BRB No. 02-0421

KERRY DeGRAND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAY SHIPBUILDING COMPANY	)	DATE ISSUED: Feb. 10, 2003.
	)	
and	)	
	)	
SENTRY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
		DECISION and ORDER

Appeal of Supplemental Decision and Order Granting Attorney Fees of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Holly Lutz, Wausau, Wisconsin, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (96-LHC-2287) of Administrative Law Judge Rudolf L. Jansen 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 law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a welder, injured his right shoulder on May 9, 1995, during the course of his employment for employer. Claimant underwent an arthroscopy and right shoulder reconstruction. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), until claimant returned to work for employer as a welder on March 15, 1996. Claimant was laid off from this position on June 21, 1996, as part of a company-wide reduction-in-force. His employment was terminated on July 19, 1996, pursuant to employer's absenteeism policy requiring excused absences. Claimant filed a claim under the Act in which he sought compensation for permanent total disability, 33 U.S.C. §908(a), or alternatively, for permanent partial disability, 33 U.S.C. §908(c)(19), (21), commencing on July 19, 1996.

In his Decision and Order, Administrative Law Judge Robert G. Mahony found that claimant cannot return to his pre-injury employment duties with employer, and that the light-duty welding position claimant performed from March 15, 1996, to June 21, 1996, established the availability of suitable alternate employment. Next, Judge Mahony determined that claimant's termination by employer in July 1996 was not caused by the work injury but was due solely to claimant's failure to comply with employer's absenteeism rule. Accordingly, as employer's light-duty welding position paid the same wages as claimant earned prior to his work injury, the administrative law judge denied claimant's claim for compensation.

Claimant appealed Judge Mahony's decision, which the Board affirmed. *DeGrand v. Bay Shipbuilding Co.*, BRB No. 98-1419 (July 26, 1999) (unpub.). Claimant filed a motion for reconsideration of the Board's decision, which the Board granted. In its Decision and Order on Reconsideration, the Board vacated its decision, and remanded for the administrative law judge to determine claimant's physical restrictions and the requirements of claimant's light-duty work for employer, and to compare these restrictions with the jobs claimant actually performed at employer's facility. The administrative law judge also was instructed to assess the credibility of claimant's testimony that his job duties caused him pain and to miss work. *DeGrand v. Bay Shipbuilding Co.*, BRB No. 98-1419 (May 9, 2000) (recon.)(unpub.). Employer's subsequent motion for reconsideration was summarily denied. Prior to the scheduled hearing on remand, the parties agreed to settle the case pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). A Decision and Order-Approving Section 8(i) Settlement was issued by Administrative Law Judge Rudolf L. Jansen on July 23, 2001.

Subsequently, Russell J. LaCourse of the law office of Courtney, LaCourse and Little, P.A., submitted a fee petition requesting $29,598.06, representing 108.75 hours of attorney services by the late James Courtney III, at an hourly rate of $200, 18.75 hours of paralegal services by the late Jill N.T. Swapinski, at an hourly rate of $60, 20.25 hours of paralegal services by Joan Lindgren at an hourly rate of $60, 24 hours of paralegal services by Pat Lemaster at an hourly rate of $60, and costs of $4,067.81. Holly Lutz submitted a fee petition requesting $10,555.47, representing 51.6 hours of attorney services at an hourly rate of $200, .5 hour of paralegal services at an hourly rate of $78, and costs of $196.47. Employer filed objections to the fee requests.

In his Supplemental Decision and Order Granting Attorney Fees, Judge Jansen (the administrative law judge), after considering the objections raised by employer, found Mr. Courtney and Ms. Lutz entitled to a fee payable by employer. The administrative law judge reduced the hourly rate requested by Mr. Courtney to $160, reduced the number of compensable hours for attorney services by Mr. Courtney to 75, approved the hourly rates and number of hours requested for paralegal services, and approved the costs. The administrative law judge awarded the hourly rate of $200 requested by Ms. Lutz, reduced by 3.6 the number of hours she claimed, and approved her costs. Accordingly, the administrative law judge awarded Courtney, LaCourse and Little, P.A., a fee of $19,847.81, representing $15,780 for attorney and paralegal time, and costs of $4,067.81. The administrative law judge awarded Ms. Lutz an attorney's fee of $9,797.47, representing $9,600 for attorney time, and costs of $197.47.

[1]After the April 22, 1997, formal hearing, Mr. Courtney and Ms. Swapinski died in an August 1998 airplane crash. Holly Lutz entered an appearance as claimant's counsel by letter dated October 25, 1998.

On appeal, employer contends that the administrative law judge erred by awarding claimant's counsel a fee payable by employer because employer did not have the opportunity to have the controversy resolved at an informal conference before the district director prior to the matter's being referred to the administrative law judge for a hearing. In the alternative, employer contends that if it is liable for claimant's attorney's fees, it should be less than that awarded. Claimant responds, urging affirmance of the administrative law judge's fee award.

Under Section 28(a) of the Act, if an employer declines to pay compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer pays or tenders benefits without an award and thereafter a controversy arises over additional compensation due, the employer shall be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b); *see*, *e.g.*, *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In this case, the administrative law judge found employer liable for an attorney's fee because claimant obtained compensation through a settlement agreement after employer controverted the claim. Supp. Decision and Order at 2-3, 5-6.

We reject employer's contention that it is not liable for claimant's attorney's fee due to the absence of an informal conference. Employer initially paid compensation without an award. Thereafter, a controversy arose over claimant's entitlement to additional compensation and claimant obtained greater compensation than employer paid voluntarily. Thus, employer is liable for claimant's attorney's fee pursuant to Section 28(b). *See generally Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998). Following the decision of the United States Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), the Board has held that an informal conference is not a prerequisite to employer's liability for a fee pursuant to Section 28(b). *Caine v. Washington Area Metropolitan Transit Authority*, 19 BRBS 180 (1986); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (Fifth Circuit holds that an informal conference is a

prerequisite to fee liability under Section 28(b)). Accordingly, we reject employer's contention that the lack of an informal conference precludes its liability for claimant's attorney's fees, and we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fees.

We also reject employer's contention regarding Ms. Lutz's and Mr. Courtney's quarter-hour minimum billing method. The Board has previously determined that this method is reasonable under the applicable regulation, 20 C.F.R. §702.132. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *cf. Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (Fifth Circuit rejects method of minimum quarter-hour increments). Furthermore, the administrative law judge adequately addressed employer's challenge to various itemized entries of Ms. Lutz and Mr. Courtney, and stated the grounds by which employer's objections were rejected. As employer has not met its burden of showing that the administrative law judge abused his discretion in this regard, the number of hours awarded by the administrative law judge to Ms. Lutz and Mr. Courtney is affirmed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Employer also objects to the administrative law judge's award to Ms. Lutz of an hourly rate of $200. Employer states that the administrative law judge should have awarded Ms. Lutz a fee based on a $195 hourly rate, which is the rate awarded by the district director in this case. We reject this contention. The administrative law judge is not bound to award the same rate as the district director, and he stated that given the quality of the representation, the qualifications of the representative, the complexity of the legal issues and the level at which Ms. Lutz entered the proceedings, the $200 hourly rate requested was appropriate. *See* 20 C.F.R. §702.132; Supp. Decision and Order at 5. Employer has not established that the administrative law abused his discretion in awarding the fee based on the $200 hourly rate in effect at the time the services were performed, and thus we affirm this

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, and thus the Fifth Circuit's decision in *Pool Co.* is not controlling precedent. The court in *Pool Co.* held that the employer therein could not be liable for claimant's attorney's fee pursuant to Section 28(b) as no informal conference had been held. Nonetheless, the court upheld employer's liability for a fee under Section 28(a) as, despite its earlier voluntary payment, employer "declined to pay" claimant additional compensation after claimant filed his formal claim. This analysis would apply in the instant case as well. Employer ceased paying compensation after claimant returned to work in March 1996. Claimant filed a formal claim for compensation with the district director. Thereafter, employer received notice of the claim, which it controverted, and claimant obtained compensation by virtue of the parties' settlement agreement. *See Pool Co.*, 274 F.3d at 185-187, 35 BRBS at 118-119(CRT). Thus, employer could be held liable for claimant's fee under Section 28(a), if *Pool Co.* were applied to this case.

award. *See generally O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2002).

Lastly, employer objects to the administrative law judge's award of costs to Ms. Lutz for meals and lodging while attending a deposition in Green Bay, Wisconsin, which is approximately 93 miles from her place of business in Wausau, Wisconsin. Section 28(d) of the Act, 33 U.S.C. §928(d), provides that where an attorney's fee is awarded against employer, costs also may be assessed against employer. *See Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). In the instant case, the administrative law judge found that Ms. Lutz's decision to remain overnight in Green Bay was not unreasonable. *See generally Brinkley v. Dept. of the Army/NAF,* 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds). We therefore reject employer's objection to this expense, as employer has failed to show that the administrative law judge abused his discretion in this regard or that the cost of the meals and lodging was unreasonable.

[3] We decline to address Ms. Lutz's request in her response brief that we modify the administrative law judge's fee award to reflect her current hourly rate of $210, or, in the alternative, that we award the total fees initially requested by Ms. Lutz and Mr. Courtney. The Board does not have the authority to enhance for delay in payment a fee award of the administrative law judge. *See Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge