

BRB No. 96-1695

STEPHEN A. BOYD, SR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SERVICE MARINE INDUSTRIES)	DATE ISSUED: _____
)	
and)	
)	
THE GRAY INSURANCE COMPANY)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Raymond Charles Vinet, Sr. (Vinet and Vinet), Cedar Crest, Louisiana, for claimant.

Robert S. Reich and JeanPaul P. Overton (Reich, Meeks & Treadway), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees (95-LHC-1837) of Administrative Law Judge C. Richard Avery 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, and abuse of discretion or not in accordance with the law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sought disability and medical benefits under the Act in connection with a

July 27, 1994, work injury. In his Decision and Order, the administrative law judge found that while claimant was not entitled to disability benefits, employer was liable for medical expenses arising out of the July 27, 1994, work injury. Thereafter, claimant's counsel sought an attorney's fee of \$9,844.38, representing 51.5 hours at \$150 per hour for work performed before the administrative law judge, plus \$2,119.38 in expenses.

In a Supplemental Decision and Order Denying Attorney Fees, the administrative law judge summarily denied the fee request, stating he agreed with employer that there was no basis for imposing fee liability because claimant was unsuccessful in the prosecution of his claim. Claimant appeals the administrative law judge's denial of his request for an attorney's fee, contending that the administrative law judge erred in finding that claimant had not successfully prosecuted the claim, as employer previously refused to pay for the medical treatment rendered by Dr. Bourgeois, an independent medical examiner selected by the Department of Labor, and was ordered to pay all medical bills incurred as treatment for his work-related accident. Employer responds, urging affirmance, but argues alternatively that any fee awarded should reflect claimant's limited success.

We need not address claimant's arguments relating to Section 28(a), 33 U.S.C. §928(a), because the issue of fee liability in this case is governed by Section 28(b), 33 U.S.C. §928(b). Under Section 28(b) of the Act, 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. Where claimant obtains disputed medical benefits, employer may be held liable for a fee. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). In this case, although the parties agree that employer voluntarily paid medical expenses to claimant, there is a dispute as to whether all medical expenses due under the administrative law judge's order were voluntarily paid by employer. The administrative law judge initially stated in his Decision and Order on the merits that it appeared that all medical expenses to date had been paid with the exception of the bill of Dr. Manale, which he disallowed as unauthorized. Thereafter, he stated that employer is liable for the expenses of the remaining physicians "assuming the same have not otherwise been paid." Decision and Order at 9. Finally, in the Order portion of his Decision and Order, the administrative law judge states that while claimant is not entitled to disability compensation, employer/carrier shall pay claimant for his medical expenses arising out of his July 27, 1994, work injury.

Claimant's counsel is entitled to payment of a reasonable attorney's fee by employer where he establishes claimant's right to payment of past medical benefits, *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987). In the present case, however, it is unclear from the administrative law judge's Decision and Order and the record before us whether any disputed medical benefits were awarded, and the administrative law judge summarily denied the fee request without providing any explanation. We therefore vacate his finding that employer is not liable for claimant's attorney's fee and remand this case for further consideration and explanation consistent with the requirements of the Administrative

Procedure Act, 5 U.S.C §557(c)(3)(a). On remand, the administrative law judge must determine whether employer voluntarily paid the medical expenses awarded; if not, employer is liable for a reasonable fee.¹ See generally *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Accordingly, the Supplemental Decision and Order Denying Attorney Fees of the administrative law judge is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

¹If on remand the administrative law judge determines that employer is liable for an attorney's fee, then, as employer asserts, the fee awarded must reflect the limited degree of success claimant's counsel achieved. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992)