

BRB Nos. 88-3595
and 88-3595A

CASEY P. JOHNSON)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	DATE ISSUED:_____
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	DECISION and ORDER

Appeals of the Compensation Order - Award of Attorney's Fees of Robert H. Bergeron,
District Director, United States Department of Labor.

John F. Dillon (Maples and 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 Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Compensation Order - Award of Attorney's Fees (Case No. 6-109130) of District Director¹ Robert H. Bergeron 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On April 8, 1987, claimant filed a claim for a 15.3 percent work-related binaural hearing loss

¹The title "District Director" has been substituted for the title "Deputy Commissioner" used in the statute. 20 C.F.R. §702.105.

based on the results of a March 27, 1987, audiogram, and provided employer with notice of his injury. On May 4, 1987, employer controverted the claim. On December 23, 1987, employer initiated payment of compensation for a 15.3 percent binaural hearing loss calculated pursuant to 33 U.S.C. §908(c)(13)(B) based upon an average weekly wage of \$297.62. On July 20, 1988, employer amended its voluntary payments to reflect an average weekly wage of \$227. On the same date, employer filed a Form LS-208, Notice of Final

Payment, which indicated that all benefits due claimant had been paid and that claimant had in fact been overpaid \$817.32. Claimant's counsel subsequently filed a fee petition for work performed before the district director's office, requesting \$1,385 representing 13.25 hours of services at an hourly rate of \$100, plus \$60 in expenses.

In his Compensation Order - Award of Attorney's Fees, the district director reduced the \$100 hourly rate sought by claimant's counsel to \$90 and disallowed 8.25 hours of the 13.25 hours requested. Accordingly, he awarded claimant's counsel a fee of \$510, representing 5 hours of services at \$90 per hour, plus the \$60 in requested expenses.

On appeal, claimant contends that he is entitled to a Section 14(e), 33 U.S.C. §914(e), penalty; specifically, claimant asserts that employer did not timely pay benefits or controvert the claim, and that the excuse granted by the district director is invalid pursuant to *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*), *aff'd in part, part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). Employer responds, urging the Board to deny claimant's request for a Section 14(e) assessment. In its cross-appeal, employer challenges the attorney's fee awarded to claimant's counsel by the district director. Claimant has not responded to employer's cross-appeal.

Section 14(e) of the Act provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion or the failure to pay is excused by the district director after a showing that owing to conditions over which employer had no control, such installment could not be paid within the period prescribed. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12, 33 U.S.C. §912, or the employer has knowledge of the injury.

The issue of entitlement to a Section 14(e) assessment may be raised by the parties at any time and has been raised by the Board *sua sponte* where a properly filed appeal regarding claimant's entitlement is before the Board. *See, e.g., Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981). In the instant case, however, although claimant filed a timely appeal of the district director's Order awarding a fee, that Order does not address claimant's entitlement to compensation benefits or a Section 14(e) assessment; rather, it addresses only counsel's request for an attorney's fee for services rendered before that official. As this Order contains no findings regarding claimant's entitlement to

benefits or a Section 14(e) penalty, those issues are not properly before the Board.² We therefore will not address claimant's contentions regarding the assessment of a Section 14(e) penalty against employer.³

Turning to employer's arguments on cross-appeal, employer contends that the district director erred in holding it liable for claimant's attorney's fee because it never declined to pay the benefits sought. Employer cites correspondence dated February 16, 1988, in which the district director informed claimant's counsel that he was approving a fee for the same amount he awarded in his October 7, 1988, Compensation Order payable directly to counsel by employer in a lump sum from claimant's schedule award. Employer asserts that there is no basis for the district director's subsequent change in position. In the alternative, employer contends that the district director erred in holding it liable for those fees incurred prior to the date it received formal notice of the claim, arguing that these fees should be assessed against claimant.

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 award payable by the employer. 33 U.S.C. §928(a). Employer may be held liable only for those fees incurred after 30 days from the date it received formal notice of the claim or, within the 30-day period, from the date employer declined to pay, whichever occurs first. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). Given the discrepancy between the district director's February 16, 1988, letter stating that the attorney's fee is payable from claimant's

²We note that claimant correctly asserts in his brief that pursuant to *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*), *aff'd in part, part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), the excuse granted by the district director is invalid. The invalidity of the district's director's excuse, however, is not determinative of claimant's entitlement to a Section 14(e), 33 U.S.C. §914(e), assessment on the facts in this case because employer controverted the claim on May 4, 1987, prior to the district director's May 11 and 14, 1987, letters excusing employer from compliance with Section 14 of the Act.

³Should claimant believe that he is entitled to a Section 14(e) assessment, he may pursue such an assessment before the district director in accordance with the regulations at 20 C.F.R. §§702.311-317. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990).

award and the Compensation Order holding employer liable for the fee, we must vacate the district director's order. On remand, the district director must determine if employer is liable for any of claimant's attorney's fee consistent with the terms of Section 28(a).⁴ *Id.*

Moreover, we note that the district director did not identify the specific itemized entries he reduced or disallowed. On remand, the district director should specify and explain any reductions made consistent with the requirements of 20 C.F.R. §702.132. Finally, employer also argues that it is not liable for any services performed subsequent to July 20, 1988, the date it completed voluntary payment of the full amount of compensation due, inasmuch as claimant obtained no additional benefits thereafter and any services performed did not result in the successful prosecution of the claim. Employer's argument is moot on the facts presented; all of the services claimed in counsel's fee petition were performed prior to July 20, 1988.

Accordingly, the district director's Compensation Order-Award of Attorney's Fees is vacated and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁴Claimant may be held liable for an attorney's fee if employer's liability is not established under Section 28(a), as a lien upon his compensation award. *See* 33 U.S.C. §928(c); *Watkins*, 26 BRBS at 185 n.6. If claimant is liable for any portion of the fee pursuant to Section 28(c), the district director must take into account the financial circumstances of the claimant in rendering his fee award. *See* 20 C.F.R. §702.132(a).