

LESTER J. TEER	)	
(Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

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

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

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

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Attorney Fees (88-LHC-3711) 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel sought an attorney's fee of \$2,845.50 for 22.63 hours at \$125 an hour, and \$16.75 in costs, for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of \$2,049.30, representing 18.63 hours at an hourly rate of \$110, plus expenses of \$16.75. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Employer contends that claimant is not entitled to any attorney's fee because he did not successfully prosecute his claim, and, in the alternative, argues that the attorney fee awarded is excessive. Claimant responds, urging affirmance.

Employer contended below that claimant did not successfully prosecute his claim because it voluntarily tendered and paid all benefits owed claimant prior to the referral of the case to the Office of Administrative Law Judges on September 15, 1988. In its reply to employer's objections, claimant contended that employer did not tender or pay all benefits prior to the date of referral as the issues of the extent of disability, the applicability of Section 14(e), 33 U.S.C. §914(e), and employer's liability for interest and medical benefits were unresolved at that time. Claimant asserted that it was not until employer filed its Form LS-208, Notice of Final Payment, on August 12, 1991, that it acknowledged liability for interest and penalties, and thereby resolved all issues. Claimant also asserted that he did not charge for any time spent after receipt of the LS-208 on August 14, 1991, except to verify payment.

In the Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge rejected employer's objection that claimant had not successfully prosecuted his claim, and summarily accepted claimant's response that employer did not acknowledge liability until the filing of the August 12, 1991 LS-208.<sup>1</sup> The administrative law judge therefore concluded that employer was liable for an attorney's fee.

On appeal, employer contends that it voluntarily commenced payment for a 12 percent whole man impairment on February 2, 1988, and paid all benefits owed to claimant through May 26, 1988, the date claimant died. Employer contends that even accounting for its liability for penalties and interest it actually overpaid claimant as it was eventually determined claimant was entitled to benefits for a 10 percent whole man impairment. Further, employer contends the litigation was protracted because the Director, Office of Workers' Compensation Programs, erroneously contended that, after claimant's death, the Special Fund should receive any unpaid benefits.<sup>2</sup> In response, claimant contends employer's contention should not be addressed as employer is presenting arguments and analysis not raised in its objections below, and further, the administrative law judge ruled on employer's objection in the fee award.

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<sup>1</sup>In an Order of Remand dated February 6, 1992, the administrative law judge noted that the parties had filed a Joint Motion to Remand as they had resolved all issues between them. The administrative law judge therefore remanded the case to the district director for appropriate action.

<sup>2</sup>It was eventually determined that all benefits due claimant were paid to him prior to his death.

Under Section 28(b), 33 U.S.C. §928(b), when employer pays or tenders compensation without an award, employer remains liable for an attorney's fee if the employee successfully obtains greater compensation than that originally paid or tendered by employer. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1987). If claimant succeeds in obtaining a Section 14(e) penalty, medical expenses and interest, these benefits constitute additional compensation on which to base an attorney's fee. *Ingalls Shipbuilding, Inc. v. Director, OWCP (Baker)*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991). If, however, all payments, including the Section 14(e) penalty, medical benefits and interest, are paid or tendered prior to the referral, employer is not liable for services performed after that date. See *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

In the instant case, employer's contentions are based on attachments to its brief rather than on documents admitted into evidence.<sup>3</sup> Moreover, the administrative law judge's discussion of this issue is cursory. We therefore vacate the fee award and remand the case for the administrative law judge to admit relevant documents into evidence as necessary and to address the parties' contentions with regard to the "successful prosecution" issue in greater detail.

Accordingly, the Supplemental Decision and Order Awarding Attorney Fees is vacated and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>3</sup>We shall address employer's contention because employer raised the issue of whether claimant successfully prosecuted his claim in its objections below, even if employer did not explain its contention in detail.