

JERRY JOSEPH GAUTHREAUX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN/AVONDALE	)	DATE ISSUED: 05/23/2006
INDUSTRIES, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Richard M. Millet, LaPlace, Louisiana, for claimant.

Richard S. Vale, Christopher K. LeMieux, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Mandeville, Louisiana, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-1493) 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 will not be set aside unless shown by the challenging party 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). In addition, employer has filed a motion to dismiss claimant's appeal. For the reasons that follow, we deny the motion to dismiss, and we vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge to address claimant's petition for an enhanced attorney's fee.

Claimant injured his back at work in 1991. The administrative law judge awarded benefits for various periods. On appeal, the Board affirmed the administrative law

judge's award of temporary total and partial disability benefits for periods between September 3, 1991, and April 2, 1993, as well as the award of medical benefits. The Board remanded the case for the administrative law judge to address all relevant evidence concerning the extent of claimant's disability after April 2, 1993. *Gauthreaux v. Avondale Industries, Inc.*, BRB Nos. 97-1105/A (May 8, 1998).

On remand, the administrative law judge awarded claimant temporary total disability benefits commencing April 2, 1993, as he found that employer did not establish the availability of suitable alternate employment. The administrative law judge also awarded claimant's counsel an attorney's fee of \$875. On appeal, the Board affirmed the award of disability benefits and the attorney's fee award. *Gauthreaux v. Avondale Industries, Inc.*, BRB Nos. 99-1021/A (June 16, 2000). The Board subsequently issued an award of an attorney's fee for work performed before the Board.

Employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. The court held that substantial evidence supported the administrative law judge's finding that employer did not establish suitable alternate employment. Thus, the court affirmed the Board's decision and the Board's fee award. *Avondale Industries, Inc. v. Gauthreaux*, No. 00-60563 (5<sup>th</sup> Cir. April 4, 2001).

Meanwhile, in 1997, the administrative law judge issued an order awarding claimant's counsel an attorney's fee of \$25,000. After the award of benefits became final in July 2001, employer refused to pay the fee award and claimant's counsel initiated enforcement proceedings before the United States District Court for the Eastern District of Louisiana. In May 2002, employer paid the fee award. *See Millet v. Avondale Industries, Inc.*, No. Civ.A. 02-1155, 2003 WL 548879 (E.D. La. 2003) (court awards attorney's fee for enforcement proceedings).

In July 2001, claimant's counsel filed with the administrative law judge a motion to augment the administrative law judge's fee award due to "extreme delay" in payment of the awarded fee.<sup>1</sup> The administrative law judge's initial fee award in 1997 was based on the hourly rate of \$125. Counsel sought to augment the award to reflect an hourly rate of \$225. The administrative law judge did not take any action on this motion. Claimant renewed his motion in March and October 2003. The administrative law judge did not take any action on these motions, nor did he respond to claimant's February 2004 motion for a status conference. Then, in a "Supplemental Decision and Order Denying Supplemental Attorney Fees" dated February 2, 2005, the administrative law judge

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<sup>1</sup> Claimant also sought an augmented fee from the Board and the district director. The Board (BRB Nos. 97-978/A, 97-1105/A, Order of September 29, 2003) and the district director issued orders augmenting their prior fee awards.

denied the augmentation request, stating “This office no longer enjoys jurisdiction over the matter. Claimant’s counsel’s application for augmentation and supplement are DENIED *without prejudice* for lack of jurisdiction.” (italics added).

Claimant did not appeal this decision. Apparently believing that the administrative law judge’s statement concerning lack of jurisdiction was the result of the district director’s failure to refer the claim to the Office of Administrative Law Judges (OALJ), claimant contacted the district director. According to claimant’s brief, the district director advised claimant to file an LS-18 pre-hearing statement and ask that the case be referred to the OALJ. Claimant did so, and the case was referred to the administrative law judge with a new number. After receiving briefs from both parties, the administrative law judge issued a Decision and Order on July 12, 2005. He stated that his February 2005 Order had become final due to the lack of any appeal to the Board, and that it was inappropriate for claimant to initiate “new proceedings” before the district director in an effort obtain augmentation of the fee award. Thus, he denied the relief sought.

Claimant filed a timely appeal of the July decision. He has filed a Petition for Review and brief to which employer has responded. Employer also has filed a motion to dismiss the appeal on the ground that claimant failed to appeal the February decision denying augmentation, and that the Board therefore lacks jurisdiction over claimant’s contention that the administrative law judge erred in denying an augmented attorney’s fee.

We deny employer’s motion to dismiss claimant’s appeal. In his February 2005 decision, the administrative law judge denied claimant’s motion for fee augmentation “without prejudice” for lack of jurisdiction. The administrative law judge did not suggest what recourse claimant had at this point. Although claimant could have appealed the decision to the Board, we hold on the facts of this case that claimant acted reasonably in seeking the assistance of the district director in having the case formally referred to the administrative law judge so that he would have jurisdiction. The administrative law judge’s denial of claimant’s motion “without prejudice” suggested that some procedural/jurisdictional deficiency could be cured without an appeal. Thus, contrary to the administrative law judge’s statement in his July 2005 Decision and Order, his February 2005 decision was not final as to the issue of counsel’s entitlement to an enhanced fee.

Moreover, we agree with claimant that the administrative law judge erred in stating he lacked jurisdiction to address the enhancement request. The Board has held that a claimant may move for augmentation of a fee award by filing a supplemental fee petition. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). In *Bellmer*, the administrative law judge awarded a fee in 1993, but the appeals on the merits

continued until December 1997. Employer paid the fee awarded in March 1997, and in June 1997, claimant filed a motion for an enhanced fee due to delay in payment of the fee. The administrative law judge denied this motion, stating he did not have jurisdiction. The Board held that the administrative law judge had jurisdiction to address the request for an enhanced fee, stating,

we conclude that requests for fee enhancement should be treated as supplemental fee petitions and not as requests to re-open fee awards which have become final. In this way, the body awarding the fee can ensure that full effect is given to the case law allowing enhancement of a fee to account for the delay in payment.

*Bellmer*, 32 BRBS at 246, citing *Missouri v. Jenkins*, 491 U.S. 274 (1989). The Board held that a request for fee enhancement must be made, at the latest, within a reasonable amount of time after the fee award became enforceable. *Id.* The Board distinguished between the finality of the original fee award and the ability of claimant's counsel to seek an augmented fee due to delay, which may not be apparent until all appeals are exhausted and employer pays the awarded fee. Both the Ninth Circuit and the Fourth Circuit have found this approach to be reasonable. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9<sup>th</sup> Cir. 1999); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4<sup>th</sup> Cir. 1999).

In this case, claimant's attorney sought augmentation of the prior fee award as soon as the award became enforceable in July 2001 and before employer paid the awarded fee in May 2002. Thus, as claimant correctly contends, his motion for an enhanced fee was timely, *Bellmer*, 32 BRBS at 246, and the administrative law judge incorrectly stated that he lacked jurisdiction over the augmentation request. Therefore, we must vacate the administrative law judge's denial of claimant's motion for an enhanced attorney's fee and we remand the case for the administrative law judge to address the motion consistent with law. *See Johnson*, 183 F.3d 1169, 33 BRBS 112(CRT); *Kerns*, 176 F.3d 802, 21 BLR 2-631; *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996); *Bellmer*, 32 BRBS 245; *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Accordingly, employer's motion to dismiss claimant's appeal is denied. The administrative law judge's Decision and Order is vacated, and the case is remanded for the administrative law judge to address claimant's motion for an enhanced attorney's fee.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge