

BRB No. 96-0234

MAE E. UNDERWOOD)
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 Claimant-Respondent)
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 v.)
)
 BETHLEHEM STEEL CORPORATION) DATE ISSUED:
)
 Self-Insured)
 Employer-Petitioner) DECISION AND ORDER

Appeal of the Order Awarding Attorney Fee of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Bernard G. Link, Lutherville, Maryland, for claimant.

Richard W. Scheiner and Heather H. Kraus (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order Awarding Attorney Fee (94-LHC-2042) of Administrative Law Judge Charles P. Rippey 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 and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a retiree, sustained a work-related hearing loss and filed a claim for compensation under the Act. On August 12, 1993, the date of the informal conference, employer offered, and claimant rejected, a lump sum payment in the amount of \$3,250 in full settlement of the claim. On December 30, 1993, employer offered to stipulate to a binaural impairment of 2.2 percent and an average weekly wage of \$341.08, which would consequently result in claimant's receiving \$1,000.51 in compensation. In his Decision and Order, the administrative law judge, after determining that claimant has a 9.69 percent binaural hearing impairment, awarded claimant \$2,029.60 in permanent partial disability compensation, representing 19.38 weeks of benefits at a compensation rate of \$104.73. *See* 33 U.S.C. §908(c)(13)(1988).

Thereafter, claimant's counsel filed a petition requesting an attorney's fee of \$4,100, representing 32.8 hours of services rendered at a rate of \$125 per hour, and \$146 in expenses. Employer filed objections to the requested fee. The administrative law judge initially found that employer's offer to stipulate in December 1993 to both the percentage of claimant's hearing loss as well as claimant's average weekly wage constituted a tender of compensation and that, thus, this case is governed by Section 28(b) of the Act, 33 U.S.C. §928(b). After next finding that claimant succeeded in obtaining \$1,069.33 in additional compensation,¹ as well the value of future medical benefits, while this claim was pending before the Office of Administrative Law Judges, the administrative law judge considered employer's specific objections, reduced the number of hours requested by 8.5, deducted a further \$200 from the fee as a result of employer's tender offer, and awarded counsel a fee of \$2,983.50.

On appeal, employer challenges the fee awarded by the administrative law judge. Claimant responds, urging affirmance.

Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. *See* 33 U.S.C. §928(b). In the instant case, it is uncontroverted that claimant obtained additional benefits while this case was pending before the administrative law judge; we therefore affirm the administrative law judge's determination that employer is liable for an attorney's fee pursuant to Section 28(b). *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). In challenging the fee awarded by the administrative law judge, employer asserts that the administrative law judge erred in awarding a fee based not only upon the difference between the amount of benefits awarded and the amount of benefits tendered, but also upon the incalculable value of future medical benefits due claimant. We disagree. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 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). Contrary to employer's contention, claimant's success in establishing entitlement to future medical benefits was properly taken into consideration by an administrative law judge when awarding an attorney's fee. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Thus, we hold that the administrative law judge in the instant case committed no error when he considered the necessity of the services performed by counsel, the amount of both disability and medical benefits awarded, and the specific objections raised by employer in reducing the number of hours requested by counsel by approximately 26 percent. Employer has not

¹The difference between the amount tendered by employer in December 1993, \$1,000.51, and the amount awarded by the administrative law judge, \$2,029.60, is actually \$1,029.09.

demonstrated that the administrative law judge abused his discretion in considering these multiple factors when substantially reducing the fee sought by counsel. *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). We therefore affirm the fee awarded by the administrative law judge.

Accordingly, the administrative law judge's Order Awarding Attorney Fee is affirmed.
SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge