BRB No. 99-516

DOUGLAS WALLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order -- Award of Attorney's Fees of Jeana F. Jackson, District Director, United States Department of Labor.

Traci M. Castille (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Compensation Order -- Award of Attorney's Fees (OWCP No. 6-110096) of District Director Jeana F. Jackson 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 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts of this case are not in dispute and claimant's entitlement to disability benefits is not at issue, as employer voluntarily paid claimant benefits for his work-related 6.2 percent binaural impairment in 1988. Exhs. C-D. What is in dispute is claimant's entitlement to an attorney's fee paid by employer, as employer contends it did not contest

claimant's entitlement to medical benefits, but rather was required to comply with the statutory requirements of the Mississippi Insurance Guaranty Association (MIGA)[1] prior to approving claimant's request for hearing aids. In the alternative, if claimant is entitled to a fee, employer asserts that it should not be held liable for any fee after October 23, 1996, when it informed claimant of its approval for the hearing aids.

Claimant requested hearing aids and authorization for treatment from Dr. McClelland on May 9, 1996. Exh. E. He underwent a hearing aid cost analysis and assessment with audiologist Debra Moyer, employer's selection, and also with Dr. McClelland. After comparing the costs, employer requested that claimant obtain the hearing aids through Ms. Moyer's office. Exhs. F-K. Claimant agreed, and he was informed by letter dated October 23, 1996, that employer approved his hearing aids. Exhs. L-M. In that same letter, employer sought information concerning claimant's willingness to settle the claim for future medical benefits. After further correspondence, MIGA advised claimant of its authorization for his hearing aids in a letter dated November 27, 1996. Exh. B.

Claimant's counsel requested a fee for four hours of services rendered on claimant's behalf between May 9, 1996, and December 11, 1996, at an hourly rate of $175, plus $4.75 in expenses, for a total fee of $704.75. Employer objected, arguing that it is not liable for a fee because it did not dispute claimant's entitlement to hearing aids or medical benefits, but delayed payment of the cost of hearing aids only as a result of its compliance with MIGA's statutory requirements. The district director disagreed with employer's position and stated that the request for hearing aids was made in May 1996 but was not approved until December 1996, and that approval occurred only after counsel took reasonable action in requesting information, sending letters, and making and confirming appointments. Thus, the district director determined that counsel's actions were necessary and reasonable. However, she reduced the requested hourly rate from $175 to $125 and she disapproved the photocopying costs as overhead. Therefore, she approved of a total fee of $500. It is this fee award which employer now appeals. Claimant's counsel has not responded.

[1]Employer's insurer, American Mutual Liability Insurance Company, is in liquidation, and is being represented by MIGA. Emp. Brief at 1.

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). Under Section 28(a), an employer is liable for a fee if it declines to pay medical benefits within 30 days. 33 U.S.C. §928(a); *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975). Because employer did not pay within 30 days upon receiving claimant's request for hearing aids, and because it did not approve of the expenditure until sometime in late November or early December of 1996, it effectively "declined" to pay. Thus, this case falls within the confines of Section 28(a), and employer is liable for a reasonable attorney's fee to compensate counsel for his services in obtaining hearing aids for claimant. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Employer's assertion that it simply complied with MIGA's rules is unpersuasive, as MIGA's rules cannot supercede the provisions of the Act. After addressing the objections and reducing the hourly rate, the district director found that $500 is a reasonable amount, and we affirm that award, as employer has not shown an abuse of discretion by the district director.[2]

Accordingly, the district director's award of an attorney's fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2]We reject employer's assertion that it should not be held liable for a fee after October 23, 1996, as that is when it approved claimant's request. The administrative file demonstrates that employer's letter necessitated further correspondence, and that MIGA gave its approval at a later date. Any services claimant's counsel provided after the initial approval in October could also be considered "wind up" services, and those services are compensable. *Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge