BRB No. 91-300

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| WILLIE C. BIGGS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| INGALLS SHIPBUILDING, INCORPORATED | ) | DATE ISSUED: _____ |
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| 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.

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

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

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order-Awarding Attorney's Fees (89-LHC-1686) of Administrative Law Judge C. Richard Avery 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 to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was exposed to injurious noise levels during the course of his employment for employer prior to his retirement in the late 1970s. On November 12, 1986, claimant underwent audiometric testing by Dr. Wold, which revealed a 98.4 percent binaural impairment which was subsequently corrected to 92.41 percent. Other audiometric testing performed on May 29, 1987, March 13, 1989, and May 26, 1986, yielded invalid results. On November 28, 1989, Dr. Wold performed audiometric testing which revealed a 24.6 percent binaural loss. The last audiogram dated December 19, 1989, resulting from testing performed by Dr. McDill, but which was read also by Dr. Muller, reflected a .3 percent binaural hearing loss.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant's hearing loss was work-related. Crediting the results of the most recent audiogram, he awarded claimant compensation for a .3 percent binaural hearing impairment under Section 8(c)(13), 33 U.S.C. §908(c)(13). The administrative law judge also awarded claimant medical expenses,

under Section 7 of the Act, 33 U.S.C. §907, and held employer liable for a Section 14(e) penalty for benefits due and untimely paid. 33 U.S.C. §914(e).

Subsequent to the administrative law judge's Decision and Order, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant case arises, issued *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 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*), which held that hearing loss benefits for a retiree should be calculated pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), rather than Section 8(c)(13). In light of *Ingalls Shipbuilding*, employer sought reconsideration of the administrative law judge's award of benefits. In response, the administrative law judge issued an Amended Decision and Order in which he vacated his award of disability compensation. Noting that under *Ingalls Shipbuilding* a retiree must be compensated for an occupational hearing loss pursuant to Section 8(c)(23), the administrative law judge converted claimant's .3 percent binaural hearing impairment to a 0 percent impairment of the whole person under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). Because claimant had no compensable disability under Section 8(c)(23), the administrative law judge concluded that claimant also was not entitled to a Section 14(e) penalty. The administrative law judge therefore vacated paragraph one of his original Order, amending it to reflect that claimant was not entitled to any disability compensation, but otherwise leaving the original Decision and Order intact, including the award of Section 7 medical benefits.[1]

Claimant's counsel then requested an attorney's fee of $2,763.75, representing 22 hours of work performed before the administrative law judge at $125 per hour, plus $13.75 in photocopying expenses. In a Supplemental Decision and Order-Awarding Attorney's Fees, claimant's counsel was awarded a fee of $1,900 for 19 hours of attorney services at $100 per hour, to be paid by employer.[2] 33 U.S.C. §928.

The sole issue on appeal concerns the attorney's fee award. Employer contends that the administrative law judge erred in assessing claimant's attorney's fee against it on the basis that claimant's counsel's services did not result in a "successful prosecution" of the claim. Alternatively, employer contends that in any event the amount of the fee, $1,900, is excessive, as this was a routine hearing loss claim. Employer specifically objects to the $100 hourly rate awarded and contests several itemized entries in claimant's fee petition, incorporating by reference the objections it made below. Claimant responds, urging affirmance of the attorney's fee award.

Initially, the issue of whether employer is liable for the fee under Section 28(a) or (b), 33 U.S.C. §928(a), (b), is not properly before the Board, as employer has raised this argument for the

[1]No aspect of this award was appealed. *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 under 33 U.S.C. §908(c)(13)).

[2]The photocopying expenses were disallowed as a part of office overhead.

first time on appeal. The Board has long held that it will consider only those objections to fee requests properly asserted by employer before the administrative law judge. *See, e.g., Clophus v. Amoco Production Co.,* 21 BRBS 261 (1988); *see generally Maples v. Texport Stevedores Co.,* 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP,* 931 F.2d 331 (5th Cir. 1991). If the issue were properly raised, we nonetheless would disagree with our dissenting colleague, who would find that there has been no successful prosecution of this case. In this case, employer controverted the issue of causation, and claimant prevailed on this issue, establishing entitlement to an award of medical benefits. In *Ingalls Shipbuilding, Inc. v. Director, OWCP (Baker),* 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993), the United States Court of Appeals for the Fifth Circuit recently held that medical benefits may be awarded where claimant has a hearing loss which does not yield a compensable impairment under the AMA *Guides* and thus has no compensable disability under the Act. Claimant in this case has a binaural impairment under the AMA *Guides* and was awarded medical benefits after prevailing on the issue of causation, a controverted prerequisite to such an award. He thus successfully prosecuted his claim for medical benefits and is entitled to a fee.

In the present case, moreover, employer, in fact, does not appeal the award of medical benefits, and there is no argument that such benefits are not due. By contrast, *Baker* involved two consolidated claims where medical benefits were awarded and employer challenged the award of medical benefits and the resultant attorney's fee. In *Baker*, while the court rejected employer's argument that since claimants had no measurable impairment they could not receive medical benefits, it reversed claimant Buckley's award of medical benefits on the basis that there was no evidence of past expenses or of a need for future treatment. Because the attorney's fee award was dependent on the award of medical benefits, the fee was also reversed. Since employer does not challenge claimant's entitlement to medical treatment in the present case, claimant herein, unlike claimant Buckley, has established a basis for the fee in the successful award of medical benefits. With regard to the consolidated case of claimant Baker, the court remanded for findings regarding the necessity of medical treatment, noting that one doctor recommended annual evaluations and stated that claimant was "a candidate for amplification," while another found that a hearing aid would not help him.

In the present case, the only medical opinion to address this issue, that of Dr. Wold, indicates that claimant should have yearly re-evaluations and that he was a candidate for amplification.[3] Cl. Exs. 2, 9. Moreover, in this case, it is undisputed that no medical benefits were paid and that there were unreimbursed requests for payment of past medical treatment. Cl. Exs. 1, 6. Thus, contrary to the claims of our dissenting colleague, actual medical expenses were incurred in this case for which claimant sought reimbursement. It is also significant in this case that employer controverted the issue of whether claimant's demonstrated binaural loss was related to his employment, as a finding of causation is necessary to an award of past and future medical expenses. Thus, as employer controverted causation and medical benefits and as claimant ultimately prevailed on these issues, resulting in an award which has not been appealed, claimant is entitled to a fee for necessary services performed in obtaining this successful result.[4]

We next address employer's challenge to the amount of the fee. Employer asserts that the amount of the fee awarded by the administrative law judge is excessive. In this regard, we disagree with our dissenting colleague who would conclude that even if claimant's counsel is entitled to a fee, the fee awarded in this case is inconsistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), in light of the limited benefits obtained.[5] On appeal, employer generally argues that the fee should be reviewed and reversed because the issues were not complex and no compensation was awarded; employer specifically challenges certain hours and the hourly rate. The general allegations in employer's appellate brief regarding the amount of benefits do not raise the limited success issues addressed in *Hensley*. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc)*(Brown and McGranery, JJ., concurring and dissenting). Employer identifies no specific

[3]Although our dissenting colleague suggests that Dr. Wold's opinion in this regard is invalid because it was premised on his belief that claimant had a 98.4 percent binaural hearing loss, a premise specifically rejected by the administrative law judge in assessing the extent of claimant's hearing impairment, we note that Dr. Wold reaffirmed his recommendation for yearly re-evaluation and amplification on November 28, 1989, when he re-evaluated claimant's hearing loss and found it to be 24.6 percent. Moreover, the fact that the administrative law judge did not rely on Dr. Wold's report in assessing the degree of claimant's impairment is not determinative; the administrative law judge could nonetheless credit Dr. Wold's opinion with regard to the claimant's need for yearly re-evaluations. *See Baker*, 991 F.2d at 166, 27 BRBS at 16 (CRT).

[4]Contrary to the position of our dissenting colleague, the fact that employer is not required to monitor employees exposed to noise equal to or less than 85 decibels for an eight hour day under the Federal Occupational Safety and Health Act, 29 C.F.R. §1910.95(c) (1), (d), and (g)(2), is irrelevant to claimant's right to periodic monitoring under the Longshore Act.

[5]We note that claimant's lack of success in obtaining an award for his binaural hearing loss under Section 8(c)(13) and a Section 14(e) assessment is due to the law applicable in the Fifth Circuit at the time, rather than a failure by claimant in submitting evidence to prove his claim. *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 under 33 U.S.C. §908(c)(13)).

manner in which the fee should be reduced due to claimant's success on only the medical benefits issue.

In addition, employer did not raise any arguments for the reduction of the fee based on the amount of the award of benefits or premised on claimant's limited success while the case was before the administrative law judge. Rather, employer raised routine objections to the hourly rate awarded and itemized hours claimed by counsel. While our dissenting colleague would reverse the administrative law judge's properly entered fee award based on a rationale not raised in the objections before the administrative law judge, the Board has long held that fee objections which are not raised below may not be raised for the first time on appeal. *See, e.g.*, *Bullock*, 27 BRBS at 94; *Clophus*, 21 BRBS at 261. This result is not inconsistent with *Hensley*, wherein the Court emphasized the trial court's obligation to exercise discretion in considering the relationship between the amount of the fee awarded and the results obtained "when an adjustment is *requested*" based on limited or exceptional success. *Hensley*, 461 U.S. at 437 (emphasis added). Neither *Hensley* nor its progeny, however, lend support to our dissenting colleague's position that an appellate body may, on its own accord, find an abuse of discretion in a fee award based on claimant's limited success where, as here, this objection was not timely raised before the trier-of-fact. As the administrative law judge fully considered employer's objections to the fee request in reducing the fee requested, and as we are not empowered to engage in a *de novo* review of the fee petition, we reject the assertion that the amount of the fee awarded to claimant's counsel should be reduced in light of the benefits obtained. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986).

We therefore direct our attention to the specific objections to the fee award raised by employer which are properly before us. Employer initially argued below that the lack of complexity of the case mandated a reduction in the hourly rate awarded to claimant's counsel. 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, 20 C.F.R. §702.132. While the complexity of issues should be considered by the administrative law judge, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). As the administrative law judge specifically considered the complexity of the case in reducing the rate from the requested $125 per hour to $100 per hour, employer's assertion that the complexity of the case does not warrant the fee awarded is rejected. Employer's assertion that the $100 hourly rate awarded is excessive and that a rate of $75 to $80 would be more reasonable is also rejected, as the administrative law judge specifically considered employer's objection to the hourly rate in reducing the $125 rate requested to $100 and as employer has offered no support for its assertion that the hourly rate awarded is excessive. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *see generally 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 also reject employer's contention that the time spent in certain discovery-related activity, trial preparation, and review and preparation of various legal documents was either duplicative, unnecessary, or excessive. The administrative law judge considered the totality of employer's

objections, disallowed three hours sought by counsel, and found the remaining services rendered by claimant's counsel to be reasonable.[6] We decline to disturb this rational determination. *Maddon*, 23 BRBS at 55; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer's final argument, that the administrative law judge erred in awarding a fee based on a fee petition that billed in quarter-hour increments must also fail. The Board has held that an administrative law judge does not abuse his discretion in awarding an attorney's fee based on a quarter-hour minimum billing method, as this method is reasonable and in compliance with the applicable regulation, 20 C.F.R. §702.132. *See Snowden*, 25 BRBS at 245. *See also Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982).[7] We therefore affirm the administrative law judge's attorney's fee award.[8]

[6]The administrative law judge agreed with employer that the two hours charged for trial preparation on November 29, 1989, were excessive given that claimant's counsel had reviewed the file on November 21, 1989, and allowed only one hour for this entry. The administrative law judge also agreed that the three hours claimed on November 30, 1989, the date of the formal hearing, were excessive given the short duration of the hearing and the fact that claimant's counsel was in attendance for several other hearings scheduled for the same time and place, and allowed only one hour for this entry.

[7]We reject employer's contention that the fee order of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished), mandates a different result in this case. In that fee order, the court declined to award fees for work before it based on a quarter-hour minimum billing method. However, the determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

[8]Claimant's contention that employer is liable for interest on the attorney's fee award under *Guidry v. Booker Drilling Co. (Grace Offshore Co.*), 901 F.2d 485, 23 BRBS 82 (CRT) (5th Cir. 1990), is rejected for the reasons stated in *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61, 65 (1991) (Decision on Remand). *See also Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd*, 820 F.2d 1528 (9th Cir. 1987).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
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 $1,900. Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928(a), provides, in effect, that if an employer declines to pay any compensation within thirty days after receiving written notice of a claim, and the claimant uses the services of an attorney and is ultimately successful in the prosecution of the claim, claimant is entitled to a reasonable attorney's fee payable by employer. The award of an attorney's fee against employer is conditioned upon a successful prosecution of the claim. Claimant must prevail. In this case, however, claimant simply did not prevail.

This is an odd case factually. Claimant worked for employer from 1940 to 1975, when he retired. Cl. Ex. 2. He underwent an audiometric examination on November 12, 1986, by Dr. Wold, an audiologist. This revealed a binaural hearing loss of 98.4 percent, based upon a loss in the right ear of 97.5 percent and a loss in the left ear of 103.1 percent. As a result of questions raised about this result, Dr. Wold, on November 27, 1989, acknowledged that there were computer calculation errors in the report. He corrected the result to a 92.41 percent binaural loss. Supplement to Cl. Ex. 2. Subsequent examinations on May 29, 1987, March 13, 1989, and May 26, 1989, were declared to be invalid by the examiners, two based on claimant's lack of cooperation. Dr. Wold performed another examination on November 28, 1989, resulting in a 24.6 percent binaural hearing loss. In contrast to the above results, or lack of results, an examination was conducted on December 19, 1989, by Dr. McDill and also read by Dr. Muller, and declared to be valid, which revealed a binaural hearing loss of only .3 percent. This is the audiogram that was credited by the administrative law judge and served as the basis of his original award under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), which, based upon an average weekly wage of $302.66, amounted to $181.60. The award also covered a penalty and medical expenses that arise out of and are causally related to the injury.

Due to a change in law in the Fifth Circuit, *see Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990), *aff'g in part and rev'g in part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), the administrative law judge amended his decision, holding that claimant was a retiree and that his claim was to be handled under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), rather than Section 8(c)(13), with the result that claimant was not entitled to any compensation under the "whole man" theory. The administrative law judge therefore vacated the award and penalty, but retained the provisions relating to medical treatment. The case was not appealed on its merits.

In a Supplemental Decision and Order, dated September 20, 1990, the administrative law judge reviewed claimant's attorney's fee petition for $2,750 plus $13.75 in costs. He reduced the rate from $125 per hour to $100, cut out three hours of services, and disallowed the costs. This resulted in a fee award of $1,900. The majority would affirm this in full; I would vacate it completely. My dissent is based on the reasons stated generally in my opinions in *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(Brown and McGranery, JJ., concurring and dissenting), *Rogers v. Ingalls Shipbuilding, Inc.*, __ BRBS __, BRB No. 89-3716 (August 19, 1993)(Brown, J., dissenting), and *Moody v. Ingalls Shipbuilding, Inc.*, _ BRBS _, BRB No. 90-1032 (September 23, 1993)(Brown, J., dissenting). In this case claimant received no compensation whatsoever. The majority would allow the $1,900 fee, however, based upon the paragraph in the order referring to medical expenses arising out of and causally related to the injury. But there is nothing in the record indicating that there was any *treatment*. It should be borne in mind that Section 7(a) of the Act, 33 U.S.C. §907(a), provides, in effect, that the employer shall furnish such medical *treatment*, nursing and hospital care as the *nature of the injury* may require. Nobody expressed any thought that this injury, a .3 percent hearing loss, required any treatment, now or in the future. The majority points out that the only medical opinion to address this issue indicated that claimant should have yearly re-evaluations and was a candidate for amplification. That was Dr. Wold, however, who was of the opinion that claimant had a 98.4 percent hearing loss. The administrative law judge did not credit this opinion, however, crediting only the opinions of Drs. McDill and Muller and the .3 percent binaural loss. Dr. Wold's opinion, therefore, is really based on a hypothetical that simply is not this case. Here is a person whose hearing is nearly normal. Common sense would rule out any need for amplification.

Although Dr. Wold indicated that he advised claimant to have hearing re-evaluations every year, it should be recognized that claimant last worked in 1975, that he is now retired, and that he presumably is no longer working in an environment where he is subject to noise exposure. Looking to the federal standards as a guide, the regulations under the Federal Occupational Safety and Health Act, 29 C.F.R. §1910.95(c)(1), (d), and (g)(2) require monitoring by employers only of employees exposed to noise equal to or over 85 decibels for an eight hour day. Such is not the case here.

The mere fact that paragraph 2 of the Order provides that the employer shall pay all causally related medicals does not mean that claimant has prevailed. This portion of the order is no more than a restatement of Section 7 of the Act which provides, in effect, such medical treatment as the injury may require. In other words, the rights and liabilities of the parties are already created by the statute upon the occurrence of an injury by an employee in the course of and arising out of the employment.[9] These are rights and liabilities already established, whether or not included in the administrative law judge's order.

Despite Section 7 of the Act and Paragraph 2 of the administrative law judge's order, claimant has another hurdle. He still has the burden of proof to establish that any expense incurred was necessary to treat the injury. *See Doris Coal Company v. Director, OWCP,* (*Stiltner*), 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), a case involving proof of necessity and relationship of medical bills under Section 7 of the Longshore Act as incorporated into Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, pursuant to Section 422(a) of that Act, 30 U.S.C. §932(a). In *Stiltner* the claimant submitted a batch of medical bills for payment to which the employer objected on the grounds that many of them were not related to the injury (in that case, coal workers' pneumoconiosis). The court held that the claimant must show that the medical expenses incurred were necessary to *treat* the miner's pneumoconiosis (the injury). Therefore, until claimant actually incurs medical expenses and then proves that they were reasonable and necessary and related to the treatment of his hearing loss, he has not prevailed.

It should be recognized that in a statute that provides for "medical treatment for the care of the injury," as in Section 7 of the Act, the kind of medical service an employer may incur at the employer's expense is limited to treatment necessary for care of the injury as distinguished from examination, such as an audiometric examination, for purposes of litigation. Such costs still fall on the party incurring them. *See* A. Larson, *2 Workmens' Compensation Law* §§61.12(h), 83.20. *Cf. Ingalls Shipbuilding, Inc. v. Director, OWCP, (Baker),* 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). The cited case involved consolidated cases by claimants Buckley and Baker. Buckley presented no evidence of medical expenses incurred or medical treatment necessary in the future. The court held there was no evidentiary basis for the administrative law judge's award of medical benefits and, therefore, vacated the award. It further pointed out that Buckley could file a claim for medical benefits if and when *treatment* became necessary. In addition, it continued that Buckley would have to justify the need for further testing. The court held that since Buckley did not successfully prosecute a claim, a condition of Section 28(a) of the Act, the award of attorney's fees must be vacated.

[9]*See Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2595, 26 BRBS 49, 53 (CRT)(1992), wherein the Supreme Court held that the suffering of an injury gave claimant the right to compensation from his employer.

In the Baker phase of the consolidated claim referred to above, the only expense incurred by Baker was an initial examination by Dr. Wold. It does not appear that employer contested liability for this on the ground that it was for purposes of litigation rather than treatment. The only evidence of potential future medical expenses was Dr. Wold's indication that Baker was "a candidate for amplification" as opposed to Dr. Gilchrist's report that a hearing aid would not help. The court thought it advisable to remand the case for a finding, on the record, about which future medical services are reasonably necessary and to set a fee award "tailored to his (Baker's) limited success." The court cited *Farrar v. Hobbs*, __ U.S. __, 113 S.Ct. 566 (1992); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), the leading cases of the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit dealing with "reasonable" attorney's fees based on fee-shifting statutes and involving limited success.

As this case now stands, claimant obtained nothing. He was awarded no compensation. If he incurs any medical expenses, he has the burden of proving they are reasonable and necessary for the treatment of his minimal hearing loss. *Stiltner*, 938 F.2d at 492, 15 BLR at 2-135. Up to this point he has not done so. He has not prevailed. He is not entitled to an attorney's fee at the expense of the employer. The majority, however, would allow him a fee of $1,900 payable by the employer. The only one to gain anything is claimant's attorney, not claimant.

This case brings to mind Justice Brennan's comment in *Riverside v. Rivera*, 477 U.S. 561, 579 (1986), 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." It also brings to mind the comment of Justice O'Connor in her concurring opinion in *Farrar*, 113 S.Ct. at 575-578, that lawyers should be discouraged from pursuing pyrrhic victories and *de minimis* awards. That is precisely what occurred in this case, a pyrrhic victory; Justice O'Connor said such victories should be denied fees. This case also brings to mind then Justice Rehnquist's comment in his dissent in *Riverside, supra*, that in a hypothetical case involving a contract action worth $10,000 it would be unjustifiable, in the absence of a special arrangement, for an attorney to put in 2000 hours and send his client a bill for $25,000. The fact that the ability to place the burden of payment of a fee on an adversary under a fee-shifting statute, the Justice commented, does not justify disregarding its reasonableness any more than if it were presented to his own client. Here we have a client who obtained nothing. His attorney, however, submitted a bill for $2,763.75, cut down to $1,900. Would it not have been patently unjustifiable to have submitted this bill to the claimant? What would the claimant's reaction have been? Is it not any less unjustifiable to submit this charge to the adversary simply because we are dealing with a fee-shifting statute?

Accordingly, I would vacate the fee award.

JAMES F. BROWN
Administrative Appeals Judge