits payable to employees under the Act, *i.e.*, medical, disability, and death benefits. Section 28, in turn, provides two avenues by which a successful claimant's attorney may

recover an attorney's fee from the employer or carrier.<sup>1</sup> In particular, an award of an attorney's fee against an employer is, under either provision, premised on an award of benefits to claimant under the Act. 33 U.S.C. §928(a), (b); *see, e.g., Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6<sup>th</sup> Cir. 1997); *Director, OWCP v. Baca*, 927 F.2d 1122 (10<sup>th</sup> Cir. 1991); *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9<sup>th</sup> Cir. 1989); *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). Section 28(a) and (b) provide that the employer may be held liable for an attorney's fee "in addition to" the compensation awarded. Section 4(a) thus does not prevent employer's liability for an attorney's fee, as it addresses the types of "compensation" for which an employer may be liable, and Section 28 addresses an employer's "additional" liability for attorney's fees. Thus, if employer is liable for "compensation" pursuant to Section 4(a), it also is liable for an attorney's fee if the provisions of Section 28 (a) or (b) are satisfied. Therefore, we hold that the administrative law judge and the district director properly held Healy Tibbitts, in its capacity as "the employer," liable for the compensation in this case, and liable for an attorney's fee on that

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<sup>1</sup> Specifically, Section 28(a) states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a). Section 28(b) states:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [*sic*] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation....

award of “compensation” pursuant to Section 28 of the Act.<sup>2</sup>

Next, we reject employer’s assertion that the administrative law judge and district director misapplied the burden of proof with respect to the hourly rate issue. Employer asserts that the pertinent regulation, 20 C.F.R. §702.132(a), requires that the applying attorney establish the validity of the requested hourly rate. Employer maintains that it was compelled to argue against an hourly rate that had never been properly established. With regard to the hourly rate, Section 702.132(a) requires that the application for an attorney’s fee provide “the normal billing rate for” each individual performing work. 20 C.F.R. §702.132(a). The applicant meets this regulatory requirement by providing a statement containing the required information; there is no requirement of “evidence” establishing “the validity” of the requested rate. Employer, as the party objecting to the “normal billing rate,” properly bears the burden of showing that the requested rate is excessive. The adjudicator then must, as both the administrative law judge and district director did herein, approve a fee that is “reasonably commensurate with the necessary work done,” taking into consideration “the quality of the representation, the complexity of the legal issues involved and the amount of benefits awarded.” 20 C.F.R. §702.132(a).

The administrative law judge explicitly considered employer’s objection to the hourly rates requested by the attorneys. The administrative law judge found that while employer objected to Attorney Easley’s hourly rate of \$250 as excessive, it suggested, in its objections to Attorney Birnbaum’s petition, that a \$250 hourly rate is reasonable for services provided in this case. The administrative law judge found that employer, however, provided no rationale to support these contradictory statements. He then determined that both attorneys have considerable ability and experience, and were well prepared, knowledgeable, and effective advocates for their respective clients. The administrative law judge thus concluded that “their efforts are clearly worthy of compensation at the prevailing market rate.” Supp. Decision and Order at 4.

The district director also acknowledged employer’s objection that the hourly rate requested by Mr. Easley was excessive. In rejecting employer’s contention, the district director found “the hourly rate [\$250] is commensurate with fees awarded for work in Hawaii at this complexity level.” Comp. Order at 1. He further cited explicitly to Section 702.132 in making his award of an attorney’s fee and appropriately factored into his decision the complexity of the issues and customary hourly rates. *Id.* at 2.

The adjudicator is in the best position to assess the quality of the legal services performed before him. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)

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<sup>2</sup> Consequently, we reject employer’s contention that the district director’s consideration of this issue is insufficient, as the district director’s conclusion that employer is liable for claimant’s attorney fee is correct as a matter of law.

(3<sup>d</sup> Cir. 2001). As the administrative law judge and district director in this case each provided an adequate rationale for the hourly rates awarded, and as employer has not established that either adjudicator abused his discretion in resolving this issue pursuant to Section 702.132(a), the hourly rates are affirmed. *See generally Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9<sup>th</sup> Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *see also Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000); *Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Accordingly, as employer does not otherwise contest the attorney's fee awards of the administrative law judge and the district director, they are affirmed.

Claimant Maumau's counsel requests an attorney's fee totaling \$13,125, representing 52.5 hours at an hourly rate of \$250 for work performed before the Board in the prior appeals in this case. Employer objects to the requested hourly rate on the ground that it is excessive given the subject matter involved and the "fee awards previously entered by the Board." Employer maintains that an hourly rate of \$175 is more appropriate.

Section 802.203(d)(4), 20 C.F.R. §802.203(d)(4), which addresses hourly rates for awards of an attorney's fee for work performed before the Board, states in part that "[t]he rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status." In the instant case, the areas "where the services were rendered" are California and Hawaii. The requested hourly rate of \$250 is reasonable and customary in these regions for an attorney of Mr. Easley's experience. Accordingly, we reject employer's assertion that the requested rate is excessive.

We also reject employer's objections to three of the specific entries on the fee petition. First, as the prior case involved multiple appeals raising complex issues regarding coverage and average weekly wage, and given the fact that the lifetime payout to claimant Maumau may exceed \$1,000,000, we hold that it was not unreasonable for an attorney to put forth 16 hours for research and an additional 24 hours to write a response brief in this case. Next, we reject employer's objection to the two hours spent to review its response brief as, in contrast to employer's contention, it did file a brief in response to Mannering's cross-appeal. We, however, disallow the one hour for the time spent by counsel to prepare a motion to dismiss, as that motion was denied. Accordingly, we award claimant Maumau's counsel an attorney's fee totaling \$12,875, representing 51.5 hours at an hourly rate of \$250. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and the district director's Compensation Order Approval of

Attorney Fee Application are affirmed. Claimant's counsel is awarded an attorney's fee of \$12,875 for work performed before the Board in BRB Nos. 03-0239/A/B, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge