

BRB No. 91-0511A

CHARLES E. MATHIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: _____
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-1827) 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). 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, Inc.*, 12 BRBS 272 (1980).

Claimant, a retired shipfitter, was exposed to injurious noise during the course of his employment. On January 20 and May 5, 1988, claimant underwent audiometric evaluations, the results of which revealed a 64.9 percent binaural impairment and a 63 percent binaural impairment, respectively. Cl. Ex. 2; Emp. Ex. 3. On July 13, 1988, employer accepted liability for medical benefits and voluntarily began paying compensation for a 22 percent impairment of the whole person pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988). Emp. Ex. 5. Because the parties disputed the applicability of Section 8(c)(23), on March 10, 1989, the case was transferred to the Office of Administrative Law Judges (OALJ) for a formal hearing. The administrative law judge agreed with employer and determined that claimant is entitled to compensation for a 22 percent

impairment of the whole man in accordance with Section 8(c)(23) of the Act and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). The administrative law judge noted employer's acceptance of medical benefits, and he awarded interest, if applicable. Decision and Order at 3-5.

The Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration of the administrative law judge's award of benefits. Because of a mathematical error in the original award, the administrative law judge granted the Director's motion with regard to claimant's compensation rate; however, he denied the remainder of the Director's motion. Order dated Oct. 22, 1990. Thereafter, claimant's counsel submitted a petition for an attorney's fee of \$3,875, representing 31 hours of work at a rate of \$125 per hour, plus \$44 in expenses. The administrative law judge approved a fee of \$2,158.75, representing 19.625 hours at a rate of \$110 per hour, plus \$44 in expenses. Supp. Decision and Order. Employer appeals the fee award, incorporating the objections it made below into its appellate brief and contending it voluntarily paid benefits and should not be held liable for counsel's fee. Alternatively, employer argues that, if it is liable for a fee, the amount awarded by the administrative law judge is excessive. Claimant's counsel responds, urging affirmance.<sup>1</sup>

Under Section 28(b), 33 U.S.C. §928(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 paid or tendered by the employer. See *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In this case, employer accepted liability for medical benefits and voluntarily paid disability benefits for a 22 percent impairment of the whole person at a rate of \$45.24 per week. Emp. Ex. 5. The administrative law judge awarded medical benefits and awarded disability benefits for a 22 percent impairment of the whole person at a rate of \$45.24 per week. Although the Board generally will not reduce or vacate a fee award because it was not based solely on the monetary difference between the amount of benefits tendered and the amount of benefits awarded, see, e.g., *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (Decision on Recon.), *appeal dismissed*, No. 94-40920 (5th Cir. Sept. 20, 1995); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993), our review of the record in this case reveals that, prior to the case's referral to the OALJ, employer tendered the full amount of benefits subsequently awarded by the administrative law judge. Contrary to claimant's assertion, employer raised this issue before the administrative law judge when it raised the applicability of Section 28(b).<sup>2</sup> Consequently, it is

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<sup>1</sup>The Director appealed the administrative law judge's award of benefits, BRB No. 91-511; however, the Board dismissed the appeal for failure to file a Petition for Review and brief. Order dated Feb. 24, 1993. Therefore, no party challenges the administrative law judge's award pursuant to Section 8(c)(23). Cf. *Bath Iron Works Corp. v. Director, OWCP*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993) (benefits for all work-related hearing losses are to be calculated under Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988)).

<sup>2</sup>Section 28(b) of the Act states that an attorney's fee is warranted:

If the employer or carrier pays or tenders payment of compensation without an award . . . and

properly raised on appeal. *See generally Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Further, Section 28(b) is not limited to those benefits actually paid but specifically refers to payments tendered. 33 U.S.C. §928(b); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). As employer tendered and began paying claimant benefits at the rate ultimately awarded by the administrative law judge, claimant did not successfully prosecute his claim before the administrative law judge and is not entitled to an attorney's fee. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992). Therefore, we vacate the administrative law judge's Supplemental Decision and Order, and we reverse his holding that claimant is entitled to an attorney's fee. *Id.*

Accordingly, the administrative law judge's Supplemental Decision and Order is vacated, and his holding that employer is liable for an attorney's fee is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

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thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled . . . and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier. . . .

33 U.S.C. §928(b).