

BRB No. 99-1122

JEFFREY LEE MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McGINESS, INCORPORATED	)	DATE ISSUED: <u>7/27/2000</u>
	)	
and	)	
	)	
FRANK GATES ACCLAIM	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Steven C. Schletker (Schletker, Hornbeck & Moore), Covington, Kentucky, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart), Chicago, Illinois, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (98-LHC-0950) of Administrative Law Judge Rudolf L. Jansen 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).

On September 6, 1995, claimant was injured during the course of his employment for

employer as a machinist when a 150 pound rudder shaft fell on his left hand and wrist. Claimant alternated between working light duty for employer and being unable to work due to hand and wrist pain until January 21, 1997, when he stopped working as a result of pain and infected sores on the back of his left hand. The record indicates that claimant was paid compensation by the Ohio Bureau of Workers' Compensation pursuant to the workers' compensation laws of Ohio during his periods of temporary total disability from the date of injury until December 1997, when compensation benefits were terminated. On December 11, 1997, claimant requested that employer initiate compensation payments under the Act, which employer declined to do. On May 18, 1998, claimant resumed receiving compensation benefits pursuant to the workers' compensation laws of Ohio.

After the claim's referral to the Office of Administrative Law Judges, but prior to the formal hearing, employer stipulated that claimant was entitled to coverage under the Longshore Act. After a formal hearing on September 29, 1998, the administrative law judge, in his Decision and Order-Awarding Benefits, rejected employer's contentions that claimant is able to return to his usual employment as a machinist and, in the alternative, that it established the availability of suitable alternate employment. Moreover, he credited the opinion of claimant's two treating physicians to find that claimant's disability remains temporary in nature. Accordingly, claimant was awarded compensation under the Act for temporary total disability from September 6 to October 23, 1995, from December 12, 1995, to February 6, 1996, and from January 22, 1997, and continuing, as well as medical benefits. 33 U.S.C. §§907(a), 908(b).

Subsequent to the administrative law judge's decision, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of \$26,062.50, representing 182.25 hours at an hourly rate of \$150 for lead counsel and an hourly rate of \$125 for associate counsel, plus costs of \$5,680.35. In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge rejected employer's objections to the fee requested and awarded claimant's counsel the requested fee and costs.

On appeal, employer contends that the administrative law judge erred in awarding claimant's counsel a fee payable by employer because claimant did not obtain greater benefits than those which claimant was receiving under the Ohio workers' compensation scheme. In the alternative, employer contends that if a fee is owed, it should be less than that awarded. Claimant responds, urging affirmance of the administrative law judge's fee award.

Under Section 28(a) of the Act, if an employer declines to pay compensation within 30 days after receiving written notice of a claim from the district director, and claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). Pursuant to Section 28(b) of the Act, when an employer pays or tenders benefits without an award and thereafter a

controversy arises over additional compensation due, the employer shall 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).

We reject employer's contention that the administrative law judge erred in holding it liable for claimant's attorney's fee. The administrative law judge found significant, and employer does not dispute, that employer acknowledged jurisdiction under the Longshore Act after transfer of the case for a formal hearing. Contrary to employer's contention, establishing claimant's coverage under the Act constitutes a successful prosecution of the claim in this case. Although the temporary total disability benefits may have been paid at the same rate under the state and federal schemes, the administrative law judge found that ultimately the disability and medical benefits of the Longshore Act are superior to that provided by the state act. *See Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992). Moreover, claimant obtained benefits for the period during which the state benefits were suspended. In addition, employer contested the extent of claimant's disability before the administrative law judge. Specifically, employer contended that claimant was capable of returning to his usual employment and, in the alternative, that it established the availability of suitable alternate employment. Claimant ultimately prevailed on these issues resulting in an award of continuing compensation under the Act for temporary total disability. Accordingly, as claimant's counsel's services resulted in claimant's obtaining greater benefits, we hold that the administrative law judge properly held employer liable for claimant's attorney fee. *See Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd sub nom. Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990).

We also reject employer's allegations regarding the amount of the fee. Employer asserts that the administrative law judge improperly awarded an attorney's fee for the time spent for two attorneys to attend the formal hearing. In addressing this objection, the administrative law judge specifically found that the services of associate counsel, Mary Ray, should be compensated after evaluating the responsibilities and services she rendered in the period immediately preceding and during the hearing. The Board has stated that work performed by co-counsel participating in the litigation of a claim is compensable where the complexity of the case or other factors warrant it. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table). Inasmuch as the administrative law judge fully considered the necessity and quality of the services of the second attorney, we reject employer's contention of error in this regard as it has not established an abuse of discretion by the administrative law judge.

Finally, we reject employer's contention regarding claimant's counsel's quarter-hour minimum billing method. The Board has previously determined that this method is

reasonable under the applicable regulation, 20 C.F.R. §702.132. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *cf. Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (Fifth Circuit has rejected method of minimum quarter-hour increments).

Claimant's counsel has filed a fee petition for time expended before the Board in which he requests a fee of \$1,575, representing 10.5 hours at an hourly rate of \$150. Employer requests 30 days to respond to claimant's fee petition after issuance of the Board's decision. It is well-established that due process requires that employer be given a reasonable time to respond to a fee request. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998). Accordingly, employer's request is granted; its response to counsel's fee petition must be received within 30 days from receipt of this decision.

Accordingly, the administrative law judge's Decision and Order Granting Attorney Fees is affirmed. Employer is granted 30 days to respond to claimant's fee petition for services rendered before the Board.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge