



BRB No. 15-0236

WILLIAM ZATTIERO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	DATE ISSUED: <u>Nov. 19, 2015</u>
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney Fees of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Attorney Fees (2014-LHC-00499) of Administrative Law Judge Dana Rosen 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 it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4<sup>th</sup> Cir. 2009); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim for a work-related hearing loss based on a September 4, 2013 audiogram. After claimant's claim was transferred to the Office of Administrative Law Judges, the parties reached an agreement. Consequently, in an Order issued on

October 7, 2014, the administrative law judge remanded the case to the district director for appropriate action.

Claimant's counsel subsequently filed a petition for an attorney's fee of \$6,110, representing 14.6 hours of attorney work at an hourly rate of \$400 and 2.25 hours of paralegal work at an hourly rate of \$120, for work before the administrative law judge. The parties subsequently agreed that employer would pay claimant's counsel a fee of \$4,500 for his services before the administrative law judge, and, by letter dated November 14, 2014, employer advised the administrative law judge of this agreement. In a Decision and Order Awarding Attorney Fees issued on November 20, 2014, the administrative law judge, without making any reference to the parties' agreement on the amount of an attorney's fee, awarded claimant's counsel a fee of \$3,998.40, payable by employer.<sup>1</sup>

Claimant appeals, requesting that the Board modify the administrative law judge's fee award based on the parties' agreement that employer would pay counsel a fee of \$4,500. Employer responds that it stands by its agreement to pay claimant's counsel a fee of \$4,500.

It is undisputed that the parties agreed that employer would pay claimant's counsel a fee of \$4,500 for the services he provided claimant while the case was pending before the administrative law judge. As the administrative law judge did not address the parties' agreement in her fee award, remand is required for the administrative law judge to give due consideration to that agreement. An agreement between the parties as to the amount of an attorney's fee is not determinative of a fee award unless the agreement is part of a Section 8(i), 33 U.S.C. §908(i), settlement that has been approved by the adjudicatory official. *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); 20 C.F.R. §702.132(c).<sup>2</sup>

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<sup>1</sup> The administrative law judge reduced the hourly rates and number of hours requested for both attorney and paralegal work and approved a fee of \$3,998.40, representing 13.04 hours of attorney work at \$300 per hour and .96 hour of paralegal work at \$90 per hour.

<sup>2</sup> In urging the Board to modify the administrative law judge's fee award pursuant to the parties' agreement, claimant cites the regulation at 20 C.F.R. §702.132(c) and the Board's decision in *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014). Section 702.132(c) and the *Losacano* decision, however, pertain only to cases in which the parties' agreement on the amount of an attorney's fee is part of a Section 8(i), 33 U.S.C. §908(i), settlement of the compensation claim. Where an agreed-upon attorney's fee is included in a Section 8(i) settlement, approval of the settlement agreement by the adjudicatory official shall also be deemed approval of the agreed-upon fee. 20 C.F.R. §702.132(c); *Losacano*, 48 BRBS 49. As this case does not involve fees included in an approved Section 8(i) settlement, it is not controlled by either Section 702.132(c) or

When the parties reach agreement on the amount of an attorney's fee payable by employer to claimant's counsel, a proper fee application, along with the parties' agreement, must be submitted to the appropriate adjudicatory body for official approval. 33 U.S.C. §928(c), (e); 20 C.F.R. §702.132; *Eaddy v. R.C. Herd & Co.*, 13 BRBS 455 (1981); *Ballard v. General Dynamics Corp.*, 12 BRBS 966 (1980); *see also Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168 (CRT) (7<sup>th</sup> Cir. 1993). Where the adverse parties in arm's length negotiations agree on an appropriate fee for claimant's attorney's services, an element of reasonableness should be inferred from such an agreement. *Ballard*, 12 BRBS at 968; *see also Carswell v. Wills Trucking*, 13 BRBS 340 (1981). Thus, in the absence of evidence of collusion, the agreed-upon fee should be approved by the adjudicatory body unless it is clearly excessive. *Carswell*, 13 BRBS at 342; *Eaddy*, 13 BRBS at 457; *Ballard*, 12 BRBS at 968-69. We therefore vacate the administrative law judge's fee award and remand the case for her to give proper consideration to the parties' agreement that employer will pay counsel a fee of \$4,500. *See Eaddy*, 13 BRBS at 457; *Ballard*, 12 BRBS 966. If, on remand, the administrative law judge does not approve the agreed-upon fee, she must provide an explanation of her reasons for declining to do so.<sup>3</sup> *Id.*

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*Losacano*, and the administrative law judge, therefore, is not required to award the fee agreed upon by the parties. For the reasons set forth *infra*, however, the administrative law judge must give proper consideration to the parties' agreement.

<sup>3</sup> *See also Seabrook v. Huntington Ingalls Industries, Inc.*, BRB No. 15-0162 (Oct. 28, 2015)(unpub.); *Glass v. Huntington Ingalls Industries, Inc.*, BRB No. 15-0076 (Sept. 23, 2015)(unpub.).

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge