

BRB Nos. 92-0780
and 92-1358

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| EDWARD F. HUDSON |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| INGALLS SHIPBUILDING, INCORPORATED |) | DATE ISSUED: |
| |) | |
| Self-Insured |) | |
| Employer-Petitioner |) | DECISION and ORDER |

Appeals of the Supplemental Decision and Order Awarding Attorney Fees of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney's Fee of N. Sandra Ramsey, District Director, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-3497) of Administrative Law Judge Kenneth A. Jennings and the Compensation Order Award of Attorney's Fee (Case No. 6-108161) of District Director N. Sandra Ramsey 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).¹ 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,

¹We hereby consolidate for purposes of decision employer's appeal of the district director's Compensation Order Award of Attorney's Fee, BRB No. 92-0780, and its appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, BRB No. 92-1358. 20 C.F.R. §802.104.

or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a retiree, sought benefits under the Act for a noise-induced work-related hearing loss based on an audiogram administered on January 20, 1987, which revealed a 32 percent binaural impairment. The audiologist noted that claimant's left ear was a good candidate for a hearing aid. A second audiogram, administered on August 12, 1987, revealed that claimant suffered from a 24.4 percent binaural impairment. On March 28, 1989, employer voluntarily commenced permanent partial disability compensation payments to claimant for a 10 percent whole man impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). On August 15, 1989, the case was referred to the Office of Administrative Law Judges for a formal hearing. In an Order dated November 8, 1990, the administrative law judge accepted the parties' joint motion to remand and remanded the case to the district director for appropriate disposition. On January 10, 1992, employer accepted liability for claimant's hearing aid.

Subsequent to the administrative law judge's order, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of \$3,577.75, representing 27.75 hours of legal services at the hourly rate of \$125, and \$109 in expenses. Thereafter, employer filed objections to the fee petition. In a Supplemental Decision and Order, the administrative law judge considered employer's specific objections to the fee request, reduced the number of hours sought by counsel to 21.5, reduced the hourly rate sought for services rendered by Attorneys Rebecca Ainsworth and John Dillon to \$100, and approved counsel's request for \$109 in expenses.

Claimant's counsel also submitted a fee petition to the district director requesting an attorney's fee of \$634.50, representing 6.25 hours of legal services performed at an hourly rate of \$100, and \$9.50 in expenses. Employer filed objections to the fee petition. In a Compensation Order issued on December 2, 1991, the district director considered employer's objections to the fee request, denied counsel's request for expenses, and awarded claimant's counsel an attorney's fee of \$625.

On appeal, employer challenges the attorney's fee awarded by both the administrative law judge and the district director, incorporating the objections it made below into its appellate briefs. Claimant responds, urging affirmance of both fee awards.

With regard to the administrative law judge's award of an attorney's fee, employer initially contends that, pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), it should not be held liable for an attorney's fee since it accepted liability of claimant's claim prior to referral of the case to the Office of Administrative Law Judges. We disagree. Pursuant to 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). Contrary to employer's assertion, in the instant case, employer did not accept liability for claimant's medical expenses until approximately 29 months after the case was referred to the Office of Administrative Law Judges. Accordingly, as claimant has successfully prosecuted his claim for medical benefits, claimant's counsel is entitled to a fee for services performed before the

administrative law judge. See *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

Employer also challenges the amount of the fees awarded by the administrative law judge and the district director, contending that the lack of complexity of the instant case mandates a reduction in the amount of the fees awarded to claimant's counsel. We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that 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). Thus, while the complexity of issues should be considered in awarding a fee, it is only one of the relevant factors. See generally *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge considered this specific objection in reducing claimant's associate counsel's hourly rate from \$125 to \$100; similarly the district director considered this objection in awarding claimant's counsel a fee. We therefore reject employer's contention that the awarded fees must be further reduced on this basis.²

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge and the district director. In considering counsel's fee petition, the administrative law judge set forth employer's objections to the number of hours requested by claimant's attorney for certain services, and thereafter reduced the number of hours requested by counsel by 6.25. In awarding claimant's counsel a fee, the district director also set forth employer's objections to the number of hours requested by claimant's counsel. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge and the district director abused their discretion in this regard; thus, we decline to further reduce or disallow the hours approved by the administrative law judge and the district director on this basis. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Next, we reject employer's assertion that the hourly rates awarded by the administrative law judge and district director are excessive. The administrative law judge determined that the hourly rate of \$125 sought by claimant's lead counsel was reasonable, but that an hourly rate of \$125 sought for services rendered by claimant's associate counsel was excessive, and thereafter awarded an hourly rate of \$100 for services rendered by Attorneys Ainsworth and Dillon; specifically, the administrative law judge found the hourly rates of \$125 for Attorney Lomax and \$100 for Attorneys

²We reject employer's reliance on the fee award of Administrative Law Judge A.A. Simpson in *Cox v. Ingalls Shipbuilding, Inc.*, No. 88-LHC-3335 (September 5, 1991), in which Judge Simpson reduced various entries as duplicative of the work performed in other cases, and awarded different hourly rates to claimant's attorneys based on their status as either a senior partner or relatively new associate. The amount of the attorney's fee award lies within the discretion of the body awarding the fee, and the decision of an administrative law judge regarding the amount of a fee is not binding precedent on another body in a different case. 33 U.S.C. §928(c).

Ainsworth and Dillon to be fair and reasonable for the issues involved in this case and in the region where this case originated. The district director found that counsel's requested hourly rate of \$100 was reasonable and appropriate. As employer's mere assertion that the awarded rates do not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rates are excessive, we affirm the rates awarded by the administrative law judge and district director to counsel.³ See *Maddon*, 23 BRBS at 55; see generally *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer next objects to counsel's minimum quarter-hour billing method. In its unpublished order in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990), the United States Court of Appeals for the Fifth Circuit stated that, generally, attorneys should charge no more than one-quarter of an hour for preparation of a one-page letter, and one-eighth of an hour for review of a one-page letter. The Fifth Circuit recently stated that this fee order is considered to be circuit precedent which must be followed. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished). Counsel's fee petitions generally conform to these guidelines. However, with regard to the fee petition before the administrative law judge, we find two one-quarter hour entries requested for services performed on December 4, 1989, and November 5, 1990, to be excessive under these criteria. With regard to the fee petition filed with the district director, we find the one-quarter hour entry for services performed on March 22, 1989, to be similarly excessive. Accordingly, we modify the awards of the administrative law judge and the district director to reflect the reduction of these entries

³We note that employer has attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections; this article, however, does not support employer's contention that the fees awarded in the instant case were unreasonable.

from one-quarter hour to one-eighth of an hour consistent with *Biggs* and *Fairley*.⁴

Lastly, with regard to the district director's award of an attorney's fee, employer asserts that the district director improperly found that it was liable for services rendered after the case was referred to the Office of Administrative Law Judges.⁵ Claimant's fee petition indicates that one-quarter hour entries were requested on November 5, 1990, and December 3, 1990. We agree with employer that time spent on November 5, 1990, reviewing correspondence from employer should be disallowed; specifically, we note that this time is duplicative of the services requested and awarded by the administrative law judge on the same date. We decline, however, to reduce the time awarded by the district director on December 3, 1990, since this service was performed subsequent to the administrative law judge's remand of the case to the district director and employer has not shown that the service rendered was either excessive or unnecessary.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is modified to reflect the reduction of the itemized entries on December 4, 1989 and November 5, 1990 from one-quarter to one-eighth of an hour. BRB No. 92-1358. The district director's Compensation Order Award of Attorney's Fee is modified to reflect the reduction of the itemized entry on March 22, 1989 from one-quarter

⁴In his response brief in BRB No. 92-1358, claimant requests that an additional hour of services be assessed against employer for the defense of his fee petition before the administrative law judge. Fees for legal services must be approved at each level of the proceedings by the tribunal before which the work was performed. 33 U.S.C. §928(c); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.*, 28 BRBS 27 (1994). Accordingly, we decline to award counsel a fee for work performed before the administrative law judge.

⁵Employer also contends that the district director erred in failing to assess against claimant that portion of claimant's attorney's fee representing work performed prior to the time the district director gave employer formal notice of claim. Employer, however, failed to raise this contention in its objections to the fee petition which it filed with the district director; thus, we will not address this contention since it is raised for the first time on appeal. See *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994); *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, No. 93-4367 (5th Cir. Dec. 9, 1993); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

to one-eighth of an hour, and the disallowance of the one-quarter hour awarded for services rendered on November 5, 1990. BRB No. 92-0780. In all other respects, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and the district director's Compensation Order Award of Attorney's Fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge