BRB No. 89-3716

STANLEY H. ROGERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order-Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Paul M. Franke (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judge.

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order-Awarding Attorney's Fees (88-LHC-2180) 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 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 has worked for employer for twelve years, during which time he has been exposed to workplace noise. Claimant underwent an audiometric examination on March 28, 1987 which revealed a 3.8 percent hearing loss in his right ear and a zero percent loss in his left ear for a .6 percent binaural impairment. *See* Cl. Ex. 2; Emp. Ex. 6. Based on this evaluation, claimant filed a notice of injury with employer on April 8, 1987, *see* Cl. Ex. 3, and a claim for noise-induced hearing loss with the Department of Labor on the same day. *See* Cl. Ex. 4. Employer filed its first notice of controversion on April 20, 1987 and a subsequent notice of controversion on July 22, 1987. *See* Emp. Exs. 2-3.

In his Decision and Order, the administrative law judge found that claimant's hearing loss is work-related, and he awarded claimant compensation pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B)(1988), for a .6 percent binaural impairment, plus interest. The administrative

law judge also awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907. Finally, the administrative law judge found that claimant's counsel is entitled to an attorney's fee for services rendered.

Claimant's counsel subsequently filed a fee petition for work performed at the administrative law judge level, requesting a fee for 16 hours of services at $125 per hour, plus $24 for expenses for a total fee of $2,024. Employer thereafter submitted objections to counsel's fee request. In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge, addressing employer's objections to the fee requested, reduced the hourly rate sought by claimant's counsel to $100 and attendance at the formal hearing by two hours, and disallowed the expenses sought; the administrative law judge thus awarded claimant's counsel a fee of $1,400, representing 14 hours of legal services performed at $100 per hour.

On appeal, employer challenges its liability for an attorney's fee and the amount of the attorney's fee awarded by the administrative law judge to claimant's counsel. Claimant responds, urging affirmance of the administrative law judge's fee award.

Specifically, on appeal employer contends that it should not be held liable for claimant's attorney's fee, since there was no "successful prosecution" of the claim by counsel. Alternatively, employer argues that the fee awarded by the administrative law judge should be reduced in light of the amount of benefits awarded. Under Section 28(a) of the Act, if an employer declines to pay any compensation within thirty days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a).

In the instant case, employer on two occasions controverted claimant's claim for compensation; specifically, employer challenged both the issues of causation and the degree of hearing loss sustained by claimant. *See* Emp. Exs. 2-3. At the formal hearing before the administrative law judge, the parties noted that the contested issues included causation, entitlement to medical benefits and nature and extent of disability. H. Tr. at 6-7. Following the formal hearing, the administrative law judge awarded claimant permanent partial disability compensation, medical benefits, and interest. Based upon these undisputed facts, employer is liable for claimant's attorney's fee since counsel successfully prosecuted this claim. *See* 33 U.S.C. §928(a).

Employer also contends that the amount of the fee awarded by the administrative law judge is excessive. The administrative law judge found that while the amount awarded is a factor to be considered, it is not the sole criteria to be used. He stated that:

> Here the Employer not only took issue with the extent of disability, but the cause of the injury as well. Also, the Employer did not accept medical benefits. Given the risk of loss involved for an attorney to take this claim as well as the fact that it had to be litigated as if no offer of settlement had ever been made and in doing so Claimant was successful both as to an increase of compensation as well as the award of medical benefits, I think it would be grossly unfair to use only the difference between the compensation the Employer states that it offered and that awarded. To use such a measuring device would have a chilling affect (sic) on the ability of the Claimant to employ effective counsel in relatively small but still significant claims.

Supplemental Decision and Order at 2. Thus, the administrative law judge concluded that the fee award is in this case not limited to the difference between the amount tendered and the amount awarded.[1] *Id.* at 2.

The Board has recently considered the impact of the United States Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), on awards of attorney's fees under the Act when there is an issue of partial or limited success. *See Bullock v. Ingalls Shipbuilding, Inc.*, BRBS , BRB Nos. 90-194/A (July 16, 1993)(*en banc)*(Brown and McGranery, JJ., concurring and dissenting). In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, it created a two-prong test focusing on the following questions:

> 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 reasonably expended a satisfactory basis for making a fee award?

461 U.S. at 434. *See also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a

[1]Despite the reference to a settlement offer, we note that the administrative law judge did not make a finding that there was an actual tender of compensation in this case, nor does employer contend that it offered to pay benefits.

reasonable hourly rate, may result in an excessive award; the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. In *Bullock*, the Board noted that the court's decision in *Hensley* did not define the "success" of an action in terms of the monetary amount awarded, but, rather, in terms of how successful the plaintiff was in achieving the claims asserted. In cases arising under the Longshore Act, the Board noted, claimant's success must be measured against the amount of benefits voluntarily paid by employer. *Bullock*, slip op. at 7; *see also Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

In the present case, employer paid no benefits voluntarily. Thus, whether the award was entered on a monaural basis under Section 8(c)(13)(A), as claimant contended, or a binaural basis under Section 8(c)(13)(B), as the administrative law judge found, in this case either award resulted from claimant's completely successful prosecution of his case. Further, in the instant case, as in *Bullock*, a common core of facts exists; regardless of which section is utilized for the award, it involves the same type of disability benefits resting on an analysis of the same evidence. Moreover, as the administrative law judge found, claimant's success goes beyond obtaining an award under Section 8(c)(13). Specifically, claimant filed a claim under the Act seeking permanent partial disability benefits for a work-related loss of hearing and medical benefits under Section 7. In contesting the claim, employer challenged the issue of causation, an issue which claimant must successfully prosecute in order to obtain any type of compensation or medical benefits.[2] Thereafter, the administrative law judge found claimant's hearing loss is work-related, and awarded claimant permanent partial disability benefits, medical benefits and interest, all of which employer resisted.

Although claimant's award of compensation was made pursuant to a different subsection of Section 8(c)(13) of the Act than that urged by claimant, he ultimately prevailed on multiple issues on a claim which was controverted by employer on two occasions. Therefore, we decline to hold that the administrative law judge abused his discretion in not further reducing the amount of the fee awarded to claimant's counsel simply because claimant did not receive benefits under Section 8(c)(13)(A). As this case does not involve unsuccessful, unrelated claims, it falls under the second prong of the *Hensley* test, which requires consideration of the overall relief obtained in relation to the hours reasonably expended.

[2]Contrary to the statement of our dissenting colleague regarding the need for medical benefits, *see* note 2, *infra*, Dr. McClelland stated claimant should have annual evaluations to monitor his hearing. Emp. Ex. 6.

In a case under the Act, the second prong of the *Hensley* test requires the administrative law judge to award a reasonable fee after consideration of employer's objections and the regulatory criteria, 20 C.F.R. §702.132. *Bullock*, slip op. at 7. While the amount of benefits awarded is a factor to be considered under Section 702.132, the Board has held that an administrative law judge need not limit an attorney's fee to the amount of compensation gained, since to do so would drive competent counsel from the field. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1992); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). In this case, employer could have avoided or limited its liability by voluntarily paying or tendering to claimant benefits on a binaural basis. The administrative law judge made a specific finding that, based on these undisputed facts, it would be "grossly unfair" to limit claimant's counsel's fee based on the amount of benefits awarded, and then properly awarded a fee after consideration of employer's objections based on the number of hours he found reasonably expended and a reasonable hourly rate. In conducting his review, the administrative law judge reduced both the rate and number of hours requested. As the administrative law judge considered the issue of the amount of benefits awarded in relation to the fee requested, we reject employer's request that the attorney's fee award be reversed or reduced, as no abuse of discretion has been shown. *Bullock*, slip op. at 9.

Our dissenting colleague suggests, however, that *Hensley* mandates a lower attorney's fee because claimant's monetary recovery is small. We do not believe that this result is compelled by *Hensley* and its progeny. Initially, it is important to note that the merits in *Hensley* did not concern monetary damages at all, but the constitutionality of treatment and conditions at a state hospital. We acknowledge that subsequent Supreme Court cases relying on a *Hensley* analysis have involved claims for monetary damages. *See, e.g., Farrar v. Hobbs* __ U.S. __, 113 S.Ct. 566 (1992). In *Farrar*, the court reversed a fee award in a civil rights suit for damages where the plaintiff prevailed on his legal theory, but received one dollar in damages in a suit seeking $17 million. The Court stated that although the plaintiff was a prevailing party, in a civil rights suit for damages, a nominal award highlights the plaintiff's failure to prove he sustained an actual compensable injury, an essential element of a claim for monetary relief. In holding that the district court erred in awarding a fee of $280,000, the court emphasized that the plaintiff "accomplished little beyond ... moral satisfaction. *Id*. at 574. Thus, in applying the second step of *Hensley*, the Court held that the plaintiff was not entitled to an attorney's because the degree of success was nil. *Id.* As we have emphasized, however, claimant in the instant case prevailed on every issue presented to the administrative law judge, with the exception of which subsection under which he would be compensated. Thus, the degree of success is total. *Cf. Ahmed*, 27 BRBS at 27. The statutory scheme, and particularly the schedule at Section 8(c)(1)-(20), clearly contemplates that some awards will be "small" as it provides for compensation for the proportional loss or loss of use of a member, based on a medical evaluation. It is unconscionable to suggest that attorneys who represent claimants with claims that are known to be small from the outset should be penalized for successfully prosecuting a controverted claim. *See Bullock*, slip op. at 9.

We further note that nothing in the plurality opinion of *Hensley* requires the award of a reduced attorney's fee. In remanding the case to the district court, the Court noted that the awarded

fee may indeed have been consistent with its holding.[3] It merely required consideration of the relevant criteria by the fact-finder. In this case the administrative law judge did consider the relevant criteria. Our colleague would, in effect, order the administrative law judge to further reduce the fee award because of the small recovery, despite claimant's degree of success on contested issues. It is not the function of the Board, however, to review the fee petition *de novo*, or to order the administrative law judge to take action which is within his discretionary authority. In reviewing a fee award, it is the function of the Board to ensure that the administrative law judge undertakes the proper analysis in arriving at a fee. *Bullock*, slip op. at 10.

In this regard, the administrative law judge did not cite *Hensley*, which, in the view of our dissenting colleague, renders his decision "not in accordance with law." As indicated by the excerpt from the administrative law judge's order quoted on page 3, however, it could not be more evident that the administrative law judge considered the small recovery as a factor in the litigation as a whole when he made his fee award. The administrative law judge specifically stated that employer controverted all aspects of the claim, and he aptly noted that claimants with "small" monetary claims are entitled to effective counsel. *See Bullock*, slip op. at 8. It is important to note that a certain amount of work must be performed by counsel in every case regardless of the amount of the potential recovery involved; if employer controverts the claim and claimant prevails, the Act states that employer is liable for claimant's attorney's fee. 33 U.S.C. §928(a), (b). It is the administrative law judge's duty to determine if the amount of time spent in pursuit of the claim is reasonable in light of the factors enumerated in 20 C.F.R. §702.132 and the case law. The administrative law judge undertook that analysis here - he reduced the hourly rate from $125 to $100, and he reduced the hours requested from 16 to 14. Our colleague points to no hours that should be further reduced, but merely seeks to have the fee lowered due to counsel's lack of "billing judgment."[4] *See Bullock*, slip

[3]Chief Justice Burger concurred in the remand on the basis that attorneys should document their fee requests. The remaining four justices found the district court's award consistent with the legal standard enunciated and thus found remand unwarranted.

[4]In discussing this issue, our colleague notes Justice O'Connor's concurring opinion in *Farrar*, but does not, in our opinion, fairly represent the entirety of her opinion. His statement omits an important part of Justice O'Connor's opinion in that she stated that the difference between the amount recovered and the damages sought is not the only factor to be considered in awarding a fee. Specifically, Justice O'Connor noted that an award of nominal damages can represent a victory in the sense of vindicating rights even if no actual damages are proven. Thus, she concluded that courts also must look to other factors, one of which the significance of the legal issue on which the plaintiff claims to have prevailed. *Farrar*, 113 S.Ct. at 578. (continued)

Moreover, we do not view a fully successful claim as a "pyrrhic victory" merely because the recovery is small, nor do we view a $1400 fee as a windfall to the attorney. We note that in *Farrar*, the district court awarded a fee of $280,000 plus expenses, and in *Hensley*, the awarded fee was $133,332.25. In *Brooks*, a case arising under the Act, the administrative law judge awarded a fee of $13,455.84. In remanding the case for consideration of *Hensley*, the Court of Appeals noted that counsel's time had been spent in pursuit of his unsuccessful permanent total disability claim, and it appeared that the additional permanent partial disability obtained was awarded by the administrative

op. at 9. In focusing on the number of hours sought by counsel, the dissent does not point to any abuse of a discretion by the administrative law judge, who considered all of employer's objections to the fee, reduced the hourly rate and hours requested and awarded a fee for necessary work. *Id.*

We turn now to employer's objections to the number of hours and the hourly rate awarded. We reject employer's contentions regarding the number of hours requested. The administrative law judge considered the totality of employer's objections, reduced the number of hours requested by two, and thereafter found that the remaining work performed by claimant's counsel was reasonable and necessary. Supplemental Decision and Order at 2. We decline to disturb these findings, as they are rational determinations. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Further, the administrative law judge reduced counsel's requested hourly rate from $125 to $100. As employer has provided no support for the allegation that this rate is excessive, we hold that employer has not met its burden of showing the award of the attorney's fee is unreasonable. *Maddon*, 23 BRBS at 55; *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Lastly, for the reasons stated in *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds), we reject employer's contention regarding the quarter-hour minimum billing method. *See also Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

In sum, the administrative law judge found that claimant's counsel successfully prosecuted the claim and considered the issue of the difference between the amount of the award of benefits and the amount of the attorney's fee requested. The administrative law judge concluded that to limit the fee award solely to the amount obtained would have a chilling affect on the ability of claimants to employ effective counsel in relatively small but still significant claims. Supplemental Decision and Order at 2. Thus, we reject employer's request that the attorney's fee award be reversed or reduced. Furthermore, we affirm the administrative law judge's award of an attorney's fee as employer failed to show that the award is arbitrary, capricious, or an abuse of discretion. *See Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1992).

Accordingly, the Supplemental Decision and Order-Awarding Attorney's Fees of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief

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law judge who raised the issue. We emphasize again that this case is different in that employer controverted the claim and claimant was fully successful in obtaining an award that employer resisted.

Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the attorney's fee award of $1,400 plus costs.

Section 28(a) of the Longshore Act, 33 U.S.C. §928(a), provides, in effect, that when a case is contested, as employer did in this case, and the claimant ultimately prevails, there shall be an award of "a reasonable attorney's fee" in favor of the claimant and against the employer or carrier. What is a reasonable fee?

In *City of Burlington v. Dague*, ___ U.S. ___, 112 S.Ct. 2638 (1992), the Supreme Court proclaimed that its decisions construing what is a "reasonable" fee apply uniformly to all federal fee-shifting statutes. This would include the Longshore and Harbor Workers' Compensation Act. The leading fee-shifting case is *Hensley v. Eckerhart*, 461 U.S. 424 (1983),[5] in which the court discusses various factors to be considered in determining a reasonable fee. First, a plaintiff must be a prevailing party. He must at least succeed on some significant issue which achieves some benefit. It then remains to determine what fee is reasonable. The Court held that the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hours that were not reasonably expended should be excluded. Justice Powell, writing for the plurality, cautioned that "billing judgment" must be exercised. Hours not properly billed to one's client are not properly billed to one's adversary pursuant to statutory fee-shifting authority. Justice Powell went on to say that the sum produced by the number of reasonable hours multiplied by a reasonable rate does not end the inquiry. An important factor is the "results obtained." If a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. It is not necessary that the plaintiff prevail on every contention. If, however, he has achieved only partial or limited success, the product of reasonable hours multiplied by a reasonable rate may be an excessive amount. The Court held that "the most critical factor is the degree of success obtained." *Hensley*, 461 U.S. at 463. It stated that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole. The Court flatly held that the extent of success

[5]The Court of Appeals for the District of Columbia specifically held in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), that the *Hensley* test applies to attorney fees under the Longshore Act.

is a crucial factor in determining the proper amount of a fee. The award should be only for a fee that is reasonable in relation to the results obtained.

Here claimant underwent an audiometric examination on March 28, 1987. It revealed a zero percent impairment in the left ear and a 3.8 percent impairment in the right ear, which converts to a binaural impairment of .6 percent. Based on this evaluation, a notice of injury and a claim for noise-induced hearing loss was filed on claimant's behalf on April 8, 1987. Subsequently, the administrative law judge awarded claimant compensation for a .6 percent binaural hearing loss, plus any medical expenses that may arise out of and are causally related to the injury.[6] This resulted in an award of $416.84, based upon a compensation rate of $347.37 per week multiplied by 1.2 weeks. Because he obtained this award, claimant's attorney submitted a fee petition for $2,000 plus $24 in expenses, which was reduced by the administrative law judge to $1400 plus the expenses.[7]

Claimant's award of $416.84 certainly could have been anticipated. Only one audiometric examination was taken. It showed a .6 percent binaural hearing loss. This was the basis for the claim that was filed shortly after the examination. It is obvious that any award would be limited. Despite this, claimant's attorney expended 16 hours of services at a rate of $125 per hour. This raises the question of "billing judgment."

As stated above, Justice Powell, writing for the plurality in *Hensley*, cautioned that billing judgment must be exercised. Chief Justice Burger in a concurring opinion also referred to the exercise of appropriate billing judgment. In *Riverside v. Rivera*, 477 U.S. 561 (1986), Justice Rehnquist, in a dissent joined by Chief Justice Burger, Justice White and Justice O'Connor, discussed the *Hensley* requirement that a fee applicant exercise billing judgment including that the hours for which he seeks compensation must be *reasonable*. Justice Rehnquist sharply disapproved

[6]There is no evidence in the record indicating claimant has any medical expenses or that medical treatment is necessary in the future. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, [*Baker*], 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Although Dr. McClelland stated claimant should have annual evaluations to monitor his hearing, Cl. Ex. 2, Emp. Ex. 6, this was not a finding by the administrative law judge. Furthermore, it is not a benefit gained as a result of the administrative law judge's decision. The whole subject of hearing conservation programs, including monitoring, is covered by the Federal Occupational Safety and Health Act, which requires employers to monitor employees exposed to noise equal to or over 85 decibels for an 8 hour day, without cost to the employees. *See* 29 U.S.C. §1910.95(c)(1), (d) and (g)(2).

[7]To put this case in perspective, if claimant had filed a claim under the Mississippi Workers' Compensation Law, based on joint jurisdiction pursuant to *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 12 BRBS 890, *reh'g denied*, 448 U.S. 916 (1980), resulting from employer's places of operation at Gulfport and Pascagoula, Mississippi, an award of $416.84 would have entitled claimant's attorney to a maximum of 20 percent of the award or $83.37 to be paid by claimant, leaving claimant $333.47. *See* Mississippi Code, 1972 Annotated, §71-3-63, reenacted 1982, reenacted 1990.

of the District Court Order in *Riverside*, which held that spending l,946.75 hours was "reasonable" to recover a money judgment of $33,350, resulting in a fee of $245,456.25. Justice Rehnquist gave a hypothetical example in which plaintiff had a contract action worth $10,000. It would be unjustifiable he said, in the absence of any special arrangement, for the attorney to put in 200 hours and send the client a bill for $25,000. He further indicated that the ability to place the burden of payment of a fee on an adversary under a fee-shifting statute does not justify disregarding its reasonableness any more than if it were presented to one's own client. This comparative analysis is what the Justices refer to as "billing judgment."

As stated above, *Hensley* provides a two-step procedure to determine a "reasonable" fee. First, did the plaintiff prevail, that is, was he successful? Second, what were the "results obtained?" If the results are excellent, the attorney should recover a fully compensatory fee. If, however, only limited success is obtained, the product of reasonable hours multiplied by a reasonable rate may be an excessive amount. The "most critical factor is the degree of success obtained." *Hensley*, 461 U.S. at 463. This emphasis on this degree of success being the most critical factor was noted by the Supreme Court in other decisions such as *Farrar v. Hobby*, __ U.S. __, 113 S.Ct. 566 (1992),[8] and *Riverside*, 477 U.S. at 561. It clearly was applied by the United States Court of Appeals for the District of Columbia Circuit in *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), wherein the court criticized the administrative law judge and the Board for not following *Hensley's* second step. The court stated that both the administrative law judge and the Board made the "erroneous assumption that an inquiry into whether the attorney himself reasonably thought the work he performed was necessary is somehow relevant to a *Hensley* analysis. It is not." *Brooks*, 963 F.2d at 1540, 25 BRBS at 172 (CRT). The Court of Appeals for the Fifth Circuit, which would have jurisdiction on an appeal in this case, has recognized that a fee should be tailored to a claimant's limited success. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993), citing *Hensley* and *Farrar*.

The majority's view does not recognize the emphasis that the Supreme Court and the Courts of Appeals of the various circuits cited herein place upon limited success as a critical factor in determining a "reasonable" fee. It begins by stating that a fee 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, citing *Muscella*, 12 BRBS at 272. It later states that the second prong of *Hensley* requires the administrative law judge to exercise his discretion and award a reasonable fee after consideration of employer's objections and the regulatory criteria. That certainly is not the second prong of *Hensley* based upon the quotes set forth above. At another point the majority states that it will not reverse the fee award as no *abuse of discretion* has been shown. Later it states that employer failed to show that the award was *arbitrary, capricious, or an abuse of discretion.* But at

[8]In its footnote 4, the majority mentions that in *Farrar* the district court awarded a fee of $280,000 and in *Hensley* a fee of $133,332.25. The Supreme Court, of course, vacated the fees in both cases, holding in *Farrar* that counsel was not entitled to a fee and remanding the issue in *Hensley* for further consideration.

no point does the majority comment upon the last factor in *Muscella* that the fee be "*in accordance with law*." Specifically, this fee award was not in accordance with the law as set forth in *Hensley* and it progeny. There is no indication that the administrative law judge was ever aware of *Hensley* and its principles.

The record indicates that this matter was initiated by claimant's counsel who referred the claimant to Dr. K.D. McClelland, who examined claimant on March 28, 1987, and then submitted his audiological report to claimant's counsel indicating the .6 percent binaural hearing loss. Cl. Ex. 2. Claimant was a relatively young thirty-year old man at the time. It was claimant's counsel who then filed the Claim for Compensation on April 8, 1987. The claim was signed by counsel not by claimant. Cl. Ex. 4. Interestingly, at the hearing claimant testified that he had never met his counsel and that he never talked to him about his case. Tr. 17, 18. Right from the beginning this case was destined to have only a limited success. The only evidence was the audiogram indicating a .6 percent binaural loss. On a scale of zero to one hundred that is .6 from the zero and 99.4 from the 100. Obviously any award would be nominal or *de minimis*. That was known from the outset. Should 16 hours of time at $125 for hour he spent on a case worth only a few hundred dollars to claimant? Where was the billing judgment? If it were not for the fee-shifting provisions of Section 28(a) of the Act, would the attorney submit a bill of $2,000 to his client after achieving an award worth $416.84? What would the client's reaction have been? This brings to mind the thought of Justice Rehnquist in *Riverside* that such a bill would be unjustifiable whether presented to one's own client or whether a fee-shifting statute allocated it to the opposing party. This also brings to mind Justice O'Connor's comment in her concurring opinion in *Farrar* that the degree of success must be considered in determining a fee to discourage lawyer from pursuing pyrrhic victories and *de minimis* awards. *Farrar*, 113 S.Ct. at 576-578. The majority simply avoids any discussion of billing judgment.

This case and *Bullock, supra*, also bring to mind Justice Brennan's comment in *Riverside* that a factor to be considered in determining the reasonableness of fees in fee-shifting cases is that the statutes were not intended to be a "windfall for attorneys." *Riverside*, 477 U.S. at 579. This case involves an award of $416.84. In *Bullock*, the award was $272.39. The fee here will be $1400. In *Bullock*, with the same attorney, it was $2,000. That's $416.84 for one claimant, $272.39 for another, and $3400 for the attorney. It should be borne in mind that over 2,000 hearing loss claims were filed against Ingalls/Litton in an eight month period. *See Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184, 189 (1989) (*en banc*), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). In its footnote 4, the majority states that it does not view the $1400 fee in this case as a windfall to the attorney. From the pattern we have seen, however, the 2,000 plus cases will provide modest awards for each claimant but several million in fees for the attorneys. That has all the earmark of a "windfall for attorneys."

Accordingly, I would vacate the fee award and remand the case to the administrative law judge to reconsider the fee application in accord with the principles laid down in *Hensley*.

JAMES F. BROWN
Administrative Appeals Judge