

BRB Nos. 00-345  
and 00-345A

CHARLENE DAVIS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: <u>Dec. 8, 2000</u>
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Attorney Fees, the Order on Reconsideration, and the Order Denying Claimant’s Motion for Modification of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, Metairie, Louisiana, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Attorney Fees and the Order on Reconsideration, and claimant appeals the Order Denying Claimant’s Motion for Modification (1996-LHC-2209) of Administrative Law Judge Richard D. Mills 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). We must affirm the administrative law judge’s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured her back during the course of her employment in February 1993. Employer voluntarily paid temporary total disability benefits from April 2 through April 5, 1993, April 8, 1993, through August 9, 1995, and from January 22, 1998, and continuing. Claimant filed a claim for benefits, and the administrative law judge determined that the issues to be resolved included: the extent of disability, whether the proper amount of temporary total disability benefits was paid, claimant's entitlement to additional medical benefits, claimant's wage-earning capacity, and her entitlement to interest, penalties, and an attorney's fee. The administrative law judge found that claimant established the compensability of her injury and that she was entitled to temporary total disability benefits from April 1993 to August 1995 at the minimum compensation rate of \$180.29. Decision and Order at 14-15, 17. However, he determined that claimant was not entitled to additional temporary total disability benefits because employer had paid the amount in full. *Id.* at 17. The administrative law judge further determined that, although claimant also suffers from a compensable psychiatric injury, claimant was no longer disabled as of August 1995, as employer established the availability of suitable alternate employment, and the psychiatric condition does not prevent claimant from working. *Id.* at 18-22. Additionally, the administrative law judge found that while claimant had requested approval of psychiatric treatment from Dr. Richoux, employer had authorized a one-time visit, and claimant was evaluated by Dr. Richoux, claimant had not requested, and employer did not refuse, further psychiatric treatment. Thus, employer was not liable for claimant's treatment with Dr. Anastasio prior to the hearing. *Id.* at 22-24. Nevertheless, the administrative law judge considered claimant's argument that employer should be liable for treatment from Dr. Anastasio as a request to change physicians, and he granted that request, holding employer liable for post-hearing treatment with Dr. Anastasio. *Id.* at 24. Finally, the administrative law judge held employer liable for a Section 14(e), 33 U.S.C. §914(e), penalty for late payments of temporary total disability benefits, interest, and an attorney's fee. Decision and Order at 28-30. This decision was not appealed by either party.

Pursuant to the administrative law judge's decision, claimant's counsel filed a petition for an attorney's fee for 203.75 hours at an hourly rate of \$150 for a total fee of \$30,562.75. Employer filed objections, challenging the fee on the grounds that the requirements of Section 28(b), 33 U.S.C. §928(b), were not met, and that claimant obtained only limited success. It also filed objections to specific entries. The administrative law judge approved 155 hours of work at a rate of \$150 per hour for a total of \$23,250. Citing the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993), he then reduced the entire fee award by one-third so the fee would be "tailored to [claimant's] limited success. . . ." Supp. Decision and Order at 2, 4. Consequently, he awarded a fee to claimant's counsel of \$15,500. The administrative law judge then denied employer's motion for reconsideration and claimant's motion for modification. Employer appeals the fee award and the denial of its

motion for reconsideration, BRB No. 00-345, and claimant appeals the denial of her motion for modification, BRB No. 00-345A. Each responds to the other's appeal, urging affirmance.

We shall first address claimant's appeal. Claimant contends the administrative law judge erred in denying her motion for modification. Specifically, she asserts that, because employer filed an appeal, her attorney's fee will be delayed by the length of time necessary for the appellate process to be completed and this entitles her to interest on the delayed payment of the fee. We disagree and hold that the administrative law judge properly denied claimant's motion. Contrary to claimant's argument that the United States Court of Appeals for the Seventh Circuit potentially permits interest to be awarded on an attorney's fee, *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7<sup>th</sup> Cir. 1982), this case arises in the Fifth Circuit, and that court has held that interest is not available on fee awards under Section 28 of the Act. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5<sup>th</sup> Cir. 1995). Should claimant's counsel's fee be delayed to such an extent that augmentation becomes warranted, the Board has held that counsel may file a supplemental request for an enhanced fee after the fee becomes enforceable. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *see also Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9<sup>th</sup> Cir. 1999); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4<sup>th</sup> Cir. 1999). We therefore affirm the administrative law judge's denial of claimant's motion.

In its appeal of the administrative law judge's fee award, employer argues that claimant's lack of success on the claim requires either a reversal or a significant reduction of the fee award. Employer avers claimant succeeded only in obtaining \$736.50 in penalties and interest, and it asserts that this minimal success occurred as a matter of law and not due to any efforts of claimant's counsel. Under Section 28(b), 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 already paid or tendered by the employer. *See Rihner*, 41 F.3d at 1007, 29 BRBS at 51(CRT); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, 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). However, if a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount which is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Baker*, 991 F.2d at 163, 27 BRBS at 14(CRT); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992).

In this case, claimant obtained \$736.50 in penalties and interest and future medical benefits for treatment with Dr. Anastasio. Claimant was thus successful in obtaining

additional benefits, and the administrative law judge properly held employer liable for a fee. However, it is not clear to what extent these results were due to the efforts of counsel rather than to the administrative law judge's application of established law. The administrative law judge found that claimant did not request authorization from employer for a change in her psychiatric treatment from Dr. Richoux to Dr. Anastasio, whom claimant was seeing at the time of the hearing, and that employer had paid costs associated with the advice of Dr. Richoux, whom claimant initially chose. The administrative law judge also rejected claimant's argument that either employer or Dr. Richoux refused her additional psychiatric treatment. Decision and Order at 22-23. While the administrative law judge therefore rejected claimant's arguments and held employer was not liable for claimant's past care with Dr. Anastasio, he then considered claimant's contentions as a request for approval of a change of physicians and granted this request, holding employer liable for claimant's future treatment with Dr. Anastasio. It is unclear from either the decision on the merits or the decision awarding an attorney's fee whether the efforts of claimant's counsel affected her recovery of these future medical benefits. *See Brooks*, 963 F.2d at 1532, 25 BRBS at 161(CRT). The same is true of the Section 14(e) penalties and interest awarded by the administrative law judge. Moreover, although the administrative law judge stated that claimant's fee award would be "tailored" to her limited success, he did not explain his rationale for determining the degree of her success or for concluding that a reduction of the fee by one-third sufficiently accounted for such limited success. *Id.* Therefore, we must vacate the administrative law judge's fee award and remand the case for further consideration of this issue.

---

<sup>1</sup>In denying employer's request for reconsideration, the administrative law judge also noted counsel's efforts were instrumental in employer's reinstatement of payments at a higher rate and authorization of surgery in 1994. These events, however, occurred prior to referral of the claim to the administrative law judge in 1996.

<sup>2</sup>As no other aspect of the fee award has been challenged, the administrative law judge's findings regarding the hourly rate and the specific objections are affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees and Order on Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion. The administrative law judge's Order Denying Claimant's Motion for Modification is affirmed.

SO ORDERED.

---

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge