BRB No. 92-907

PAT D. DENMARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

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

Paul M. Franke, Jr. and Traci M. 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's Fees (89-LHC-3349) 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 may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was exposed to workplace noise at employer's facility during the course of his employment. On February 16, 1988, employer commenced voluntary payment of benefits to claimant based on an 11.3 percent binaural hearing impairment converted to a four percent whole-man rating. The matter was referred to the Office of Administrative Law Judges for a formal hearing on August 9, 1989.

According to a letter in the record and counsel's fee petition, employer relayed a settlement

offer to claimant on February 28, 1991, which claimant accepted by letter dated March 8, 1991.[1] On March 14, 1991, at claimant's request the administrative law judge issued an Order which remanded the case to the district director's office for implementation of a settlement agreement. On November 22, 1994, employer submitted a Form LS-208, Notice of Final Payment, which indicates that it made its last payment to claimant on July 13, 1983, for an 11.3 percent binaural hearing loss for 22.6 weeks at $175.20 per week, as well as a $57.64 penalty for late payment, $19.61 in interest, and $450 in attorney's fees. In addition, this document states an overpayment of $373.58.

Thereafter, claimant's attorney submitted a fee petition for services rendered at the administrative law judge level requesting $2,777.25 representing 22.125 hours of services at $125 per hour and $11.25 in expenses. Employer filed objections and claimant replied to employer's objections. In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge reduced the hourly rate requested to $110, and disallowed the photocopying expenses claimed, but found the fee requested was otherwise reasonable. Accordingly, he awarded claimant's counsel $2,433.75 for 22.125 hours of services at $110.[2]

On appeal, employer challenges the administrative law judge's fee award on various grounds, incorporating the objections it made below into its brief on appeal. Claimant, incorporating his reply brief to employer's objections below, responds, urging that the fee award be affirmed. Employer replies to claimant's response.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fees. Employer asserts that there was no successful prosecution of the claim and no additional benefits gained for claimant while the case was before the administrative law judge because it accepted liability for, and voluntarily commenced payment of disability compensation on February 16, 1988, prior to referral, in an amount equal to that ultimately agreed upon by the parties. Moreover, employer asserts that if any fee is awarded under Section 28(b), 33 U.S.C. §928(b), it should be limited to the difference between the amount voluntarily tendered by employer and the amount which claimant ultimately obtained pursuant to the parties compromise agreement.

Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the deputy commissioner, and the claimant's attorney's

[1]According to claimant's letter, employer was to prepare a Section 8(i), 33 U.S.C. §908(i), petition.

[2]The administrative law judge denied claimant's counsel's request for an additional one hour for time spent in defending the fee petition which claimant had requested in his reply to employer's objections.

services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays 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. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

We need not address employer's arguments with respect to fee liability under Section 28(a); as voluntary payments were made, this case is governed by Section 28(b). We are unable to resolve the fee liability issue presented, however, because it is impossible to glean from the existing record whether claimant obtained additional compensation before the administrative law judge, as no evidence was presented regarding the terms of the parties' agreement. Accordingly, we vacate the administrative law judge's finding of fee liability under Section 28(a) and remand for him to reopen the record and explicitly consider whether pursuant to the terms of the parties' March 1991 agreement, claimant obtained additional compensation sufficient to support a finding of fee liability under Section 28(b). *See Rihner v. Boland Marine and Manufacturing Co.*, 24 BRBS 84 (1990).

Although the case is being remanded for reconsideration of the issue of fee liability, we will entertain employer's remaining arguments in the interests of judicial economy. Employer contends that the fee awarded by the administrative law judge is excessive. Although employer maintains that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the fee award, we decline to address these arguments which have been raised by employer for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). We note, however, that the administrative law judge did consider the complexity of the case in determining that the $125 hourly rate requested was excessive and that an hourly rate of $110 is reasonable and appropriate. While employer also argues that the $110 hourly rate awarded by the administrative law judge is excessive, and that an hourly rate of $75 to $80 would be more appropriate, employer has not established an abuse of discretion committed by the administrative law judge in this regard.

See Maddon v. Western Asbestos Co., 23 BRBS 55 (1989); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds).[3]

Employer also argues that any fee awarded under Section 28(b) should have been limited solely to the difference between the amount of benefits voluntarily paid by the employer and the amount claimant ultimately obtained. We disagree. The Board has consistently rejected the contention that the amount of the fee awarded under Section 28(b) must be limited in the manner urged by employer. *See, e.g., Hoda v. Ingalls Shipbuilding, Inc.,* 28 BRBS 197 (1994)(McGranery, J., dissenting)(Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Employer additionally objects to counsel's use of the minimum one-quarter hour billing method and to specific itemized entries on various dates involving the preparation or review of routine correspondence or orders. The administrative law judge in the present case determined that counsel's minimum quarter-hour billing method was reasonable and appropriate. Our review of counsel's fee petition indicates that it generally conforms to the guidelines set forth in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990)(unpublished), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished), that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for writing a one-page letter. The one-quarter hour entry claimed on January 22, 1990, for receipt and review of a letter from carrier requesting signature on forms, however, is excessive under the aforementioned guidelines and must accordingly be reduced to one-eighth of an hour consistent with *Biggs* and *Fairley*. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

[3]We also reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (September 5, 1991), as 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; *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

Finally, employer contends that time spent in certain discovery-related activity and in reviewing various legal documents was either unnecessary, excessive, or clerical in nature. In evaluating counsel's fee petition, the administrative law judge considered employer's objections, but found the itemized entries claimed to be reasonable and necessary. We decline to disturb this rational determination. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). We therefore conclude that with the exception of the reduction in the January 22, 1990 entry, previously discussed, the administrative law judge made no error in his calculation of the amount of the fee. Accordingly, if employer is found liable for claimant's attorney's fee pursuant to Section 28(b) on remand, the administrative law judge should modify his prior fee award to reflect that counsel is entitled to $2,420, representing 22 hours of services at $110 per hour.[4]

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated in part, and affirmed in part, and the case is remanded for further proceedings 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

[4]Claimant's contention that employer is liable for interest on the attorney's fee award under *Guidry v. Booker Drilling Co. (Grace Offshore Co.)*, 901 F.2d 485, 23 BRBS 82 (CRT)(5th Cir. 1990), is rejected for the reasons stated in *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 65 (1991) (Decision on Remand). *See also Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd*, 820 F.2d 1528 (9th Cir. 1987).