

WILLIE J. HUTCHINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order of N. Sandra Ramsey, District Director, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Order (6-116205) of District Director<sup>1</sup> N. Sandra Ramsey denying additional attorney's fees 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 only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

<sup>1</sup>Pursuant to 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant was exposed to repeated noise during his employment with employer from 1973 through 1988. On June 6, 1988, claimant filed a claim for a 4.9 percent binaural noise-induced hearing loss. On August 18, 1988, employer filed a Form LS-206, Payment of Compensation Without Award, stating that claimant would be paid the compensation sought based upon an average weekly wage of \$371.67, for a total of \$2,428.24, representing 9.8 (4.9 percent of 200) weeks at a compensation rate of \$247.78. Thereafter, according to an August 23, 1990, letter to claimant's counsel from the district director, claimant's counsel filed a fee petition on March 27, 1990, and employer filed its response on August 14, 1990. In this letter, the district director indicated that inasmuch as employer received formal notice of the claim on July 20, 1988, and accepted the claim and made payment beginning August 18, 1988, claimant, rather than the employer, was liable for the \$275 fee awarded, which represented 2.75 hours of services at an hourly rate of \$100. On October 18, 1990, claimant notified his counsel that he had not received any compensation payments from employer. Although claimant's counsel made repeated attempts to contact employer to determine why the promised compensation had never been paid, employer did not pay the compensation it initially tendered on August 18, 1988, until May 16, 1991. Moreover, it was not until December 11, 1991, that employer ultimately agreed to authorize payment for claimant's hearing aids.

Subsequently, claimant's counsel filed a fee petition with the district director for services rendered in securing the tendered but unpaid compensation and medical benefits. In this fee petition, claimant requested \$355.50 representing 3.5 hours of services at \$100 per hour. In a letter, dated December 16, 1991, the district director denied the fee request, indicating that no unresolved issues existed subsequent to the prior award. Claimant appeals the district director's denial of this fee. Employer has not responded to claimant's appeal.

On appeal, claimant contends that the district director erred in denying him a fee for work performed in securing payment of the tendered but unpaid compensation and medical benefits, arguing that employer is liable for these fees under Section 28(b) of the Act, 33 U.S.C. §928(b). Claimant asserts that the district director erred in treating employer's Form LS-206 as a valid tender of payment, given that employer failed to timely pay the compensation tendered initially, and that it took nearly six months after the matter was brought to employer's attention for employer to actually pay the tendered compensation and another year to authorize appropriate medical care. Claimant asks that the Board remand the case for further development of the record on the issue of claimant's entitlement to attorney's fees.

We agree with the claimant that employer is liable for a fee on the facts presented in this case. A tender of voluntary payments means a readiness, willingness, and ability on the part of the employer or carrier expressed in writing to make such payments to claimant. *See Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). In the present case, although employer tendered compensation on August 19, 1988, its failure to actually pay those benefits for over two years brought the sincerity of that offer into question and necessitated that claimant's counsel take additional measures to ascertain when, and if, the proffered compensation would be paid. Moreover, while employer tendered

\$2,428.24 in disability compensation on August 19, 1988 and paid those benefits in May 1991, as a result of claimant's counsel's efforts, employer ultimately agreed to accept liability for claimant's hearing aids on December 11, 1991. Employer's failure to timely pay the tendered compensation necessitated further action by claimant's counsel. Moreover, as claimant's counsel was ultimately successful in obtaining medical benefits for the claimant, counsel succeeded in establishing entitlement to benefits beyond those initially tendered by the employer. Employer is thus liable for reasonable and necessary services rendered in securing the tendered but untimely paid compensation and medical benefits pursuant to Section 28(a), (b) of the Act, 33 U.S.C. §928(a), (b). *See generally Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991)(decision on remand); *Kaczmarek*, 23 BRBS at 376.

Accordingly, the district director's November 6, 1991, Order denying claimant's request for additional fees is reversed, and the case is remanded for the district director to consider the compensability of the services claimed consistent with the requirements of 20 C.F.R. §702.132.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge