BRB No. 99-0292

BUFORD SIMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fee of Jeana F. Jackson, District Director, United States Department of Labor.

Scott O. Nelson (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fee (Case No. 6-107564) of District Director Jeana F. Jackson 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 & Dry Dock Co*., 12 BRBS 272 (1980).

Claimant was employed by employer from 1951 to 1955, and in 1959, during which time where he was exposed to loud noise. Claimant sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered by Dr. McClelland on March 5, 1987, which revealed a 13.8 per cent binaural impairment. CX A. Dr. McClelland also noted that claimant is a good candidate for binaural amplification. The claim was settled pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), in a Decision and Order Approving Compromise Settlement issued on February 15, 1989. Pursuant to the terms of the settlement agreement, claimant received $4,000 in compensation and employer agreed to pay any future medical bills related to claimant's work-related hearing loss.

Subsequently, on November 20, 1992, claimant, through his attorney, requested authorization for hearing aids. Employer's insurer at the time of the settlement, American Mutual Liability Insurance Company (American Mutual), had become insolvent; therefore, the claim for hearing aids was submitted to the Mississippi Insurance Guaranty Association (MIGA). CX E. MIGA responded to claimant's request by asking for a hearing aid estimate. Additionally, MIGA requested that claimant submit an affidavit for the statutory purpose of properly substituting MIGA for the insolvent American Mutual. EX A at E. On February 2, 1992, claimant's attorney submitted an executed affidavit. The estimate cost of claimant's requested hearing aid was submitted on January 4, 1994. EX A at F, H. MIGA then requested that claimant have his hearing evaluated by Dr. McDill for purposes of obtaining a second opinion. CXS G, H. After obtaining a second opinion and cost estimate from Dr. McDill, MIGA paid Dr. McClelland $1,462.50 for an audiological evaluation of claimant and claimant's hearing aids. CX I; EX A at Q. Claimant's request for an additional $642 for canal hearing aids was denied. CX J.

Claimant's counsel subsequently sought an attorney's fee of $596.75, representing 2.875 hours of services performed at a rate of $150 per hour, for work performed before the district director after September 1, 1993, and 1.25 hours at $125 per hour for work performed prior to September 1, 1993, plus $9.25 for photocopying expenses. The district director reduced the hourly rate to $100, denied the photocopying expense, and awarded a fee of $412.50, representing the requested 4.125 hours at a rate of $100 per hour.

On appeal, employer challenges the attorney's fee awarded by the district director, incorporating the objections it made below into its appellate brief. Claimant responds, urging affirmance.

Employer initially challenges the district director's fee order on the grounds that claimant's counsel's services did not result in a successful prosecution under

Section 28 of the Act. We disagree. Counsel for claimant is entitled to an attorney's fee where there is a successful prosecution of the claim and the work performed was necessary. *See* 33 U.S.C. §928. In general, a successful prosecution of a claim exists when claimant receives an economic benefit resulting from an adversarial proceeding. *See Mobley v. Bethlehem Steel Corp.,* 20 BRBS 239 (1988), *aff'd,* 920 F.2d 538, 24 BRBS 49 (CRT)(9th Cir. 1990); *Powers v. General Dynamics Corp.,* 20 BRBS 119 (1987).

Contrary to employer's contention, it is clear that employer's actions subsequent to claimant's request for hearing aids effectively controverted claimant's claim. We note in this regard that employer concedes in its reply brief that it requested that claimant undergo a second audiological evaluation "in order to explore the question of whether claimant's medical benefit entitlement was reasonable and necessary," *see* Employer's reply brief at 2, despite the March 1987 report of Dr. McClelland that claimant is a good candidate for amplification, upon which employer in part relied in agreeing to settle the claim. Moreover, employer additionally required that claimant complete an affidavit to establish MIGA's liability, which required claimant to re-establish, *inter alia*, noise exposure, last maritime employer, date of awareness of his injury, and state of residence. Accordingly, as claimant was ultimately successful in establishing his right to the cost of hearing aids at employer's expense, as provided for by the settlement agreement, claimant's counsel engaged in a successful prosecution and is entitled to a fee payable by employer. *See Ingalls Shipbuilding v. Director, OWCP [Baker]*, 991 F.2d 163,166, 27 BRBS 14, 16 (CRT)(5th Cir. 1993); *see also* 33 U.S.C. §928.

Employer next avers that claimant obtained only a nominal gain in benefits and that the attorney's fee awarded should therefore be limited in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). Moreover, employer argues that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. In considering counsel's fee petition, the district director specifically addressed the regulatory criteria governing approval of an attorney's fee under the Act pursuant to 20 C.F.R. §702.132, which provides that the award of any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Moreover, in reducing counsel's requested hourly rates of $150 for work performed after September 1, 1993, and $125 for work performed before September 1, 1993, to $100 per hour, the district director specifically considered employer's objection that the amount sought in counsel's fee petition was excessive in relation to the result

achieved by claimant. Inasmuch as the district director thus considered these objections when addressing counsel's fee petition, we decline to further reduce or disallow the hourly rate or the number of hours approved by the district director. *See Ross v. Ingalls Shipbuilding, Inc.,* 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989).

Accordingly, the district director's Compensation Order Award of Attorney's Fee is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge