



BRB No. 15-0070

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| LIONEL GROWS |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| HUNTINGTON INGALLS, |) | |
| INCORPORATED (AVONDALE |) | |
| OPERATIONS) |) | |
| |) | DATE ISSUED: <u>Sept. 21, 2015</u> |
| Self-Insured |) | |
| Employer-Petitioner |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Compensation Order Award of Attorney's [Fees] on Remand and the Compensation Order Den[y]ing Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Ryan A. Jurkovic and Isaac H. Soileau, Jr. (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Compensation Order Award of Attorney's [Fees] on Remand, and the Compensation Order Den[ying] Reconsideration (OWCP No. 07-187222) of District Director David A. Duhon 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 will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

This case has been before the Board previously. To summarize, claimant worked for employer as a rigger and leaderman for 42 years. Audiometric testing on November 25, 2009, revealed a 30.9 percent work-related binaural hearing impairment. Audiometric testing on February 19, 2010, revealed a 41.9 percent impairment. On April 19, 2010, employer commenced voluntary payment of benefits for a 30.9 percent binaural impairment based on an average weekly wage of \$1,084.85. Claimant retired on May 31, 2010.

On March 2, 2011, claimant filed a claim for a 41.9 percent binaural hearing loss. After receiving notification of the claim on March 19, 2011, employer paid additional benefits, compensating claimant for a 36.4 percent binaural impairment, the average of the two audiogram results. Employer calculated benefits using the same average weekly wage of \$1,084.85. Claimant requested an informal conference, seeking an average weekly wage of \$1,088.40. By letter dated May 3, 2011, the district director recommended that the parties average their calculations and compromise the average weekly wage (\$1,086.63). Further, noting that the two audiograms constituted the only valid evidence of the extent of claimant's disability, the district director instructed claimant to file another claim if he was claiming additional hearing loss after February 2010. On May 10, 2011, employer questioned claimant's average weekly wage calculation, and on July 13, 2011, the district director referred this claim, OWCP No. 07-187222, to the Office of Administrative Law Judges (OALJ) for a hearing.

Claimant filed a second claim for hearing loss on July 7, 2011. Employer controverted the claim, but voluntarily paid claimant additional benefits on July 27, 2011, so that employer's total payments were for a 41.9 percent binaural impairment based on an average weekly wage of \$1,084.85. On August 2, 2011, employer adjusted the average weekly wage to \$1,112.18, and paid claimant additional compensation so that total benefits paid equaled \$62,133.51, representing compensation for a 41.9 percent impairment at the higher average weekly wage of \$1,112.18. On March 8, 2012, based on a March 2, 2012 independent audiometric evaluation, the district director

recommended that employer pay claimant permanent partial disability benefits for a 37.8 percent binaural impairment. Claimant requested a hearing, and the district director referred this claim, OWCP No. 07-192631, to the administrative law judge on April 16, 2012.

Administrative Law Judge Clement J. Kennington consolidated the two claims and held a hearing on February 13, 2013. He issued a decision on August 19, 2013, awarding claimant compensation for a 43.3 percent binaural impairment at an average weekly wage of \$1,099.92 for a total of \$63,502.05 in benefits. The administrative law judge further found that employer is entitled to a credit of \$62,133.51 for compensation previously paid. Thus, the administrative law judge found claimant entitled to \$1,368.54 in additional compensation. Pursuant to claimant's appeal, the Board affirmed the administrative law judge's award of benefits, but remanded the case to the administrative law judge to determine claimant's entitlement to interest. *Grows v. Huntington Ingalls, Inc.*, BRB No. 13-0550 (July 17, 2014) (unpub.).

Claimant's counsel filed a fee petition for services performed before the district director in both claims (OWCP Nos. 07-187222 and 07-192631). The district director determined counsel is not entitled to any attorney fees under Section 28, 33 U.S.C. §928, and counsel appealed to the Board. The Board held that, although counsel is not entitled to a fee for work performed in OWCP No. 07-192631, he is entitled to a fee for work in OWCP No. 07-187222 pursuant to Section 28(b), 33 U.S.C. §928(b), because he was successful in obtaining benefits for claimant at a higher average weekly wage than employer was willing to pay after the district director's May 3, 2011 recommendation.¹ The Board remanded the case to the district director for calculation of an attorney's fee. *Grows v. Huntington Ingalls, Inc.*, BRB Nos. 14-0085, 14-0133 (Oct. 24, 2014) (unpub.) (Boggs, J., dissenting).

On November 5, 2014, the district director awarded claimant's counsel an attorney's fee of \$1,871.50 payable by employer for work performed in connection with OWCP No. 07-187222.² In so finding the district director found, "the hourly rate of \$275 per hour is reasonable and is within the usual and customary rates awarded by this office for similar cases in this geographic region," and that "none of the charges objected to by the employer are found to be inherently excessive given the tasks performed." Thus, the district director declined to disallow any charges. Order at 2. Employer requested

¹ The Board also affirmed the administrative law judge's denial of a fee.

² The district director determined that employer's liability for fees began on March 28, 2011, the date employer made its final voluntary payment to claimant for a 36.4 percent binaural impairment based on an average weekly wage of \$1,084.85.

reconsideration and argued that Section 28(b) requires that the attorney's fee be based solely on the difference between the compensation awarded and the amount paid or tendered by employer. The district director denied employer's motion. He found that an attorney's fee of \$1,871.50 is appropriate given that employer did not pay the additional compensation recommended by the district director, thus forcing claimant's counsel to pursue the claim. Order at 1. Employer appeals the district director's fee award. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

On appeal, employer contends that the district director's fee award of \$1,871.50 is excessive given claimant's minimal recovery and contravenes that portion of Section 28(b) which states that employer is liable for "a reasonable fee based solely upon the difference between the amount awarded and the amount tendered or paid." 33 U.S.C. §928(b). Section 28(b) of the Act states, in relevant part:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation.

33 U.S.C. §928(b). Prior to the informal conference in this case, employer had paid claimant benefits for a 36.4 percent binaural impairment based on an average weekly wage of \$1,084.85. After the May 4, 2011, informal conference, the district director recommended that employer pay benefits based on an average weekly wage of \$1,086.63. Employer refused this recommendation, and did not pay or tender any additional benefits to claimant within 14 days of the recommendation. On August 2, 2011, before any proceedings before the administrative law judge, employer paid benefits based on the increased average weekly wage of \$1,112.18. *See Grows*, BRB Nos. 14-0085, 14-0133,

slip op. at 10. This ultimately resulted in additional compensation of \$1,099 for the hearing loss of 36.4 percent involved in OWCP No. 07-187222.³

We reject employer's contention that the district director's fee award contravenes Section 28(b). Although employer correctly asserts that the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has stated that a fee award must be tailored to a claimant's "limited success," the "success" of an action is not defined in terms of the monetary benefit gained, but, rather, in terms of how successful the plaintiff was in achieving the claims asserted. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *see also Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (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*, 46 F.3d 66 (5th Cir. 1995). Thus, it is the "success in achieving the claims asserted" that must be measured against the amount of benefits paid or tendered by employer. *See also Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). In this case, the only claim asserted before the district director was claimant's entitlement to greater compensation based on a higher average weekly wage, and counsel was fully successful on this issue notwithstanding the relatively small monetary recovery. *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89 (1993) (Brown, J., dissenting).

Moreover, contrary to employer's contention, the Fifth Circuit's decision in *Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003), does not mandate a lower fee award in this case. In *Davis*, the court noted that Section 28(b) states that a fee award should be based "solely on the difference between the amount awarded and the amount tendered or paid." The court vacated a fee award of \$15,500 because the claimant was unsuccessful in having a disability award reinstated and obtained only \$736.50 in penalties and interest, plus future medical benefits. The court held that the administrative law judge failed to quantify the total value of additional benefits obtained and "take it into consideration in determining the amount of the attorney's fee award" "when reducing the fees in light of the success obtained." The court stated only that the fee "may be excessive," given the limited recovery. The court left it to the administrative law judge to determine whether the fee was reasonable. *Davis*, 348 F.3d at 491, 37 BRBS at 115(CRT). Moreover, the Board has previously held

³ Employer's August 2011 payment resulted in additional compensation of about \$1,990 for claimant's 36.4 percent hearing loss. Claimant's success in this regard was reduced to about \$1,099 before the administrative law judge. Nevertheless, claimant obtained additional compensation from employer more than 14 days after the informal conference and before the proceedings before the administrative law judge.

that although the amount of benefits gained must be considered in determining a reasonable attorney's fee, the phrase "based solely upon the difference between the amount awarded and the amount tendered or paid" means that the fee is to be solely for the work done to increase compensation.⁴ *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (decision on recon.); *Brown v. Lykes Brothers Steamship Co., Inc.*, 6 BRBS 244 (1977). In this case, the district director's fee award is only for the services claimant's counsel performed after March 28, 2011 in successful pursuit of a higher average weekly wage. The district director recognized that the fee award was greater than claimant's monetary recovery, but stated that the limitation on the fee award proposed by employer would be a disincentive for attorneys to pursue claims of low value. Employer has not established that this fee award is contrary to law or based on an abuse of the district director's discretion, and therefore we reject its contention that the fee award is excessive in view of the results obtained. *Hoda*, 28 BRBS 197.

We agree with employer, however, that the district director failed to address all of employer's objections to specific itemized entries in the fee petition. The district director addressed employer's objections to the 1.1 hours it considered "excessive,"⁵ but did not address employer's objections to charges alleged to be "unnecessary, clerical, and duplicative."⁶ Consequently, we must vacate the district director's attorney fee award in this case and remand the case. See *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). On remand, the district director must address employer's objections and provide reasons for his findings regarding the compensability of the contested entries. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); 20 C.F.R. §702.132.

⁴ As the Director states, the legislative history accompanying Section 28(b) is not to the contrary. It merely explains that "fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 9, reprinted in 1972 U.S.C.C.A.N. 4706.

⁵ As employer does not challenge the administrative law judge's hourly rate determination or the finding that specific items are not "excessive," those findings are affirmed. See *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

⁶ Only 1.1 hours of the additional time objected to postdate March 28, 2011, the date the district director found employer's liability in this case commenced.

Accordingly, the district director’s “Compensation Order Award of Attorney’s [Fees] on Remand”, and the “Compensation Order Den[ying] Reconsideration” are vacated, and we remand this case for further consideration of employer’s objections.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues’ decision for the reasons stated in my dissenting opinion in the Board’s decision in *Grows v. Huntington Ingalls, Inc.*, BRB Nos. 14-0085, 14-0133 (Oct. 24, 2014) (unpub.) (Boggs, J., dissenting), slip op. at 12-13. As discussed therein, the parties stipulated before the administrative law judge that the district director did not hold any informal conferences, and the administrative law judge accepted the stipulation and accordingly determined that there was no entitlement to an attorney’s fee under Section 28. Having been accepted by the administrative law judge, the stipulation of fact is binding and precludes employer’s liability for any attorney’s fees in this case. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Thus, I would reinstate the district director’s original decision denying claimant’s counsel an employer-paid attorney’s fee.

JUDITH S. BOGGS
Administrative Appeals Judge