

V.A. HEWES)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:_____)
INGALLS SHIPBUILDING,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fee (89-LHC-54) of Administrative Law Judge James W. Kerr, Jr., 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant was employed at employer's shipyard from 1972 to 1988, where he was exposed to loud industrial noise. An audiogram performed by Dr. K.D. McClelland, Ph.D., on January 24,

1987, revealed a 5.3 percent binaural hearing loss. Based on the results of this audiogram, claimant filed a claim for occupational hearing loss benefits under the Act on February 24, 1987, and provided employer with notice of his injury on the same day. On July 29, 1987, employer tendered a settlement offer of \$2,385 which included an attorney's fees which was not to exceed \$250.¹ On October 8, 1987, employer initiated voluntary payments of compensation for a 5.3 percent binaural impairment based upon an average weekly wage of \$449.32, completing payment of \$3,175.12 on February 25, 1988. On September 28, 1988, the case was referred to the Office of Administrative Law Judges for a formal hearing.

In his Decision and Order, the administrative law judge awarded claimant compensation for a 5.3 percent binaural hearing loss based upon the stipulated average weekly wage of \$493.19 pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B). The administrative law judge also awarded claimant medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907, interest, and an assessment under Section 14(e), 33 U.S.C. §914(e).

¹Pursuant to the settlement offer, however, employer would only pay one-half of the \$250 fee or \$125.

Thereafter, claimant's attorney filed a fee petition for work performed before the administrative law judge, in which he requested \$2,942.75, representing 23.25 hours of services at \$125 per hour plus \$36.50 in expenses. Employer filed objections and claimant replied to employer's objections. In a Supplemental Decision and Order Awarding Attorney's Fee dated May 15, 1992, the administrative law judge, addressing employer's objections, disallowed 5.75 hours of the time claimed and reduced the hourly rate for non-trial work to \$100. Accordingly, he awarded counsel a fee of \$1,849, representing 15 hours at \$100 per hour,² 2.5 hours at \$125 per hour, plus the \$36.50 in requested expenses. Employer appeals the fee award on various grounds, incorporating the arguments it made below into its appellate brief. Incorporating his reply brief below, claimant responds, urging affirmance.

On appeal, employer initially contends that it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Employer argues that there has been no successful prosecution of the claim since it initiated voluntary payment of compensation on October 8, 1987, within 30 days of receiving formal notice of the claim from the district director on September 25, 1987, and completed payment for a 5.3 percent binaural hearing loss, the same percentage of impairment found by the administrative law judge, prior to referral, on February 25, 1988. In the alternative, employer argues that if it is liable for a fee under Section 28(b), 33 U.S.C. §928(b), the fee should be far less than that awarded and should be limited to the difference between the amount employer voluntarily paid to claimant and the amount ultimately awarded by the administrative law judge.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). 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 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).

Initially, we need not address employer's arguments with respect to liability under Section 28(a), as the present case is governed by Section 28(b). On February 25, 1988, employer voluntarily paid claimant \$3,175.12 for a 5.3 percent binaural hearing loss based upon an average weekly wage of \$449.32. The parties stipulated that this amount also included an attorney's fee of \$485. Thereafter, however, over employer's objections, claimant continued to assert his right to greater compensation, medical benefits, and an assessment under Section 14(e). As claimant was ultimately successful in establishing his right to compensation based on a higher average weekly wage than that on which employer's voluntary payments were made, and in establishing his right to medical benefits and an assessment under Section 14(e), the administrative law judge's determination that

²The administrative law judge awarded claimant's counsel a one hour fee for time spent in defending employer's objections which had been requested in claimant's reply brief.

employer is liable for claimant's attorney's fees is affirmed. Inasmuch as a controversy remained even after employer voluntarily paid compensation, and claimant was ultimately successful in obtaining additional compensation over that which employer voluntarily paid, employer is liable for claimant's counsel's attorney's fee pursuant to Section 28(b). See *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision on remand).

We further reject employer's argument that the amount of the fee award is excessive. Employer asserts that a consideration of the quality of the representation provided, the complexity of the issues involved, and the benefits obtained mandates a complete reversal or at least a substantial reduction of the \$1,849 fee awarded. We need not address these arguments which employer has raised for the first time on appeal. See *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993) *aff'd mem.* No. 93-4367 (5th Cir. Dec. 9, 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We note, however, that the administrative law judge specifically considered the factors cited by employer in determining the compensability of the services claimed. Moreover, we note that as a result of claimant's counsel's efforts before the administrative law judge claimant prevailed in establishing his right to additional disability compensation over that voluntarily paid by employer, \$224.94 in interest, medical benefits, and a Section 14(e) penalty of \$348.52. On these facts, employer has not met its burden of establishing that the \$1,849 fee awarded by the administrative law judge is unreasonable.³

We also reject employer's contention that under Section 28(b) any fee awarded should be based solely on the difference between the amount of benefits voluntarily paid and those awarded. Although the amount of benefits awarded is a relevant factor in awarding a fee, a fee under Section 28(b) is not limited to the difference between the compensation voluntarily paid and that ultimately awarded.⁴ See *Hoda v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB Nos. 88-3187/A (Aug. 12, 1994)(McGranery J., dissenting)(decision on recon.).

Although employer also asserts that the hourly rates awarded do not conform to reasonable and

³ Employer cites the ruling in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), that where an attorney achieves only limited success in a claim filed under the Act, he may not be entitled to a fee for all hours expended on the case. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the case at bar, however, as claimant was fully successful on all controverted issues before the administrative law judge, the limited success issues addressed in these cases are not relevant. See *Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting).

⁴Employer cites *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished) in support of its assertion that the fee awarded is excessive. The Board has held that unpublished cases should not be cited or relied upon by the parties as they lack precedential value. See *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990).

customary charges in the area and that an hourly rate of \$75 to \$80 would be more appropriate, we reject this argument.⁵ Employer's assertions are insufficient to meet its burden of establishing the hourly rates awarded by the administrative law judge are unreasonable. *See Maddon v. Western Asbestos Co*, 23 BRBS 55 (1989); *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Moreover, we reject employer's challenge to counsel's quarter-hour billing method; the Board has previously determined that this method is reasonable and comports with the requirement of the applicable regulation, 20 C.F.R. §702.132. *See Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 252 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds).⁶

⁵Employer attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; however, the article merely indicates that fees for defense attorneys in the area range widely. This does not support employer's contention that the hourly rate requested by claimant's counsel in this case is unreasonable.

⁶We reject employer's argument that the fee order of United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, Nos. 89-4459, 89-4468, 89-4469 (5th Cir. July 25, 1990)(unpublished), mandates a different result. In that fee order, the court declined to award fees for work before it based on a quarter-hour minimum billing method. However, the determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

Finally, we reject employer's contention that time spent on certain discovery-related activity, trial preparation and attendance, and in preparing and reviewing various legal documents was either unnecessary, excessive, or clerical in nature. In entering the fee award, the administrative law judge considered the totality of employer's objections, disallowed 5.75 of the hours claimed, and found the remaining itemized entries to be reasonable and necessary. We decline to further reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Accordingly, we reject employer's arguments and affirm the fee award made by the administrative law judge.⁷

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

⁷We reject claimant's assertion in his response brief that he is entitled to interest on the attorney's fee award pursuant to *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82 (CRT) (5th Cir. 1990), for the reasons enunciated in *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 65 (1991)(decision on remand). Although claimant's counsel also requests that an additional fee be assessed against employer for services rendered in connection with this appeal, in order to receive a fee for work performed before the Board, counsel must file an fee petition which conforms to the requirements of 20 C.F.R. §802.203.