BRB No. 93-2433

JAMES J. VENABLES	)	
	)	
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 Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

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

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-443) of Administrative Law Judge Quentin P. McColgin 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, a retired supervisor, worked at employer's facility from 1968 until 1985 where he was exposed to loud workplace noise. A February 14, 1987, audiogram performed by K. D. McClelland, Ph.D., revealed a 10.6 percent binaural hearing impairment. On February 27, 1987, claimant filed a claim under the Act for occupational hearing loss benefits based on the results of the February 14, 1987, audiogram and provided employer with notice of his injury. Employer filed a Form LS-207, Notice of Controversion, on April 11, 1987. The case was referred by the district director to the Office of Administrative Law Judges on November 4, 1988. Employer filed another Notice of Controversion on November 20, 1987. A December 17, 1987, audiogram was interpreted by Gordon L. Stanfield, Ph.D., as showing a 3.44 percent binaural hearing impairment. On January

12, 1988, employer made a voluntary lump sum payment of $1,388.78 to claimant for a 3.44 percent binaural hearing loss calculated pursuant to 33 U.S.C. §908(c)(13)(B) based upon an average weekly wage of $302.66. A formal hearing was held on February 1, 1990, at which time the nature and extent of disability, the subsection under which claimant's hearing loss benefits should be calculated, and claimant's entitlement to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e), remained in dispute.

In his Decision and Order, the administrative law judge averaged the two audiograms and determined that claimant suffered from a 6.9 percent binaural hearing impairment. He then determined that as claimant was a retiree, and this case arose within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit, pursuant to *Ingalls Shipbuilding v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *rev'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), his benefits must be calculated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Accordingly, he converted claimant's 6.9 percent binaural hearing impairment to a 2 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), and determined that claimant is entitled to a continuing award of $4.04 per week based upon the stipulated compensation rate of $201.77. The administrative law judge also awarded claimant medical benefits pursuant to 33 U.S.C. §907, and denied claimant a Section 14(e) assessment, characterizing the amount of money involved as *de minimis*. On appeal, the Board modified the administrative law judge's Decision and Order to reflect employer's liability for a 10 percent assessment pursuant to Section 14(e) on all compensation due and unpaid from February 27, 1987 until April 11, 1987. *Venables v. Ingalls Shipbuilding, Inc.*, BRB No. 91-693 (July 22, 1992)(unpublished).

Subsequently, claimant's counsel sought an attorney's fee of $3,609.75, representing 28.5 hours of services at $125 per hour, and $47.25 in expenses 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 $2,025.00, representing 20.25 hours of services at an hourly rate of $100, plus expenses of $47.25. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant has not responded to employer's appeal.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fee. Employer argues that there has been no successful prosecution of the claim because the $1,388.78 it voluntarily paid to claimant on January 12, 1988, based on a 3.44 percent binaural hearing loss, is more than the compensation for a 2 percent whole person impairment ultimately awarded by the administrative law judge.

We need not address employer's arguments which relate to liability under Section 28(a) of the Act, 33 U.S.C. §928(a), as the case at bar is governed by Section 28(b). In the present case, although employer initially controverted the claim, subsequent to referral employer voluntarily paid claimant compensation for a 3.44 percent binaural hearing loss pursuant to Section 8(c)(13)(B) and

agreed to accept liability for payment of claimant's medical benefits. Moreover, as a result of counsel's efforts before the administrative law judge, and subsequently before the Board, claimant ultimately received a continuing award of benefits under Section 8(c)(23), an inchoate right to greater compensation than that voluntarily paid by employer,[1] medical benefits and an assessment under Section 14(e).[2] As claimant's counsel was ultimately successful in obtaining additional compensation for claimant while the case was before the administrative law judge, we affirm his determination that employer is liable for claimant's attorney's fee pursuant to Section 28(b) and reject employer's assertion that its fee liability terminated as of January 12, 1988. *See Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995).

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 considered the complexity of the case in determining the applicable hourly rate, we reject employer's contention that the awarded fee must be further reduced on this basis.

Employer's objections to the number of hours and hourly rate 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). Inasmuch, however, as the administrative law judge neglected to consider employer's assertion that the fee requested was unwarranted in light of the *de minimis* or nominal value of the claim, the case must be remanded to allow him to reconsider the fee award in light of this objection. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). While claimant's counsel was fully successful before the administrative law judge in establishing claimant's right to disability compensation for a 2 percent whole person impairment, as well as past and future medical benefits, *see Hensley v. Eckerhart*, 461 U.S. 424 (1983), and the amount of a fee is not limited to the

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[1]No party has challenged the award of compensation benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23)(1988). *Cf. Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993)(all hearing loss is properly compensated pursuant to 33 U.S.C. §908(c)(13)). Claimant's compensation award is approximately $210 per year, commencing in February 1987.

[2]The fact that the 10 percent assessment awarded under 33 U.S.C. §914(e) may be subsumed by virtue of employer's overpayment is not determinative as employer's credit may one day run out and employer will once again be required to make weekly payments of compensation. *See Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 64-65 (1991)(decision on remand).

amount of additional compensation gained, *see Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993), the amount of benefits obtained is a relevant factor for the administrative law judge to consider in determining the amount of an attorney's fee award under the regulatory criteria of 20 C.F.R. §702.132. *See Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting) (Decision on Recon.), *appeal dismissed*, No. 94-40920 (5th Cir. Sept. 20, 1995). We therefore vacate the Supplemental Decision and Order Awarding Attorney Fees, and remand the case for the administrative law judge to reconsider the fee in light of the amount of benefits obtained.

Our colleague's opinion in this case is somewhat puzzling, in view of the fact that this decision remands the case for consideration of a reasonable fee in light of the amount of benefits awarded pursuant to *Hensley*, which is the result she purports to advocate. In doing so, we have noted that the Board has consistently rejected a construction of Section 28(b) which limits the fee awarded to an amount less than the benefits awarded. The language at issue provides for an employer to pay "reasonable attorney's fees based solely upon the difference between the amount awarded and the amount tendered or paid." 33 U.S.C. §928(b). Since Section 28(b) defines circumstances under which employer may be held liable for claimant's attorney's fee, it simply provides that an employer's liability under Section 28(b) must be based solely on the increased benefits obtained by counsel. The reasonableness of the fee is then determined by the awarding body.

We note that our colleague does not cite any relevant cases[3] discussing this aspect of Section

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[3]Although the dissent cites *Todd Shipyards Corp. v. Director, OWCP*, 950 F.2d 607, 25 BRBS 65 (CRT)(9th Cir. 1991), as directly on point, this case does not address the language in Section 28(b) at issue in this case and concerns fee liability rather than the amount of the fee; our colleague agrees employer is liable for a fee here. Insofar as her assertion that the cited case is on point, the language referenced speaks for itself. As we have explained, we agree with the proposition that fee liability under Section 28(b) is based solely upon counsel's obtaining increased benefits for claimant.

The issue before the court in *Todd Shipyards* was whether under Section 28(b) an employer is liable for claimant's attorney's fee for legal services performed before the district director prior to the issuance of the written recommendation following an informal conference, where employer accepted the recommendation and stipulated to claimant's entitlement to permanent total disability benefits, future medical benefits, and cost-of-living adjustments; the only issue left unresolved after the informal conference was employer's liability for a fee for these services. The court relied on language in Section 28(b) providing for employer's liability only where a dispute remains after the informal conference and claimant obtains additional benefits thereafter. Inasmuch as there was no controversy concerning the amount of compensation to be paid after the informal conference, the court held that employer was not liable for the attorney's fee under Section 28(b) and reversed the Board's decision to the contrary. *Id.*, 950 F.2d at 611, 25 BRBS at 70 (CRT). In contrast, in the present case, the amount of the compensation owed was clearly in controversy beyond the informal proceedings. Claimant proceeded to a hearing before the administrative law judge, where he

28(b) with the exception of *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992).[4] Since we remand this case for consideration consistent with *Hensley*, *Brooks* supports our decision herein. As was previously noted in the majority opinion in *Hoda*, moreover, in determining the meaning of the word "solely" in Section 28(b), the *Brooks* court did not state that the amount of the fee cannot exceed the difference between the amount voluntarily paid and the amount ultimately awarded. Rather, the court stated that the use of the word "solely" suggests that once an issue is successfully pursued, "recovery is limited `solely' to *work done* to increase compensation on that particular issue." *Id.*, 963 F.2d at 1537, 25 BRBS at 166 (CRT) (emphasis added). The same must be said with regard to the legislative history cited by our dissenting colleague, H.R. Rep. No. 1441, 92d Cong, 2d Sess. 9, 20, *reprinted in* 1972 U.S.C.C.A.N. 4706.

Moreover, once liability is established, a reasonable fee is to be assessed by the factfinder for the necessary work performed in obtaining the increased compensation. While our colleague cites *Hensley*, 461 U.S. at 434, for the proposition that the result obtained is the "crucial" factor, not just another consideration in determining the amount of the fee to be awarded, she concludes that it is the sole factor. In *Hensley*, however, after noting that the product of reasonable hours times a reasonable rate does not end the inquiry in determining the reasonableness of a requested fee, the Court states:

> There remain other considerations that may lead the district court to adjust the fee upward or downward, *including the important factor of the "results obtained."*

461 U.S. at 434 (emphasis added). At this point in a footnote, the Court cites *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974), which lists 11 factors in addition to the amount involved and the results obtained, and states that the district court may consider "other factors" though it should note that many of these factors are usually subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. *Id.* at 434 n.9. Although the Court does state later in its opinion that the "most critical" factor is the degree of success obtained, *id.* at 436, the Court does not define the degree of success in monetary terms, but rather, in terms of how successful the plaintiff was in achieving the asserted claims. *See Hoda*, 28 BRBS at 199. Moreover, the Court's use of the term "most," a word of comparison, in this context necessarily implies that other factors are also relevant. Our determination that the amount of benefits is a relevant factor, but is not solely determinative, is thus not only consistent with, but is mandated by, *Hensley*.[5]

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obtained additional compensation, medical benefits and a Section 14(e) penalty. Employer is thus liable for a reasonable fee in the present case.

[4]*Quave v. Progress Marine*, 918 F.2d 33, 24 BRBS 43 (CRT) *on rehearing*, 921 F.2d 213, 24 BRBS 55 (CRT)(5th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991), cited by our dissenting colleague, also addresses only fee liability and not the amount of the fee.

[5]That the *Hensley* analysis is multifactorial was recently recognized by the United States Court of

Our colleague also relies on *Farrar v. Hobby*, 113 S.Ct. 566, 575 (1992), wherein the Court stated that a court, having considered the amount and nature of damages awarded, may lawfully award a low fee or no fee without reciting the 12 factors bearing on reasonableness set forth in *Hensley*, 461 U.S. at 430, n.3, or multiplying "the number of hours reasonably expended ... by a reasonable hourly rate," *id.*, at 433. This statement recognizes that in certain extreme circumstances such as those presented in that case, where claimant sought $17 million but received only one dollar in damages, the nominal degree of claimant's success was sufficient to resolve the fee issue without further inquiry. That this interpretation is correct is reinforced by the portion of Justice O'Connor's concurring opinion immediately prior to that portion cited by our dissenting colleague:

> the Court properly holds that when a plaintiff's victory is purely technical or *de minimis*, a district court need not go through the usual complexities in calculating attorney's fees.

113 S.Ct. at 576. That this is the exception, rather than the general rule, is made apparent later in Justice O'Connor's concurrence when, in referring to *Hensley*, she states:

> We have explained that even the prevailing plaintiff may be denied fees if "'special circumstances would render [the] award unjust.'" (citation omitted). While that exception to fee awards has often been articulated separately from the reasonableness inquiry, sometimes it is bound up with reasonableness: It serves as a short-hand way of saying that, even before calculating a lodestar or wading through all the reasonableness factors, it is clear that the reasonable fee is no fee at all.

113 S.Ct. at 576-577. In discussing claimant's lack of monetary success in *Farrar*, the court specifically stated that, in a suit for damages, a nominal award highlights plaintiff's failure to prove actual compensable injury, an essential element of a claim for monetary relief.[6] In the present case, however, claimant prevailed on each aspect of his claim. Thus, contrary to the assertions of our dissenting colleague, *Farrar* does not apply here, nor does it support the contention that the majority's position reflects a misunderstanding of *Hensley*. In the present case, counsel prevailed in successfully pursuing the claims asserted but even with full success, the amount of benefits awarded

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Appeals for the First Circuit in *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir. 1996).

[6]The fee awarded by the United States Court of Appeals for the Eighth Circuit in *Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 334, 20 BRBS 79 (CRT)(8th Cir. 1988), is similar to *Farrar*, in that claimant pursued claims for various scheduled and unscheduled disabilities. He was successful on only one claim, receiving $250. The court noted that the Board had not addressed counsel's fee application and directed a fee of $200 in view of counsel's limited success. The opinion does not indicate what fees, if any, counsel was awarded by the administrative law judge or district director.

must be addressed.[7] This case is thus one where the second step of the *Hensley* analysis applies, requiring the administrative law judge to award a reasonable fee for work performed based on the amount of benefits obtained and other factors.

Finally, while we agree with our colleague that the Secretary's power to implement the Act does not include the power to modify the clear mandate of a statute, where, as here, a regulation may be construed together with the statute so as to uphold the validity of the regulation while at the same time preserving the legislative intent and purpose behind the statute, it is incumbent upon the court that the regulation be upheld. *See generally Batterton v. Francis,* 432 U.S. 416 (1977); *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71, 75 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991). In any event, we believe that the regulation, as well as our discussion of Section 28(b) in this case, comports with the language of the statute.

Accordingly, the Supplemental Decision and Order of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's judgment that claimant is entitled to an attorney's fee because the whole man award pursuant to 33 U.S.C. §908(c)(23), which, although very small ($4.04 per week), continues into the future, is ultimately greater than employer's voluntary payment of $1,388.78 for a

[7] In a continuing award case, there is no definite amount of benefits, as claimant received a continuing award for a 6.9 percent binaural impairment converted to a 2 percent impairment of the whole person. At a rate of $4.04 per week since February 1987, claimant would have received almost $2,000 to date in compensation alone, plus medical benefits. Employer voluntarily paid $1,388.78 for a 3.44 percent binaural loss.

binaural hearing loss, pursuant to Section 8(c)(13).[8] Counsel also won for claimant imposition of the penalty pursuant to Section 14(e), as well as medical benefits. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 166, 27 BRBS 14, 16 (CRT) (5th Cir. 1993) (holding that a claimant who litigated to obtain medical benefits is entitled to a "fee award tailored to his limited success. . . .").

I disagree, however, with the majority's statement of the law applicable to an attorney's fee award pursuant to 33 U.S.C. §928(b). The majority construes the pertinent statutory language of Section 28(b), providing that claimant is entitled to "a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered...," to mean that only employer's liability for an attorney's fee is to be based solely upon the difference between the amount awarded and the amount tendered. In the majority's view, once liability is established, the "reasonableness of the fee is then determined by the awarding body" (maj. op. at 4), which should consider the increase in compensation as well as other relevant factors, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The majority's interpretation of Section 28(b) does not give meaning to the words of the statute. Congress did not state that liability for an attorney's fee [would be] "based solely upon the difference between the amount awarded and the amount tendered...." Rather, Congress specifically provided that a "reasonable attorney's fee [is to be] based solely upon the difference between the amount awarded and the amount tendered...." It is clear that Congress was providing for the amount to be awarded as an attorney's fee, not only because Congress used the term "attorney's fee" instead of liability, but also because Congress modified the term "attorney's fee" with the word "reasonable," meaning the appropriate sum to be awarded for the attorney's work in the case. Congress directed that the "reasonable attorney's fee [is to be] based solely on the difference between the amount awarded and the amount tendered...," that is, that the amount of the fee is to be based solely upon the additional amount of compensation gained through litigation. The majority's substitution of "liability" for "reasonable attorney's fee" in the statute makes no sense. If Congress were concerned only with liability in Section 28(b) it would have provided that "liability [be]" based solely upon an "increase in the amount awarded over the amount tendered or paid." It does not make sense to interpret Section 28(b) as providing that liability would be "based solely on the difference between the amount awarded and the amount tendered...," because that difference refers to a specific sum of money.

After disregarding the specific words of the statute, the majority rests its decision in the instant case on the statute's implementing regulation, holding that the case must be remanded because in issuing the attorney's fee award the administrative law judge failed to consider the "amount of benefits obtained which is a relevant factor under the regulatory criteria of 20 C.F.R. §702.132." The majority's statement effectively deletes the statutory directive in Section 28(b) that the attorney's fee award be based "solely upon the difference between the amount awarded and the

[8]Employer recognizes that the award should have been made pursuant to Section 8(c)(13)(B) in view of the Supreme Court's decision in *Bath Iron Works v. Director, OWCP*, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), but the administrative law judge's award is now final. Brief for Emp. at 12 n.1.

amount . . . paid . . . ." Not only are the words of the statute clear, but they perfectly reflect the legislative intent, expressed in a report by the House Committee on Education and Labor: "The 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, 20, *reprinted in* 1972 U.S.C.C.A.N. 4706.

By reference to the statute's implementing regulation for attorney's fee awards, the majority's interpretation modifies significantly the forceful and clear words of the statute. This is contrary to well-established law. It is axiomatic that the Secretary's power to promulgate rules and regulations to implement the Act does not include the power to modify the clear mandate of a statute. *Insurance Co. of North America v. Gee*, 702 F.2d 411, 414, 15 BRBS 107, 112 (CRT)(2d Cir. 1983). *Accord, Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240, 245, 10 BLR 2-322, 2-326 (11th Cir. 1987).

The Ninth Circuit gave meaning to the words of Section 28(b) in *Todd Shipyards Corp. v. Director, OWCP,* 950 F.2d 607, 25 BRBS 65 (CRT) (9th Cir. 1991), in which the court reversed the Board's decision and held that Section 28(b) did not authorize the award of an attorney's fee when employer had agreed to pay permanent total disability benefits at the informal conference and the subsequent litigation was limited to the attorney's fee issue. The court declared that in enacting Section 28(b), Congress determined that employers would not be responsible for attorney's fees unless "the employee obtains additional benefits at a formal hearing . . . ." *Id.*, 950 F.2d at 611, 25 BRBS at 70 (CRT). Since the litigation did not increase the compensation, claimant was entitled to no fee under Section 28(b). Unlike the cases cited in the majority opinion, *Todd Shipyards* is a case directly on point, from a superior authority, and the court's decision rests on the specific words of Section 28(b).

The majority seeks to evade the force of this decision by falsely asserting that the court did not discuss the language at issue here and by indicating that *Todd Shipyards* supports the majority's construction of Section 28(b). The court not only quoted in the text the language at issue here, the court went on to say that "while we believe that the intent of Congress is clear from a plain reading of the words used in Section 928(b), the legislative history explains unequivocally the very limited scope of attorneys' fees awards under the statute."[9] 950 F.2d at 610, 25 BRBS at 69 (CRT). In light

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[9]The court quoted from the legislative history as follows:

> A new provision is added dealing with cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, *despite the written recommendation of the deputy commissioner*. The provision directs an award of a reasonable attorney's fee . . . *where the employer or carrier has refused to accept the recommendation* . . .
> . . . .
>
> In all cases other than those specified above, attorneys' fees may not be assessed against the employer. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3,

of the express language of Section 28(b), authorizing an attorney's fee award based solely upon the amount gained through litigation, the court held that claimant was not entitled to an attorney fee award:

> In enacting Section 928(b), Congress has determined, however, that if an employer pays the benefits claimed by the employee, the employer will not be responsible for the payment of attorneys' fees, unless the employer rejects the written recommendation of the claims examiner following the informal hearing and the employee obtains additional benefits at a formal hearing before the Department of Labor. (citation omitted)

950 F.2d at 611, 25 BRBS at 70 (CRT).

The majority's contention that *Todd Shipyards* supports the majority's interpretation of Section 28(b) is belied by the court's decision. In that case, the Ninth Circuit vacated the Board's decision awarding attorney's fees because the Board had misconstrued Section 28(b). The court explained:

> The purpose of Section 28(b) is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted....

950 F.2d at 611, 25 BRBS at 70 (CRT), quoting *National Steel and Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 882, 11 BRBS 68, 73 (9th Cir. 1979). Thus, it is clear that Section 28(b) pertains to "extent of liability" as well as to the existence of liability. Section 28(b) is written in such a way that the determination of the existence of liability is incorporated into a determination of the extent of liability. Because the claimant in *Todd Shipyards* earned through litigation zero additional compensation over the amount tendered, under Section 28(b), his reasonable attorney fee for this work was zero.

The United States Court of Appeals for the District of Columbia Circuit construed the disputed language of Section 28(b) in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1537, 25 BRBS 161, 167 (CRT)(D.C. Cir. 1992), holding that the words of the statute supported application of the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to attorney's fee awards under the Longshore Act. In *Hensley*, the High Court defined the conditions under which prevailing parties could recover attorney's fees under federal fee-shifting statutes. It provided a two-step inquiry:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours

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reprinted in 1972 U.SC.C.A.N. 4698, 4717 (emphasis added).

Id., 950 F.2d at 610, 25 BRBS at 69 (CRT).

reasonably expended a satisfactory basis for making a fee award?

Sierra Club v. EPA, 769 F.2d 796, 801 (D.C. Cir. 1985), discussing *Hensley*, 461 U.S. at 434. The Supreme Court made plain that the result obtained was the crucial factor, not just another consideration, as the majority asserts, 461 U.S. at 434.[10] The majority attempts to undermine the significance of this statement with two arguments. First, the majority points out that the *Hensley* Court stated in a footnote that courts may consider the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), although the Court cautioned: "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." (citation omitted) *Hensley*, 461 U.S. at 435 n.9. Second, the majority asserts that "the Court does not define the degree of success in monetary terms, but rather in terms of how successful the plaintiff was in achieving the asserted claims." (Maj. op. at 6).

A glance at the Supreme Court's decision in *Farrar v. Hobby*, 113 S.Ct. 566 (1992) reveals that the majority's contentions reflect a complete misunderstanding of *Hensley*. In *Farrar*, the Court applied the teaching of *Hensley* and held that a civil rights plaintiff who established the violation of his right to due process and who recovered nominal damages of one dollar, was a prevailing party but entitled to no attorney's fee. The Court made clear that where the object of plaintiff's litigation is recovery of monetary damages and he is awarded one dollar, his "degree of success" warrants no fee at all. The court went on to explain:

> Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, *see Hensley*, 461 U.S. at 430, n. 3, 103 S.Ct at 1937-1938, n.3, or multiplying the number of hours reasonably expended ... by a reasonable hourly rate. *Id.* at 433, 103 S.Ct. at 1939.

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[10]The majority raises a red herring when it declares that the "*Brooks* court did not state that the amount of the fee cannot exceed the difference between the amount voluntarily paid and the amount ultimately awarded." (Maj. op. at 5). That was not an issue in *Brooks*, because the compensation awarded through litigation was substantial, in contrast to the compensation in the case at bar. The *Brooks* court applied the rationale of *Hensley* to hold that claimant was entitled to a fee only for work related to the issue on which he was successful, even though the court recognized that the attorney's work on that issue was either nonexistent or negligible. The court held that the attorney's fee, if any, must reflect the work. The court concluded by chastising the Board for failing to conduct a second-step *Hensley* review and remanded the case to the Board to undertake that analysis and to provide an "explanation of its reasons for any award." *Brooks*, 963 F.2d at 1540, 25 BRBS at 172 (CRT).

Farrar, 113 S.Ct. at 575. Justice O'Connor reenforced this point in her concurring opinion:

> As a matter of common sense and sound judicial administration, it would be wasteful indeed to require that courts laboriously and mechanically go through those steps when the *de minimis* nature of the victory makes the proper fee immediately obvious. Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to "award low fees or no fees" at all. (citation omitted)

113 S.Ct. at 576. *See Lewis v. Kendrick*, 944 F.2d 949, 954-956 (1st Cir. 1991)(court denied all attorney's fees, reversing the district court's award of a $50,000 fee to the attorney for a civil rights plaintiff who had brought suit for $300,000 and was awarded $1,000).

It is thus clear, that in actions for damages or for compensation, success is measured in terms of the sum of money awarded on claims advanced by the attorney. In *Arrar v. St. Louis Shipbuilding Co.*, 837 F.2d 334, 20 BRBS 79 (CRT) (8th Cir. 1988), the Eighth Circuit reflected this understanding of a successful claimant in issuing an attorney's fee award under Section 28(a). Claimant had sought benefits for several injuries, both scheduled and unscheduled, but was awarded only $250 in compensation by the administrative law judge, whose decision was affirmed by the Board and the Eighth Circuit. The court directed the Board, in view of claimant's limited success before both the Board and the court, to award an attorney's fee in the amount of $200. *See also Quave v. Progress Marine*, 918 F.2d 33, 24 BRBS 43 (CRT) (1990), *on rehearing*, 921 F.2d 273, 24 BRBS 55 (CRT)(5th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991).

In sum, the sole purpose of this dissent is to elucidate the significance of Section 28(b)'s directive for calculating a reasonable attorney's fee and thereby provide the administrative law judge with the guidance necessary to discharge his responsibility when the case is remanded. Accordingly, the administrative law judge should determine precisely the amount of money by which this litigation has increased claimant's award of compensation, to establish the benchmark for the attorney's fee award authorized by Section 28(b). *Todd Shipyards*, 950 F.2d at 607, 25 BRBS at 65 (CRT). He should then determine whether this sum is *de minimis*, as employer maintains, justifying a low fee or no fee at all under *Farrar*. If he concludes that it is not *de minimis*, he must apply the second step of the *Hensley* analysis, analyzing whether the time expended and the rate charged were reasonable, and, if so, whether the hours multiplied by the rate establish a reasonable attorney's fee in light of the additional compensation obtained through litigation.

REGINA C. McGRANERY
Administrative Appeals Judge