BRB No. 96-0259

| | | |
|---|---|---|
| CHARLES L. MERCHANT | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| INGALLS SHIPBUILDING, INCORPORATED | ) | DATE ISSUED: |
| | ) | |
| | ) | |
| Self-Insured Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

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 Fees (94-LHC-1057) of Administrative Law Judge Richard D. Mills 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's counsel sought an attorney's fee of $1,665.00, representing 10 hours at $150 per hour and 1.5 hours at $110 per hour, for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of $1,336.88, representing 9.375 hours at an hourly rate of $125, and 1.5 hours at an hourly rate of $110. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

Employer initially avers that inasmuch as it paid all benefits ultimately due on August 30,

1994, and the only issue presented for adjudication was the date from which interest accrues, an issue on which claimant did not prevail, there was no true "gain" of benefits while the case was before the administrative law judge. Employer thus asserts that, as any attorney's fee assessed under 33 U.S.C. §928(b) must be based solely on the difference between the amount it initially paid and the amount ultimately awarded by the administrative law judge, the fee requested by counsel in the present case should have been denied in its entirety or substantially reduced to reflect claimant's limited success consistent with *Farrar v. Hobby*, 113 S.Ct. 566 (1992), *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). We disagree. In making the fee award in this case, the administrative law judge considered this objection, and reasonably concluded that the fee should not be reduced on this basis.

Initially, the administrative law judge's determination that counsel's fee is not limited to an amount less than the compensation obtained accords with law. *See, e.g., Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). In addition, employer's assertion that no gain in benefits was achieved while the case was before the administrative law judge is not supported by the record, which reflects that employer did not pay any benefits or enter into stipulations regarding its liability for disability compensation or medical benefits until at, or on the date immediately prior to, the hearing. Although claimant's counsel did not ultimately prevail in establishing claimant's entitlement to interest dating back to his last date of employment, claimant's counsel's efforts before the administrative law judge did result in claimant's receiving $5,041.44 in disability compensation for a 22.65 binaural hearing loss based upon an average weekly wage of $166.93, $170.42 in interest, and an award of medical benefits. Inasmuch as claimant was successful in obtaining an award before the administrative law judge and the administrative law judge, after considering the regulatory criteria of 20 C.F.R. §702.132, specifically found that the work performed was necessary in achieving the highest amount of compensation that claimant was entitled to receive, employer has failed to meet its burden of establishing that the administrative law judge abused his discretion in this regard. *See generally Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89, 93 (1993)(Brown, J., dissenting).

Employer alternatively contends that claimant's counsel is not entitled to a fee for work performed after August 30, 1994, when it made full payment of benefits to claimant because the services performed thereafter did not contribute to the successful prosecution of the case. The time claimed by counsel thereafter on August 31, 1994, to review the stipulations and the compensation check, on September 1, 1994, to attend the hearing and submit the stipulations, and on March 13, 1995, to review the administrative law judge's Decision and Order was properly awarded as reasonable "wind-up" services necessary to close the case. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). We agree with employer, however, that because claimant's counsel did not ultimately prevail in establishing claimant's entitlement to interest dating back to the last date of exposure and the September 26, 1994, and October 3, 1994, entries relate only to work performed on the interest issue, the 1.75 hours claimed on these dates in connection with this distinct unsuccessful claim should not have been awarded. *See generally Hensley*, 461 U.S. at 441.

Accordingly, we modify the administrative law judge's fee award to reflect the disallowance of this time.

Employer also contends that the fee awarded by the administrative law judge is excessive in light of the routine and uncomplicated nature of the case. 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 the award of any attorney's fee 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). In the instant case, inasmuch as the administrative law judge specifically considered the complexity of the case in assessing the reasonableness of the fee request, we reject employer's contention that the awarded fee must be further reduced on this basis.

Employer's remaining objections to the number of hours and hourly rates awarded are rejected, as it has not shown that the administrative law judge abused his discretion in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).[1] Employer's specific objection to counsel's method of billing in minimum increments of one-quarter hour also is rejected, as the administrative law judge considered this objection, and his award conforms to the criteria set forth in the decisions of the United States Court of Appeals for the Fifth Circuit 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) (table).

Employer's contentions which were not raised below will not be addressed 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 mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the Supplemental Decision and Order Awarding Attorney Fees is modified as stated herein and is otherwise affirmed.

SO ORDERED.

---

[1]Although employer asserts that the administrative law judge abused his discretion in awarding .125 hours to claimant's counsel for review of April 25, 1994, correspondence from the Director, Office of Workers' Compensation Programs, as this letter dealt only with employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f), we disagree. The administrative law judge considered employer's objection in this regard and acted within his discretion in allowing .125 of the .25 hours claimed for this entry on the rationale that such work was necessary as claimant's counsel has an interest in reviewing any correspondence provided to him if only to keeping his files current. *See generally 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).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge