

BRB No. 02-0221

ESSIE L. LIDDELL, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KODY MARINE, INCORPORATED)	DATE ISSUED: <u>Nov. 14, 2002</u>
)	
and)	
)	
LOUISIANA WORKERS' COMPENSATION CORPORATION)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of
Clement J. Kennington, Administrative Law Judge, United States
Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (00-LHC-3310) of Administrative Law Judge Clement J. Kennington 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).

On November 28, 1995, claimant injured his right shoulder during the course

of his employment for employer as a sandblaster. Claimant underwent shoulder surgery on June 10, 1998. On June 22, 1999, claimant's treating physician, Dr. Bourgeois, opined that claimant's shoulder condition had reached maximum medical improvement, and that claimant was capable of working light duty, with lifting of no more than 20 pounds. On January 26, 2000, Dr. Bourgeois approved as suitable two jobs identified by Jean Lillis, a vocational consultant. On January 13, 2000, claimant was involved in a motor vehicle accident. Claimant sought treatment from Dr. Bourgeois, who stated on February 15, 2000, that claimant was totally disabled due to persistent right rotator cuff tendonitis and requested authorization for claimant to undergo an MRI, which employer denied. Dr. Bourgeois subsequently reported to employer on March 28, 2000, that the car accident had aggravated claimant's shoulder condition, and in his August 4, 2000, report, Dr. Bourgeois opined that claimant had returned to his pre-motor vehicle accident status and was again capable of performing light-duty work. Employer voluntarily compensated claimant at the minimum weekly compensation rate of \$195.61 for temporary total disability, 33 U.S.C. §908(b), from December 11, 1995, to February 1, 2000, when it terminated compensation based on Dr. Bourgeois's approval of two jobs identified by Ms. Lillis. Employer also terminated payment for claimant's treatment by Dr. Bourgeois after his examination on May 23, 2000, because of claimant's motor vehicle accident.

On March 8, 2001, a formal hearing was conducted to resolve the contested issues of whether claimant was totally disabled from February 15, 2000 to August 2000, due to the work injury, suitable alternate employment, average weekly wage, and claimant's entitlement to medical benefits, including the MRI of claimant's right shoulder. In his Decision and Order, the administrative law judge awarded claimant compensation for temporary total disability from December 11, 1995, to June 22, 1999, based upon an average weekly wage of \$400, and a corresponding compensation rate of \$266.66. Claimant was awarded compensation for permanent total disability, 33 U.S.C. §908(a), from June 23, 1999, to February 1, 2000, when the administrative law judge found that employer established the availability of suitable alternate employment. The administrative law judge found that claimant was disabled by his shoulder condition due to the motor vehicle accident from February 15, 2000 to August 2000, and that employer is not liable for total disability compensation during this period. Claimant was awarded ongoing partial disability compensation of \$143.20 from February 2, 2000, based upon a loss of wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Finally, the administrative law judge determined that claimant's shoulder does not require an MRI test; however, he found that employer was not justified in terminating claimant's medical care from Dr. Bourgeois after May 23, 2000. The administrative law judge found claimant entitled to treatment every three months by Dr. Bourgeois.

Claimant's counsel subsequently sought an attorney's fee of \$7,931.88, representing 45.325 hours of attorney services at \$175 per hour, plus expenses of \$1,010.30, for work performed before the administrative law judge. The administrative law judge deducted seven hours of services for the deposition of Dr.

Bourgeois, .75 hours for drafting medical portions of claimant's post-trial brief related to arguments rejected by the administrative law judge, and .75 hours for drafting legal arguments rejected by the administrative law judge. The administrative law judge also denied costs of \$769.55, associated with the deposition of Dr. Bourgeois. The administrative law judge awarded claimant's counsel a fee of \$6,444.38, representing 36.825 hours at an hourly rate of \$175, plus costs of \$240.75.

On appeal, claimant challenges the fee awarded by the administrative law judge. Employer has not responded to claimant's appeal.

Claimant contends that the administrative law judge erred by applying *Hensley v. Eckerhart*, 461 U.S. 421 (1983), to deny a fee for seven hours of attorney time expended and \$769.55 in costs incurred to depose Dr. Bourgeois, and for .75 hours to draft the medical portion of claimant's post-trial brief. Claimant asserts that he was successful before the administrative law judge in obtaining the reinstatement of medical benefits and compensation for permanent partial disability, and claimant argues that Dr. Bourgeois's testimony was critical to claimant's prevailing on these issues. In *Hensley*, the Supreme Court held that a fee award, under a fee-shifting scheme, should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434; see also *George Hyman Constr. 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). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The administrative law judge has considerable discretion in setting the amount of the attorney's fee where claimant's success is only partial. See generally *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001).

In the present case, the administrative law judge found that claimant prevailed on the contested average weekly wage issue, and that, as a result thereof, succeeded in obtaining greater disability compensation. The administrative law judge found that the deposition of Dr. Bourgeois was not necessary to establish claimant's entitlement to these benefits, and that the attorney time expended thereon is severable from the time expended on issues on which claimant succeeded. The administrative law judge reasoned that claimant did not prevail on his contention that he is entitled to compensation for total disability from February 15 to August 2000, during which time Dr. Bourgeois opined in his deposition that claimant was unable to work due to the temporary aggravation of claimant's shoulder condition from the motor vehicle accident. The administrative law judge found that Dr. Bourgeois's testimony that claimant no longer required an MRI also was not supportive of claimant's contention that employer should pay for such testing. Finally, the administrative law judge found that, as claimant did not prevail on any of his claims based on the medical evidence of record, he denied the .75 hour expended drafting the medical portion of claimant's post-trial brief.

Because Dr. Bourgeois's deposition testimony and the medical portion of

claimant's post-trial brief did not contribute in any way to claimant's ultimate success, which was due to an increase in claimant's average weekly wage, we hold that the administrative law judge rationally reduced counsel's attorney's fee request pursuant to *Hensley*. Significantly, Dr. Bourgeois's deposition was taken on March 13, 2001, after the formal hearing on March 8, 2001. At the hearing, employer conceded claimant's entitlement to periodic treatment by Dr. Bourgeois, and it was undisputed at the hearing that, but for the period of total disability from February 15, 2000, to August 2000, claimant was capable of working light-duty, pursuant to Dr. Bourgeois's evaluation of claimant's shoulder condition and the January 2000 labor market survey of Ms. Lillis. Tr. at 19-21, 28-30. We reject claimant's contentions that Dr. Bourgeois's testimony was critical to the administrative law judge's finding claimant entitled to continuing medical treatment from Dr. Bourgeois, and in claimant's obtaining compensation after February 1, 2000, for permanent partial disability. Claimant's entitlement to medical treatment from Dr. Bourgeois was no longer at issue at the date of Dr. Bourgeois's deposition, and claimant's award of compensation for permanent partial disability from February 1, 2001, is solely related to claimant's prevailing on the contested average weekly wage issue. Thus, the administrative law judge did not err in severing from the fee request time spent on unsuccessful issues. See *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

We next address claimant's assertion that the administrative law judge erred by denying costs of \$769.55 associated with the deposition of Dr. Bourgeois. The administrative law judge denied these costs for the same reasons he denied the seven hours requested by claimant's attorney to depose Dr. Bourgeois. Section 28(d) of the Act, 33 U.S.C. §928(d), the statutory provision authorizing the administrative law judge to assess costs, provides that where an attorney's fee is awarded against an employer there may be a further assessment against the employer of costs, fees, and mileage for necessary witnesses. Section 28(d) requires only an analysis of the reasonableness and necessity of the costs incurred by counsel in litigating the case. Accordingly, *Hensley* is inapplicable to the award of costs. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The test for determining the necessity of work performed by counsel is whether, at the time it was performed, the attorney reasonably believed it was necessary to establish entitlement. See, e.g., *Bazor v. Boomtown Belle Casino*, 35 BRBS 121, 129 (2001).

In this case, we agree with claimant that the administrative law judge erred by denying claimant the cost of deposing Dr. Bourgeois pursuant to *Hensley*. *Ezell*, 33 BRBS at 31. Dr. Bourgeois is claimant's treating physician. His medical records state that claimant was totally disabled from February 15 to August 4, 2000, and he had first recommended MRI testing in February 2000. CX 5. At his deposition, Dr. Bourgeois's testimony addressed the relevant issues of the contribution of claimant's work accident to claimant's period of temporary disability after the January 13, 2000, motor vehicle accident, and claimant's need for MRI testing. The evidence admitted into the record at the formal hearing, before the deposition of Dr. Bourgeois, contains no conclusive evidence on these issues. Accordingly, we hold that claimant's attorney reasonably believed that Dr. Bourgeois's testimony was

necessary to establish claimant's entitlement to MRI testing and to compensation for total disability from February 15 to August 2000, notwithstanding that the administrative law judge ruled against claimant on these issues. See *generally Bazor*, 35 BRBS at 129. We therefore reverse the administrative law judge's denial of \$769.55 in costs associated with the deposition of Dr. Bourgeois, and we modify the administrative law judge's fee award to include these additional costs. 33 U.S.C. §928(d).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is modified to award claimant \$769.55 for costs associated with the deposition of Dr. Bourgeois. In all other respects, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge