

MARTHA CRIMM, Widow of)
LUTHER A. CRIMM)
)
 Claimant-Respondent)
)
 v.)
)
 INGALLS SHIPBUILDING,)
 INCORPORATED) DATE ISSUED:
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Second Supplemental Decision and Order Awarding Attorney Fees of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Traci M. Castile (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 Second Supplemental Decision and Order Awarding Attorney Fees (88-LHC-2889) of Administrative Law Judge Quentin P. McColgin 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a steel shaper, worked for employer from 1944 until 1980, during which time he was exposed to industrial noise. Claimant filed a claim for a noise-induced work-related hearing loss on January 13, 1991, based upon an audiometric evaluation performed on November 18, 1986, by Dr. Gordon Stanfield, which reflected a 34.06 percent binaural hearing loss. CX 1. Claimant was evaluated by Dr. Jim McDill on July 21, 1987; this examination reflected an 18.1 percent binaural hearing loss. On September 8, 1987, employer filed a Notice of Payment of Compensation without Award, LS-206, based upon the lower rating, the National Average Weekly Wage, and Section 8(c)(13), 33 U.S.C. §908(c)(13). *See* CX 6. Subsequently, on May 3, 1988, employer filed an amended LS-206, agreeing to pay claimant compensation based upon an average of the two tests,

i.e., 26.08 per cent. *See* CX 7. Thereafter, this case was referred to the Office of Administrative Law Judges (OALJ) on July 18, 1988. On February 18, 1991, employer completed its payment to claimant of \$10,524.32 in compensation plus \$392.08 in interest. EX E. Claimant died on December 13, 1991, of causes unrelated to this claim.

The only issue before the administrative law judge was under which section of the Act, Section 8(c)(13), or Section 8(c)(23), 33 U.S.C. §908(c)(13), (23), was claimant to be properly compensated. In his Order Granting Summary Decision, issued January 26, 1989, the administrative law judge awarded benefits under Section 8(c)(13); subsequently, the administrative law judge issued a Supplemental Decision and Order Awarding Attorney Fees of \$717 on August 8, 1989.

Employer appealed both decisions to the Board, which consolidated them for purposes of decision. On April 23, 1990, the Board granted the motion of the Director, Office of Workers' Compensation Programs (the Director), to hold this case in abeyance pending the decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). Following the issuance of a decision by the Fifth Circuit in *Fairley*, employer filed a Motion to Remand. In an Order, dated September 13, 1991, the Board remanded the case to the administrative law judge to reconsider the award as well as to address the issue of the applicability of Section 14(e), 33 U.S.C. §914(e).

Subsequently, the United States Supreme Court issued its decision in *Bath Iron Works v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT)(1993), in which it held that benefits for all work-related hearing losses are to be calculated under Section 8(c)(13). Accordingly, on remand, the administrative law judge awarded claimant compensation pursuant to Section 8(c)(13) for an 18.1 per cent binaural hearing impairment plus interest for an award of \$7,304.07, plus a penalty under Section 14(e). These amounts were subsumed by the payment already rendered by employer, \$10,916.40, resulting in an overpayment. Subsequently, claimant's attorney submitted a fee petition for 4.25 hours of services rendered on July 9, 1992, at \$125 per hour plus expenses of \$8.25, for a total of \$539.50. The administrative law judge in his Second Supplemental Decision and Order Awarding Attorney Fees addressed employer's objections and awarded a fee of \$275, representing 2.5 hours at \$110 per hour, plus \$8.25 for expenses.

On appeal, employer challenges the administrative law judge's fee award on remand, reiterating the fee liability arguments it raised below. Claimant has not responded to this appeal.

We agree with employer that the administrative law judge erred in holding it liable for claimant's attorney's fee. We need not address employer's arguments relating to fee liability under Section 28(a), 33 U.S.C. §928(a), because the case at bar is governed by Section 28(b). Under Section 28(b) when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, employer will be liable for an attorney's fee if the claimant succeeds in obtaining compensation greater than that voluntarily paid or agreed to by employer. 33 U.S.C. §928(b); *see Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Although the issue of under which section of the Act claimant's award should be made remained unresolved when the case at bar was transferred to the OALJ, employer voluntarily paid claimant all compensation due prior to the administrative law judge's Decision and Order on remand. Specifically, employer accepted liability

for an impairment of 26.08 percent prior to the transfer of the claim, and consequently paid claimant disability benefits totalling \$10,524.32. The administrative law judge thereafter awarded claimant compensation and interest totalling \$7,304.07, as well as a Section 14(e) penalty. Inasmuch as employer voluntarily paid to claimant an amount in excess of that ultimately awarded by the administrative law judge, claimant did not obtain greater compensation than that which employer paid. The administrative law judge's determination that employer is liable for claimant's attorney's fee is therefore reversed. *See Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992); *Flowers v. Marine Concrete Systems*, 19 BRBS 162 (1986).

In light of our determination that employer is not liable for claimant's attorney's fee, the fee awarded must be vacated, and the case must be remanded for the administrative law judge to consider whether the fee should be assessed against claimant as a lien upon his compensation award pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Under such circumstances, the administrative law judge must take into account the financial circumstances of the claimant. *See* 20 C.F.R. §702.132(a). *See generally Jones v. C & P Telephone Co.*, 11 BRBS 7 (1979), *aff'd mem.*, No. 79-1458 (D.C. Cir. Feb. 26, 1980), *amended*, (D.C. Cir. Mar. 31, 1980).

Accordingly, the administrative law judge's determination that employer is liable for claimant's attorney's fee is reversed. The Second Supplemental Decision and Order Awarding Attorney Fees is vacated and the case is remanded to the administrative law judge 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