BRB No. 00-0927

RENE M. DARBY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Compensation Order Upon Motion for Reconsideration of Attorney Fee Award of Jeana F. LaRock, District Director, United States Department of Labor.

Blewett W. Thomas, San Antonio, Texas, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Laura Stomski (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Mark Reinhalter, Senior Appellate Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Compensation Order Upon Motion for Reconsideration of Attorney Fee Award (Nos. 6-110624, 6-145508) of District Director Jeana F. LaRock 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; the award will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980).

This case has a protracted procedural history. Claimant sustained left elbow and cervical spine injuries in a September 1987 work accident. Administrative Law Judge Jennings denied claimant permanent partial disability benefits for his cervical injury as he found that claimant had no loss in wage-earning capacity. Claimant was awarded permanent partial disability benefits for a 15 percent impairment to the left arm in accordance with the schedule at Section 8(c)(1), 33 U.S.C. §908(c)(1). As a result of this proceeding, claimant's counsel was awarded an attorney=s fee of approximately $8,500, plus costs.

Claimant appealed the decision to the Board, raising issues concerning suitable alternate employment and wage-earning capacity. The Board affirmed the administrative law judge=s decision in all respects. *Darby v. Ingalls Shipbuilding, Inc.*, BRB No. 92-1547 (Feb. 24, 1995). Claimant thereafter appealed the Board=s decision to the United States Court of Appeals for the Fifth Circuit. The court affirmed the finding that employer established suitable alternate employment by virtue of a light-duty job in its facility, but remanded for further findings concerning claimant=s post-injury wage-earning capacity, stating that the administrative law judge made no determination that claimant=s post-injury wages represented his wage-earning capacity and that he therefore had no loss. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

On remand, the case was assigned to Administrative Law Judge Mills (the administrative law judge), and he consolidated the issue on remand from the court with a claim for a new injury. Claimant injured his neck in May 1992 while working at his modified job. The administrative law judge found that claimant had no loss in wage-earning capacity resulting from the first injury, finding that claimant=s actual post-injury earnings represented his wage-earning capacity. The administrative law judge further found that, following the May 1992 injury, claimant was unable to return to the modified job in employer=s facility. He found that employer established suitable alternate employment as of August 31, 1997, when claimant became self-employed. Thus, claimant was awarded periods of temporary total and permanent total disability benefits, and ongoing permanent partial disability benefits as a result

of the May 1992 injury. 33 U.S.C. §908(a), (b), (c)(21). Claimant filed a motion for reconsideration of this decision. The administrative law judge rejected claimant=s contention that he is entitled to a nominal award for the 1987 injury. Order Denying Recon. at 2. Claimant did not appeal the administrative law judge=s decision on remand or the order denying his motion for reconsideration.[1]

[1]In an Order dated May 24, 1999, the Board denied claimant=s counsel a fee for work performed before the Board, stating that claimant was unsuccessful in his appeal on the 1987 claim. Claimant filed a motion for reconsideration of this Order. The Board denied the motion in an Order dated August 20, 1999, explaining the basis for its statement that claimant did not obtain any further benefits for his 1987 injury by virtue of his appeal to the Board, his subsequent appeal to the Fifth Circuit or the remand to the administrative law judge. In addition, the Fifth Circuit summarily denied claimant's request for an attorney's fee for work performed before the court, as well as claimant's motion for reconsideration thereof.

Following the proceedings on remand, claimant=s counsel also filed a fee petition with the administrative law judge, seeking a fee of $132,343.75, representing 756.25

In March 1999, claimant's counsel sought an attorney's fee for work performed before the district director in conjunction with claimant's 1992 injury. He sought a fee for 62.5 hours at an hourly rate of $175, plus expenses of $78.14, for a total of $11,015.64. Employer filed objections. The district director awarded a fee of $4,770, payable by employer, in an order filed on April 29, 1999.

Claimant's counsel filed a motion for reconsideration of the fee award, which the district director granted in an order filed on May 17, 2000. The district director vacated her prior award, and discussed the entire history of this case, through the Board's March 2000 decision. Taking into consideration the factors at 20 C.F.R. §702.132, and the case law concerning the enhancement of an attorney's fee to account for the delay in payment, the district director awarded counsel an hourly rate of $175 for all services. In considering

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hours at an hourly rate of $175, plus expenses of $3843.11. The administrative law judge awarded counsel a fee of $21,791.25, and expenses of $2,272.55, which he tailored to reflect claimant's limited success. Claimant appealed this decision. The Board affirmed the administrative law judge's reduction of the fee requested due to claimant's limited success, but remanded the case for reconsideration of the compensability of the costs incurred, holding that an award of costs is not to be limited by the degree of success, but must be evaluated under the reasonable and necessary standard pursuant to Section 28(d) of the Act, 33 U.S.C. §928(d). The Board also remanded for reconsideration of the hourly rate, and for certain hours expended by counsel in investigating the labor market and in responding to employer's objections to the fee petition. *Darby v. Ingalls Shipbuilding, Inc.*, BRB No. 99-0618 (March 10, 2000). Claimant has filed an appeal of the administrative law judge's decision on remand. BRB No. 01-0365.

claimant's success before the district director in view of the hours expended, the district director determined that a 10 percent reduction in the fee requested was warranted in relation to claimant's success. Finally, the district director found employer liable for pre-controversion services pursuant to the Board's decision in *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting), and held employer liable for the entire fee awarded. Thus, counsel was awarded $9,677.83, plus $78.14 in expenses.

Employer appeals, contending it is not liable for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b), for work performed before the district director, as employer voluntarily paid claimant benefits, and claimant was not successful in obtaining a greater award from the district director. Employer also appeals the awarded hourly rate, contending that the delay in payment is due to counsel's own delay in submitting a fee petition. Claimant responds, urging affirmance of the fee award. Claimant also has filed a fee petition for work performed before the Board in conjunction with employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to hold this case in abeyance pending a decision by the Fifth Circuit on the appeal filed from the Board's decision in *Weaver v. Ingalls Shipbuilding, Inc.*, BRB No. 99-0921 (June 1, 2000) (*en banc) (*Hall, C.J., concurring) (Smith, J., concurring) (Brown and McGranery, JJ., dissenting), *appeal filed*, No. 00-60475, regarding the applicability of *Liggett*. Employer opposes the Director's motion, maintaining that *Liggett* and *Weaver* are not even potentially applicable in this case, as those cases involve an interpretation of Section 28(a) of the Act, and the instant case involves Section 28(b).

We deny the Director's motion to hold this case in abeyance. As employer suggests, *Liggett* is not applicable to this case, which involves employer's liability for an attorney's fee under Section 28(b). *Liggett* holds that when an employer declines to pay benefits, and thereafter claimant successfully prosecutes his claim, employer is properly held liable under Section 28(a) for all reasonable and necessary services, including those services rendered before employer received the claim and declined to pay benefits. *Liggett*, 31 BRBS at 139.[2] As Section 28(b) presupposes that employer is paying benefits,[3]

[2]In *Weaver*, the Board issued an *en banc* decision with four opinions on the subject of *Liggett*'s applicability in the Fifth Circuit. The lead opinion by Judge Nelson noted that *Liggett* was a departure from longstanding precedent and that the black lung case on which *Liggett* was based had its rationale found faulty on appeal to the Fourth Circuit, *see Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 21 BLR 2-479 (4th Cir. 1998), *aff'g on other reasoning Jackson v. Jewell Ridge Coal Corp.*, 21 BLR 1-27 (1997) (*en banc)* (Smith and Dolder, JJ., dissenting). Judge Nelson affirmed the decision that employer was not liable for pre-controversion services. Chief Judge Hall stated in her concurring opinion that *Liggett* is still good law, but, given the Fifth Circuit's unpublished, yet precedential, decision in

Watkins v. Ingalls Shipbuilding, Inc., No. 93-4367 (5th Cir. Dec. 9, 1993), agreed to affirm the denial of pre-controversion services. In *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), the Board held that, pursuant to Section 28(a), only written notice of the claim from the district director, pursuant to Section 19(b) of the Act, 33 U.S.C. §919(b), triggers employer's liability for an attorney's fee, even when employer had actual notice of the claim from the claimant. The Board thus rejected the claimant's contention that employer could be liable for claimant's attorney's fees for services performed prior to the employer's receipt of the claim from the district director. In affirming the Board's decision, the Fifth Circuit, in an unpublished decision, rejected the claimant's argument that, pursuant to the strict interpretation of Section 28(a) rendered by the Board in that case, it would be unfair to hold him responsible for the payment of pre-controversion legal fees where employer had not been notified of the claim by the district director for nearly eight months. The court stated that claimant's contention had "no legal foundation" and that the "statute preclude[d]" an award of attorney's fees against the employer which were incurred by claimant prior to employer's

Liggett is not applicable to a case controlled by Section 28(b).

In this case, the record supports employer's contention that its liability is controlled by Section 28(b). Employer voluntarily paid claimant benefits for two periods of temporary total disability following the 1992 injury. EX 37. Claimant filed a claim for this injury on September 6, 1996. EX 39. Employer, however, had instituted temporary total disability benefits on August 20, 1996, EX 37 at 3, which it continued until August 4, 1997. EX 38 at 3. The fact that employer also controverted the claim in 1992 does not negate its payment of benefits. As the record supports employer's contention that it was paying benefits at the time it received claimant's claim, this case is not controlled by Section 28(a), and *Liggett* and any decision in *Weaver* are not applicable.

Turning to employer's appeal, employer contends the district director erred in holding it liable for any attorney's fee, as it paid all benefits due while the case was pending before the district director and as a controversy did not arise between the parties until August

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receipt of written notice of the claim. *Watkin*s, No. 93-4367, slip op. at 2. In *Weaver*, Judge Smith, in concurrence, also affirmed the denial of pre-controversion services, on the ground that *Liggett* was wrongly decided, and he found support as well in the *Watkins* decision. Judges Brown and McGranery dissented, and would have applied *Liggett* to hold employer liable for pre-controversion services.

[3]Section 28(b) states, in relevant part:

> 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 . . . .

7, 1997, which is after the case was referred to the Office of Administrative Law Judges (OALJ). Alternatively, employer suggests that it is not liable for any attorney's fee until October 1, 1996, based on the administrative law judge's award of permanent total disability benefits from December 14, 1995, which would include the first cost-of-living adjustment on October 1, 1996. *See* 33 U.S.C. §910(f). Employer further contends that an enhancement for delay in payment is not appropriate, as any delay is not extreme and is due to actions by claimant's counsel.

As discussed above, this case is controlled by Section 28(b) in that employer was voluntarily paying benefits when the claim was filed in September 1996, and employer paid benefits until August 1997, when it filed a notice of controversion. EX 40 at 2. Contrary to employer's contention, the fact that it was paying benefits at the time the case was referred to the OALJ in February 1997 does not absolve it of fee liability in view of the fact that claimant obtained greater benefits than employer paid or tendered, namely an ongoing permanent partial disability award pursuant to Section 8(c)(21), plus the benefit of one Section 10(f) adjustment, occurring on October 1, 1996. Inasmuch as claimant was successful in obtaining greater benefits than employer voluntarily paid or tendered by virtue of the proceedings before the administrative law judge, employer is liable for an attorney's fee under Section 28(b) for work performed before the district director. *See Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). The case cited by employer in an attempt to absolve it of fee liability, *FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997), is distinguishable, in that the parties therein settled their dispute as to the amount of compensation due prior to the imposition of informal or formal proceedings, whereas in the this case, the claim proceeded to a formal hearing before an administrative law judge and claimant obtained greater benefits. *See also Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998); *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Boe v. Dep't of the Navy/MWR,* 34 BRBS 108 (2000).

We must vacate the fee award and remand this case, however, for the district director to determine the amount of the fee for which employer is liable under Section 28(b) without regard to *Liggett*, as discussed above. Under Section 28(b), employer may be held liable for services rendered before employer controverted the claim, but only if those services are reasonable for and necessary to the success claimant achieved before the administrative law judge. Moreover, the regulatory criteria of 20 C.F.R. §702.132, and the degree of claimant's success, *see generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993), must be considered in determining the amount of the attorney's fee award.[4]

[4]In his response brief, claimant contends that the case should be remanded for the

Employer also challenges the awarded hourly rate of $175. Counsel's fee petition listed his billing rate as $150 per hour for work performed 1992-1995, and as $175 per hour for work performed thereafter.[5] Counsel requested that he be awarded the $175 rate for all work to account for the delay in payment, and the district director agreed that the $175 rate was appropriate for all hours awarded. Employer's first contention in this regard is that the delay is not extreme because counsel is not entitled to an employer-paid fee for work performed before October 1996 at the earliest. As discussed above, employer's premise is erroneous, as employer is properly held liable for services performed before the district director. Moreover, the district director did not abuse her discretion in determining that the delay in payment warrants enhancement in this case. *See Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

Employer's second contention is that the delay is of counsel's own making, and that therefore it should not bear the burden of paying an enhanced fee. Employer asserts that the administrative law judge ordered counsel to file his fee petition within 30 days of the April 30, 1998, Decision and Order, and that counsel did not file with the district director until March 26, 1999. This contention is without merit, as the administrative law judge did not order counsel to file a fee petition with the district director within 30 days of his decision. Moreover, the district director took over a year to rule on claimant's motion for reconsideration of her initial fee award, and this delay cannot be attributed to claimant's counsel. Thus, we reject employer's contentions of error with regard to the awarded hourly rate of $175, and we affirm the district director's determination in this regard.

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district director to substantiate the rationale for the 10 percent reduction due to limited success. We reject this contention, as claimant did not file his own appeal of the district director's fee award. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

[5]The fee petition covers work from May 1992 to February 1997, plus some work in 1999 and 2000 relating to the fee petition and initial fee award of the district director

Lastly, we address claimant's counsel's petition for an attorney's fee for work performed before the Board. Counsel requests a fee of $6,081, representing 34.75 hours at $175 per hour. He also requests costs of $67.75 for photocopying and long distance charges. Employer has not filed objections to the fee petition.

Claimant's counsel is entitled to an attorney's fee for work performed before the Board, inasmuch as he has succeeded in defending employer's appeal regarding its liability for an attorney's fee for work performed before the district director and the hourly rate of $175. *Smith v. Alter Barge Line, Inc.,* 30 BRBS 87 (1996). We find, however, that the number of hours requested by counsel is excessive given the nature of this appeal. *See* 20 C.F.R. §802.203(e). We reduce by half the 25.5 hours counsel spent on research and writing his two response briefs, and otherwise allow the fee requested, including the hourly rate of $175 and the costs. We therefore award claimant's counsel an attorney's fee of $3,850, representing 22 hours at $175 per hour, plus costs of $67.75, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928.

Accordingly, the Director's motion to hold this case in abeyance is denied.[6] The district director's fee award is vacated, and the case is remanded for further consideration in accordance with this decision. The hourly rate of $175 awarded by the district director is affirmed. Claimant's counsel is awarded a fee of $3,850, plus costs of $67.75, for work performed before the Board.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]Claimant's motion to expedite this case is moot.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge