BRB No. 00-0866

BERTHA S. BRINKLEY	)	
	)	
Claimant-Respondent	)	DATE ISSUED: May 14, 2001
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Attorney's Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Anthony Lawrence Romo (Romo & Associates, P.C.), Albuquerque, New Mexico, for claimant.

Andrew Z. Schreck (Galloway, Johnson, Tompkins, Burr & Smith), Houston, Texas, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order - Awarding Attorney's Fees (96-LHC-2262) of Administrative Law Judge James W. Kerr, Jr., 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.*, 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 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, a secretary with the Department of the Army in Fort Hood, Texas, suffered a work-related psychological injury. In August 1999, the administrative law judge awarded claimant various periods of temporary total disability benefits and a period of temporary partial disability benefits, as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Neither claimant nor employer appealed this

award.

Subsequent to the administrative law judge's award of benefits, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $28,601, representing 216.43 hours of attorney services at $125 per hour, 20.63 hours of paralegal services at $75 per hour, plus the New Mexico gross receipt tax of $1,568.75, and $2,141.19 in expenses, plus a gross receipt tax of $117.62. Employer filed numerous objections to claimant's counsel's fee request. Employer objected to its liability for the gross receipts tax, asserting it was in the nature of interest and therefore not allowable, citing *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995) (interest is not available on attorney's fee awards). Employer also objected to certain services as unnecessary, excessive, clerical, or insufficiently detailed. Employer further objected to time spent on a status conference and an unsuccessful motion for sanctions. Employer lastly objected to all costs except the deposition transcription fee of $312.46 and the witness fee for Dr. Neland of $500.

Subsequent to employer's filing of its objections but prior to the issuance of his fee award, the administrative law judge ordered claimant's counsel to clarify his request for reimbursement of the New Mexico gross receipts tax and requested that a copy of the relevant statute be included in the response. The administrative law judge also ordered claimant's counsel to show cause as to why the gross receipts tax should not be considered a requirement of doing business and why the tax should be considered in furtherance of claimant's case. Claimant's counsel responded, enclosing a copy of the relevant statute and conceding that neither the Act nor case law under the Act has addressed the issue of whether an administrative law judge can award a separate amount for the gross receipts tax paid on an attorney's fee and costs awarded under the Act. Claimant's counsel attempted to distinguish the holding in *Rihner*, 41 F.3d 997, 29 BRBS 43(CRT), asserting that the New Mexico gross receipts tax is mandatory and accrues to the benefit of the state of New Mexico, unlike interest on a fee which would accrue to claimant's counsel. Claimant's counsel asserted that an award of this tax would not be inconsistent with the Act's policy of ensuring that competent counsel is available to represent claimants under the Act. Claimant's counsel further stated that:

> The tax at issue should not be considered a requirement of doing business because it is not in the nature of overhead. Further in no way does the amount at issue advance the infrastructure of Applicant's professional practice. Rather, it is an assessment that by law must be remitted to the New Mexico Taxation and Revenue Department by the 25th day of the month following receipt by the Applicant.

Response to Order Seeking Clarification and Order to Show Cause at 2.

In his supplemental decision, the administrative law judge awarded a fee of $28,601, representing all time requested by counsel, plus the New Mexico gross receipts tax of $1,505.68, and costs in the amount of $1,807.11, plus the New Mexico gross receipts tax of $95.22, disallowing costs for facsimiles of $264 and postage of $70.08. On appeal, employer challenges the administrative law judge's fee award. Claimant's counsel responds in support of the administrative law judge's fee award, and requests that employer be sanctioned for appealing the fee award.

Employer first contends that the administrative law judge erred in awarding claimant's counsel a separate amount for the New Mexico gross receipts tax and asserts that the tax should be disallowed, as is interest on a fee award, citing *Rihner*, 41 F.3d 997, 29 BRBS 43(CRT), and as it is a part of counsel's overhead and cost of doing business. The state of New Mexico imposes "an excise tax equal to five percent of gross receipts . . . on any person engaging in business in New Mexico." *See* N.M. STAT. ANN. §§7-9-3, 7-9-4 (Supp. 2000). Amounts received as an attorney's fee are subject to the gross receipts tax. *Mears v. Bureau of Revenue*, 531 P.2d 1213 (N.M. Ct. App. 1975). This tax may be passed on to the attorneys' clients. *See Herrera v. First N. Sav. & Loan Ass'n,* 805 F.2d 896 (10th Cir. 1986).

Section 28 of the Act, 33 U.S.C. §928, and its implementing regulation, 20 C.F.R. §702.132, do not state whether a tax required by state law may be assessed against employer or claimant. Section 28 provides merely for a reasonable attorney's fee to be awarded to claimant's counsel by employer or claimant, *see* 33 U.S.C. §928(a), (b), (c), and the implementing regulation provides for a fee award reasonably commensurate with the necessary work done. *See* 20 C.F.R. §702.132(a). Because Section 28 is a fee-shifting statute, and the United States Supreme Court has held that case law construing what is a "reasonable fee" applies uniformly to all federal fee-shifting statutes, cases in which federal fee-shifting statutes address the losing party's liability for a gross receipts tax on the fee award are dispositive on this issue. *See City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). The federal cases involving federal fee-shifting statutes, including the Federal Coal Mine Health and Safety Act, the Truth-in-Lending Act, and the Internal Revenue Code, however, are not uniform in their treatment of this issue.[1] *See*

[1]In the New Mexico state cases involving federal and state fee-shifting statutes, the courts have awarded the gross receipts tax, but without explanation. *See O'Neal v. Ferguson Constr. Co.*, 35 F.Supp.2d 832 (D.N.M. 1999), *aff'd*, 237 F.3d 1248 (10th Cir. 2001); *Bustamante v. Albuquerque Police Dep't*, 1991 WL

Velasquez v. Director, OWCP, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988) (tax not awarded under Section 28 of the Longshore Act, as applicable to the Federal Coal Mine Health and Safety Act); *Herrera*, 805 F.2d 896 (tax not awarded under the Truth-in-Lending Act); *McWilliams v. Comm'r of Internal Revenue,* No. 4651-92, 1995 WL 116295 (T.C. 1995)(tax not awarded in a federal tax case); *but see Mares v. Credit Bureau of Raton*, 801 F.2d 1197 (10th Cir. 1986)(gross receipts tax awarded in case arising under the Truth-in-Lending Act, Fair Credit Reporting Act and the Fair Debt Collection Practices Act).

In *Velasquez,* 844 F.2d 738, 11 BLR 2-134, the United States Court of Appeals for the Tenth Circuit awarded a reasonable attorney's fee pursuant to Section 28 of the Act, but summarily declined to award an additional amount for the gross receipts tax, to counsel who successfully represented a black lung claimant on appeal. The United States Tax Court in *McWilliams,* No. 4651-92, 1995 WL 116295*,* summarily held that the gross receipts tax should be included in overhead and as part of the attorney's hourly rate, and thus it is not recoverable separately. In *Herrera*, 805 F.2d 896, the Tenth Circuit provided the most extensive explanation in affirming the district court's disallowance of the gross receipts tax. The plaintiffs in this Truth-in-Lending Act (TILA) violations case had agreed to reimburse their attorney for the amount of the gross receipts tax. Their attorney, in turn, included this tax in the amount of his fee request, to be paid by the defendants under the fee-shifting scheme. The district court awarded an attorney's fee, but not the gross receipts tax. On appeal, the Tenth Circuit acknowledged cases wherein the tax had been awarded without discussion, but found no abuse of discretion by the district court in declining to award the tax. *Id*., 805 F.2d at 902. The court noted that the plaintiffs were not required by law to pay this tax and that a fee award to a successful plaintiff is not governed by a party's fee agreement with his attorney. Finally, the court stated that disallowance of the tax did not defeat the underlying purposes of TILA to make the plaintiff whole and "to create a system of private attorneys general to aid the effective enforcement of the [TILA]." *Id.* In *Mares*, 801

125307 (D.N.M. 1991); *Mieras v. Dyncorp.*, 925 P.2d 518 (N.M. Ct. App. 1996), *cert. denied,* 923 P.2d 1164 (N.M. 1996); *Murillo v. Payroll Express*, 901 P.2d 751 (N.M. Ct. App. 1995); *Shadbolt v. Schneider, Inc.*, 710 P.2d 738 (N.M. Ct. App. 1985), *rev'd in part,* 709 P.2d 189 (N.M. 1985); *Paternoster v. La Cuesta Cabinets, Inc.*, 689 P.2d 289 (N.M. Ct. App. 1984).

F.2d 1197, the Tenth Circuit allowed, without explanation, the gross receipts tax, as had the lower court, in an appeal of an attorney's fee award involving a TILA case.

In the instant case, the administrative law judge summarily awarded the gross receipts tax on the attorney's fee and costs requested, finding only that it is not analogous to interest as it does not accrue to claimant's counsel and it is reflective of hours spent in furtherance of claimant's case. We agree with the administrative law judge that the gross receipts tax is not analogous to interest in that it does not accrue to claimant or her attorney. However, we hold that administrative law judge abused his discretion in awarding the gross receipts tax. In so deciding, we rely on the holdings in the federal cases involving federal fee-shifting statutes, particularly those where the court has provided a rationale for not allowing the gross receipts tax. *See Herrera*, 805 F.2d 896; *McWilliams*, No. 4651-92, 1995 WL 116295. We note that the cases approving an award including a separate amount for this tax contain no rationale for doing so, and therefore are not persuasive. *See Mares*, 801 F.2d 1197; *see also* cases cited in n. 1, *supra*.

As stated by the court in *Herrera*, the claimant herein is not required to pay the gross receipts tax imposed on the amount of the attorney's fee award. The Supreme Court has stated that, "hours that are not properly billed to one's client also are not properly billed to one's adversary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Moreover, we are persuaded that the tax is part of counsel's overhead and should be included in his hourly rate, as all attorneys practicing in New Mexico are subject to this tax and must accept it as a cost of doing business. *See McWilliams*, No. 4651-92, 1995 WL 116295. Counsel's hourly rate should be set at a level that allows him to recoup a reasonable attorney's fee, yet also permits him to pay the tax without diluting the reasonable fee.[2] Thus, we vacate the administrative law judge's award of the New Mexico gross receipts tax on the attorney's fee and costs, and we modify the administrative law judge's award to exclude this tax in the amount of $1,600.90.

Employer next challenges certain entries as unnecessary or as involving excessive legal research. We hold that the administrative law judge abused his discretion in awarding the 10.08 hours spent on January 4 and 5, 1999 (third entry) by claimant's counsel in reading the Act and its annotations. We modify the fee

[2]For example, if counsel's normal billing rate is $150 per hour, and he performs 100 hours of services, the attorney's fee award would be $15,000. If the gross receipts tax rate were 5 percent, the attorney would owe $750 in tax, reducing his recovery to $14,250. To compensate for the tax, however, the attorney could set his hourly rate at $157.50, resulting in a gross fee of $15,750, and a fee of $14,962.50, after the gross receipts tax is paid.

award to disallow these 10.08 hours, as time spent by claimant's counsel in familiarizing himself with the Act is not compensable. *See generally Snyder v. Director, OWCP*, 9 BLR 1-187 (1986). However, the administrative law judge rationally awarded the remaining time over employer's objections, as the time requested is for research on specific issues regarding the Act or for research in anticipation of or after the hearing, and as employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused his discretion in awarding fees for these services.

Employer contends that the administrative law judge erred in awarding all fees and costs associated with claimant's motion for sanctions, including time entries from August 13 through and including September 13, 1999, as the motion was denied and resulted in no additional benefits for claimant. We hold that the administrative law judge abused his discretion in awarding fees and costs associated with claimant's unsuccessful motion for sanctions; we therefore vacate the award for this time, and modify the total fee award to disallow 17.83 hours spent on this activity. *Hensley,* 461 U.S. 424; *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT)(D.C. Cir. 1992); Ex. A at 3 to Application for Attorney's Fees (specifically itemizing 17.83 hours spent on the Motion for Sanctions). Additionally, we modify the administrative law judge's award of costs to disallow $378.65 in costs associated with this motion.[3]

Employer next challenges all services performed by counsel's staff at $75 per hour and asserts that they should have been disallowed as part of counsel's overhead. Over employer's objections, the administrative law judge rationally awarded all services at $75 per hour as these services involve the performance of non-clerical work including the receipt and review of documents, and the sending and receiving of telephone calls. *See Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986). Employer also challenges certain work performed by attorney Romo or his associate, Ms. Curry, as clerical and therefore not compensable. Contrary to employer's contentions, the administrative law judge reasonably rejected employer's objections, finding the services in question were not clerical in nature. *See Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.*, 28 BRBS 27 (1994); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980). Employer's remaining contentions concerning the attorney's fee award are rejected. As employer has shown no abuse of discretion in the

[3]The $378.65 figure is arrived at by adding the costs itemized from August 13 through 25, 1999, as they are associated with work on the motion for sanctions and the September 13, 1999, charge of $23.50 for the transcript of the hearing on the motion for sanctions. *See* Ex. B to Application for Attorneys' Fees.

administrative law judge's finding that these services were not excessive, were reasonable, necessary, and contributed to the successful prosecution of the case, and are sufficiently detailed to describe the nature of the work performed, *see* 20 C.F.R. §702.132, the administrative law judge's award of fees for these services are affirmed. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Lastly, employer contends that the administrative law judge erred in finding certain costs to be reasonable, necessary, and recoverable under the Act.[4] We affirm the administrative law judge's decision in this regard. 33 U.S.C. §928(d). Claimant resided in New Mexico, and the hearing was held in Dallas, Texas. The costs incurred are reasonable, necessary, and in excess of that normally considered to be a part of overhead. *See generally Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982); *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979); *see also O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995); *Ferguson v. S. States Coop.*, 27 BRBS 16 (1993).

Accordingly, the administrative law judge's Supplemental Decision and Order - Awarding Attorney's Fees is vacated in part, and is modified to reflect an attorney's fee award of $25,112.25, representing 188.52 hours of attorney services at an hourly rate of $125, 20.63 hours of paralegal services at an hourly rate of $75, plus costs of $1,428.46, exclusive of the New Mexico gross receipts tax on the attorney's fee and costs, 27.91 hours of attorney time, and $378.65 in costs. In all other respects, the administrative law judge's fee award is affirmed. Claimant's counsel's motion that employer be sanctioned for appealing the administrative law judge's fee award is denied.[5]

SO ORDERED.

ROY P. SMITH

[4]Costs included $39.99 for mileage, $113.25 in long distance charges, $111.25 for photocopying, $70.08 for postage, $70 in delivery fees, $1.06 for a notary fee, $515 for airline tickets, $312.46 for deposition transcription, $13 in parking fees, $53.70 for taxi fares in Dallas, Texas, $500 for Dr. Neland's witness fee, and $77.58 for meals (as part of travel expenses). *See* Ex. A at 3-4 to Application for Attorneys' Fees.

[5]We deny claimant's counsel's request that employer be sanctioned for appealing the administrative law judge's fee award. The Board has no authority to sanction a party, *see Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT)(5th Cir. 1995), and, moreover, employer's appeal was not frivolous.

Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from two aspects of my colleagues' decision. First, I disagree with their decision to disallow the gross receipts tax as a cost. Awards of an attorney's fee are reviewed for an abuse of discretion. *See generally* *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also* *Herrera v. First N. Sav. & Loan Ass'n,* 805 F.2d 896 (10th Cir. 1986). I would hold that employer has not established such an abuse in this instance. Although the case law cited by my colleagues supports the proposition that the gross receipts tax is not properly shifted to the losing party, there is ample case law that supports the opposite result. *See* *Mares v. Credit Bureau of Raton*, 801 F.2d 1197 (10th Cir. 1986), and cases cited in n.1 of the majority's opinion. That the cases award this tax as a cost without explanation could be due to the routine nature of such awards in New Mexico. In view of the fact that the case law can support either result, it is my opinion that an abuse of discretion on the part of the administrative law judge has not been demonstrated.

Moreover, I cannot support the proposition that the gross receipts tax should be considered overhead and therefore included in counsel's hourly rate in order to cover the costs of running his practice. The gross receipts tax on an attorney's fee award appears to be unique to the state of New Mexico, and is unlike traditional overhead such as rent, electricity, or support staff, which is a common expense of all businesses. Furthermore, it is disingenuous to suggest that this tax should be reflected in counsel's hourly rate. If counsel were to raise his hourly rate to attempt to cover the tax as an overhead expense, the amount of the tax itself would increase, as the tax is a flat rate on the amount of the fee. Counsel would have to adjust his hourly rate in each case to account for the tax, and would not be able to assert his "normal billing rate" as contemplated by the regulation at 20 C.F.R. §702.132. Thus, in this regard, requiring counsel to pay the tax out of his fee award causes a dilution in the amount of the "reasonable fee" awarded and may provide a disincentive for counsel to take cases arising under the Act. *See generally* 33 U.S.C. §928; *Denny v. Westfield State College*, 880 F.2d 1465 (1st Cir. 1989) (noting that disincentive might result in failure of Civil Rights Act of 1964 to allow the shifting of all expert witness fees, but finding that $30 statutory limit on such fees is binding).

I also disagree with my colleagues' decision to disallow the 10.08 hours claimant's attorney spent familiarizing himself with the Act and case law. Counsel's requested hourly rate of $125 indicates that he is not experienced with cases arising under the Act, and all things considered, the time spent performing basic research at a lower hourly rate "evens out" in comparison to more experienced attorneys' spending less time on research at higher hourly rates.

For the above stated reasons, I would affirm the administrative law judge's award of the New Mexico gross receipts tax on the attorney's fee award and costs. I also would affirm the award of 10.08 hours spent by claimant's counsel on basic research. In all other respects, I concur in my colleagues' decision.

BETTY JEAN HALL, Chief
Administrative Appeals Judge