U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0350

XAVIER HERNANDEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUIDLING COMPANY	)	
	)	
	)	DATE ISSUED: 6/23/2022
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Approving Attorney Fee of Marco A. Adame II, District Director, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for Claimant.

Roy D. Axelrod (Law Office of Roy Axelrod), San Diego, California, for Self-Insured Employer.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

GRESH and JONES, Administrative Appeals Judges:

Employer appeals District Director Marco A. Adame, II's Order Approving Attorney Fee (OWCP No. 18-094688) 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.* (Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Claimant sustained work-related injuries to his left knee in 2002 and 2008 while working for Employer. He filed claims for those injuries, which the parties resolved via stipulations approved by the district director in Orders issued in 2004 and 2010. Employer paid Claimant compensation pursuant to those orders. Claimant's left knee continued to bother him, prompting further treatment in 2011, which culminated with his treating physician, Dr. Behr, performing a total left knee replacement on October 22, 2012. Dr. Behr opined claimant could return to semi-sedentary work on February 28, 2013, and his left knee condition had reached maximum medical improvement on June 10, 2013, with a permanent impairment of the left lower extremity.

Claimant last worked for employer on December 1, 2011, when he was laid off due to the lack of work. Employer voluntarily paid Claimant temporary total disability benefits for his knee injury starting on October 25, 2012, making its last payment on August 4, 2014. Meanwhile, Claimant stated prolonged standing began causing back and hip pain in early 2013. Pursuant to Section 22 of the Act, 33 U.S.C. §922, Claimant filed a petition for modification of the district director's April 27, 2010, Compensation Order, alleging a worsening of his left knee and a mistake in fact as to the calculation of the stipulated average weekly wage for his 2008 knee injury. Claimant also filed a claim in 2014 alleging he sustained a back and hip injury as a result of cumulative trauma during his work for Employer through December 1, 2011, and a leg length discrepancy resulting from his October 22, 2012 left knee surgery. Employer controverted the claims, and the case was transferred to the Office of Administrative Law Judges (OALJ).

Administrative Law Judge (ALJ) Christopher Larsen issued a decision on December 19, 2017, finding Claimant entitled to, and Employer liable for, temporary total disability benefits from October 22, 2012, through June 9, 2013, permanent partial disability benefits for a 25 percent impairment to his left knee commencing June 10, 2013, each based on an average weekly wage of $952.50, and medical benefits. However, he denied Claimant's claim for ongoing disability benefits for his back and hip condition, a finding Claimant challenged on appeal. The Board affirmed the ALJ's decision, *Hernandez v. National Steel & Shipbuilding Co.*, BRB No. 18-0222 (Oct. 3, 2018) (unpub.), and the United

States Court of Appeals for the Ninth Circuit affirmed the Board's decision. *Hernandez v. National Steel & Shipbuilding Co.*, 771 F. App'x 814 (9th Cir. 2019).

Claimant's counsel thereafter filed fee petitions for work performed at the Office of Workers' Compensation (OWCP) and the OALJ.[1] Pertinent to this appeal, counsel sought a fee totaling $25,382.11 for work performed before the OWCP, representing 15.4 hours of his time at $515 per hour ($7,931), 42.7 hours of his associate Kim Ellis's time at $385 per hour ($16,439.50), 6.3 hours of paralegal time at $130 per hour ($819), plus costs of $192.61. Employer filed objections to counsel's fee petition. The district director granted the requested hourly rates, reduced the requested hours, denied the requested costs, and awarded counsel a fee, totaling $12,453.75, payable by Employer.[2]

On appeal, Employer contends the district director's fee award is excessive, as a matter of law, in view of the results achieved.[3] Claimant responds, urging the Board to reject Employer's appeal and affirm the district director's award of an attorney's fee.[4] The Director, Office of Workers' Compensation Programs (the Director), responds urging the Board to vacate the district director's fee award and remand the case for an analysis of the fees requested in terms of the degree of Claimant's ultimate success as required by law.

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[1] The ALJ awarded Claimant's counsel a fee of $55,008.13, representing $46,466 for legal services and $8,542.13 in costs, payable by Employer. Employer appealed and Claimant cross-appealed the ALJ's fee award. The Board vacated the ALJ's Attorney Fee Order and remanded the case for reconsideration of counsel's hourly rate determination and Employer's contention that the fee requested was not appropriate based on Claimant's degree of success in the pursuit of his claims. *Hernandez v. National Steel & Shipbuilding Co.*, BRB Nos. 19-0537/A (May 22, 2020) (unpub.).

[2] The district director granted counsel 13.35 hours at $515 per hour, Ms. Ellis 12.7 hours at $385 per hour, and 5.3 hours of paralegal work at $130 per hour.

[3] We affirm the district director's relevant community and hourly rate determinations as they are unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[4] Counsel also challenges the district director's "drastic reduction" of Ms. Ellis's fees "because he wrongly speculates that the briefing she performed was merely for purposes of the informal conference." Cl. Br. at 17. We decline to address this contention because it is made in a response brief, rather than a formal cross-appeal, and it neither responds to issues raised in Employer's brief nor does it support the district director's order. 20 C.F.R. §802.212(b); *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

Employer contends the district director refused to correctly apply *Hensley v. Eckerhart*, 461 U.S. 421 (1983), to reduce counsel's fee to reflect Claimant's partial success. Emp. Br. at 8. Employer maintains that, based on "the clear and unequivocal admonitions by the Supreme Court in *Hensley*," a reduced attorney's fee award in this case is appropriate due to Claimant's lack of success in obtaining any additional compensation as a result of the adjudication of his 2014 claim.

The Director states that although Claimant's counsel successfully obtained medical benefits for his back and hip injury and increased Claimant's average weekly wage, he did not prevail in his other requests, most notably his request for permanent total disability benefits. Because of this, he maintains, in agreement with Employer, that the district director should have more thoroughly analyzed whether and how Claimant's lack of success affected the request for attorney's fees for the work performed before him. He suggests the district director's "cryptically stated" rationale that Employer's *Hensley* argument "did not comport with" the holding of that case, his failure to explain the rejection of Employer's objection, and his not weighing Claimant's limited success in terms of his overall pursuit of benefits, mandates a remand for further consideration. We agree.

In *Hensley*, a plurality of the United States 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. The Court 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?

Hensley, 461 U.S. at 434. The Court stated the district court should focus on the significance of the overall relief the plaintiff obtained 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 achieved only partial or limited success, however, the product of hours expended on litigation as a whole times a reasonable hourly rate may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-437. Contrary to counsel's assertion, this analysis does apply to claims arising under the Act.[5] *Ingalls Shipbuilding, Inc. v. Director, OWCP*

[5] We agree with our dissenting colleague that counsel's time in this case was devoted not to "a series of discrete claims," but "generally to the litigation as a whole" involving "a common core of facts or [claims] based on related legal theories." *Hensley*, 461 U.S. at

[Baker], 991 F.2d 163, 166, 27 BRBS 14, 17(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1535, 25 BRBS 161, 164(CRT) (D.C. Cir. 1992); *Gen. Dynamics Corp. v. Horrigan*, 848 F.2d 321, 325, 21 BRBS 73, 77(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988); *see also* 20 C.F.R. §702.132(a) (amount of benefits is a relevant factor in a fee award).

Employer raised *Hensley* to the district director, asserting the fee requested was not appropriate based on Claimant's degree of success. The district director rejected Employer's position because he found it "does not comport with" *Hensley*. Order Approving Attorney Fee at 4. In this regard, the district director found Claimant was successful in establishing he sustained a work-related back and hip injury and in obtaining, albeit through a pre-trial stipulation, an impairment rating for his left knee. *Id.* He concluded Claimant's counsel is entitled to an attorney's fee under Section 28(a) because he "was able to obtain a successful prosecution of the claim and the employer/carrier do not object to the entitlement of fees." *Id.* at 5.

It is undisputed Claimant prevailed in establishing both entitlement to medical treatment for his back and hip injury and a higher average weekly wage for his 2008 left knee injury. Factoring in Employer's credit for prior compensation payments made in this

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434-435. Nevertheless, the Supreme Court stated in *Hensley* that in such cases where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. *This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith*." *Id.* at 436 (emphasis added). "The most critical factor is the degree of success obtained," *id.* at 436, and the relevant inquiry is whether the relief obtained justified the hours reasonably "expended on the litigation as a whole." *Id.* at 435-436. Contrary to our dissenting colleague's reading of *Hensley*, the Board has consistently interpreted this language to mean that an adjudicator should assess the claimant's degree of success in terms of all the issues adjudicated in the case; an analysis which the district director, in this case, did not adequately undertake. *See, e.g., Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999) (a 50 percent reduction in an attorney's fee is reasonable given the claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999) (a 90 percent reduction in an attorney's fee is reasonable given the claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits). Moreover, the underlying basis for our remanding the case on this issue is not merely because the district director's analysis pursuant to *Hensley* is incomplete; we also consider remand necessary because the district director's summary rejection of Employer's argument for a fee reduction "does not comport with *Hensley*," lacks sufficient explanation and therefore is "patently inadequate." *Id.* at 455 n.11.

case, Claimant did not obtain any additional compensation or monetary relief. He also did not prevail on his claims for permanent total disability due to his left knee injury, his back and hip injury, or a combination of those injuries or for further compensation for his scheduled left knee injury. Claimant therefore has "achieved only partial or limited success" in the pursuit of his claim. *Hensley*, 461 U.S. at 434.

The district director did not fully assess Claimant's success in terms of all the issues adjudicated in this case. Instead, he rejected Employer's *Hensley* argument without adequate explanation. As such, the district director's *Hensley* analysis is incomplete. He should have considered Claimant's overall success in terms of the entirety of the claims he raised and determined whether Claimant achieved "a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Id.* We therefore vacate the district director's attorney's fee award.

Because Employer timely raised this issue, and the district director did not adequately address the overall degree of Claimant's success as *Hensley* requires, the district director must do so on remand as he is in the best position to assess whether the fee requested is commensurate with the degree of success Claimant obtained in relation to the benefits sought. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993).

Accordingly, we vacate the district director's Order Approving Attorney Fee and remand this case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to overturn the district director's fee award. Fee awards are discretionary and cannot be set aside unless the challenging party shows the decision was arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See generally Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). Employer has not met its burden.

Before the district director, Claimant's counsel requested $25,189.50 in attorney fees for 64.4 hours of work successfully prosecuting Claimant's entitlement to benefits for knee, back, and hip injuries.[6] Agreeing with Employer that more than half of the time entries (33.05 hours) were either excessive or clerical, and thus non-compensable, the district director awarded counsel a fee of $12,453.75, as follows: 13.35 hours at an hourly rate of $515; 12.7 hours at an hourly rate of $385; and 5.3 hours at an hourly rate of $130.

Relying on *Hensley v. Eckerhart*, 461 U.S. 424 (1983), Employer alleges the district director abused his discretion by rejecting its request for an additional fifty percent across-the-board reduction in the number of hours counsel expended due to Claimant's alleged lack of success in prosecuting his claim. I disagree.

In *Hensley*, the Supreme Court of the United States held that under federal fee-shifting statutes a prevailing party is entitled to a "reasonable" attorney fee paid by the losing party. *Hensley*, 461 U.S. at 433. According to the Court, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably

[6] Counsel also requested reimbursement of $192.61 in costs which the district director denied as unsupported.

expended on the litigation multiplied by a reasonable hourly rate." *Id*. After making that calculation, an adjudicator may reduce the fee if he determines it overcompensates the attorney based on the "results obtained" for the client. *Id*. This factor is particularly important where a party is "deemed 'prevailing' even though he succeeded on only some of his claims for relief." *Id*.

The Court, however, distinguished between two types of cases: those where counsel expends time "in one lawsuit [on] distinctly different claims for relief that are based on different facts and legal theories," and those where counsel's time is devoted not to "a series of discrete claims" but "generally to the litigation as a whole" involving "a common core of facts or [claims] based on related legal theories." *Hensley*, 461 U.S. at 434-435. In the former category, time spent on unsuccessful claims is not compensable because it "cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 435, quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). In the latter category, it is "difficult to divide the hours expended on a claim-by-claim basis;" therefore, the focus should be on the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id*. at 435; *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1535 (D.C. Cir. 1992) ("Under the second *Hensley* inquiry, the factfinder must . . . consider whether the success obtained on the remaining claims is proportional to the efforts expended by counsel.").

This case belongs in the latter category. Claimant's Longshore Act claim did not involve "different claims . . . based on different facts and legal theories." *Hensley*, 461 U.S. at 435. His claim stems from a singular set of facts and one ultimate legal theory – he suffered a work-related injury to his knee and a subsequent worsening thereof, rendering him totally disabled; the work-related knee injury, which required surgery, caused secondary disabling injuries to his back and hip; and, therefore, he is entitled to monetary compensation and medical benefits under the Act for those injuries.[7]

In arguing that the district director's fee award is excessive in light of Claimant's degree of success, Employer largely treats the eleven or more issues considered by the ALJ as discrete claims, each warranting a reduction in counsel's fee if Claimant was not fully successful on it. Employer's Brief to the Board at 14; Employer's Brief to the District Director at 11; *see* ALJ Decision and Order at 3-4 (identifying contested issues). But, as *Hensley* instructs, a fee award "should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley*, 461 U.S. at 435, citing *Davis*

[7] The relatedness of these allegations is confirmed by the fact that the parties and ALJ relied on the same few medical opinions to address whether each injury was work-related, permanent, disabling, and required medical treatment.

v. County of Los Angeles, 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). The reason? "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Id*. at 436. Therefore, when a claimant is only partially successful on "interrelated, nonfrivolous, and . . . good faith" arguments, his counsel's fee should not be reduced based on the outcome of each individual issue; rather, "the most critical factor is the degree of success obtained."[8] *Id*.

As for his degree of success, Claimant was awarded an increase in his average weekly wage (from $859.82 to $952.50) for determining his compensation rate for his knee injury; was awarded $45,722.16 in compensation for a scheduled period of permanent partial disability to his knee; established the work-relatedness of his hip and back injuries, overcoming Employer's arguments that the claims were barred by the Act's statutes of limitations, not subject to Section 22 modification, and unrelated to his work; and, importantly, was awarded "all past, present, and future" medical care for his knee, hip, and back, including, but not limited to "annual physician visits and follow up x-rays to monitor his left knee re-placement prosthesis; anti-inflammatory medication for his low back and hip injury; and 24 physical therapy sessions [for his back]." Decision and Order at 11-14, 19, 28, 29, 31, 32.

Employer argues that Claimant's success was limited because the $45,722.16 in compensation he was awarded was eventually credited back to Employer due to a previous overpayment it made to him.[9] Money need not change hands, however, for Claimant to be

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[8] Thus, contrary to the majority's assessment, I do not ignore that a claimant's overall degree of success, even in cases involving interrelated and nonfrivolous claims, is the most important factor in determining the reasonableness of a fee award. The Court elaborated on this concept in *Fox v. Vice*, 563 U.S. 826 (2011), instructing that "[a] court should compensate the [claimant] for the time his attorney reasonably spent in achieving the favorable outcome, even if 'the plaintiff failed to prevail on every contention.'" *Id.* at 834, quoting *Hensley*, 461 U.S. at 435. While a fee award "should not reimburse the plaintiff for work performed on claims that bore *no relation* to the grant of relief . . . the presence of these unsuccessful claims does not immunize a defendant against paying for the attorney's fees that the plaintiff reasonably incurred" successfully pursuing his rights. *Id.* (emphasis added).

[9] The ALJ determined only that Employer, like all employers, is entitled to a credit for past overpayments, but he explicitly declined to order an amount because while Employer generally "raised the issue" of a credit, it "never detail[ed] what kind of credit it believes it is entitled to." Decision and Order at 32. In its brief to the Board, Employer asserts the Office of Workers' Compensation Programs later determined Claimant's award

deemed "successful" in his claim. *Hensley*, 461 U.S. at 435, n.11 ("[A] plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time."). Prior to the ALJ's final decision awarding Claimant benefits, he was obligated to reimburse Employer for any past overpayments "out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). After receiving a judgment against Employer for compensation benefits totaling $45,722.16, he was able to credit that amount back to Employer in satisfaction of his obligation to reimburse it for past overpayments. Beyond his success in securing an actual compensation award, the fact that Employer is no longer entitled to a credit in that amount, and Claimant is no longer liable for it, is an actual success. *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 1106 (9th Cir. 2003) (To be successful under federal fee-shifting statutes, a claimant need not "obtain monetary relief," such as additional benefits; he need only obtain "some actual relief" that "materially alters the legal relationship" between the parties and "causes the defendant's behavior to change for [his] benefit.").

Employer's argument also ignores that Claimant achieved significant success in the form of "all past, present, and future" medical treatment for all three injuries, including specific pending treatments for his knee, hip, and back, such as annual visits, x-rays, medication, and physical therapy. This, too, constitutes monetary relief, as costs for these services and all future services would come out of his own pocket, not Employer's, had his claim been denied.

It is also noteworthy that Employer does not contest the reasonableness of counsel's hourly rates of $515, $385, and $130. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Nor does it contest the district director's refusal to reduce counsel's number of hours by 20 percent based on an alleged lack of complexity in the case. *Id.* Therefore, the sole question on remand is whether the hours counsel expended were reasonable in light of Claimant's success. *Hensley*, 461 U.S. at 435. Before the district director, however, Employer conceded that even with a 50 percent *Hensley* reduction, counsel reasonably expended 11.75 hours on this litigation, his associate reasonably expended 6.5 hours, and his paralegal reasonably expended 2.5 hours.[10] Employer's Brief to the District Director

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of compensation benefits is fully offset by Employer's prior overpayment. Employer's Brief at 2.

[10] Employer argued to the district director that even with a 50 percent *Hensley* reduction, a fee award of $6,650 is appropriate, as follows: $4,700 for counsel based on an hourly rate of $400, which equates to 11.75 hours; $1,625 for his associate based on an hourly rate of $250, which equates to 6.5 hours; and $325 for his paralegal based on an

at 13-14. Given this concession, and the fact that Employer does not challenge the reasonableness of counsel's awarded hourly rates, the district director must award counsel at least $8,938.75.[11] For the reasons identified above, I do not consider such a reduction warranted. I simply point this out for the purpose of establishing the amount Employer itself concedes is warranted by Claimant's success.

In conclusion, remanding this claim is counter to the Supreme Court's admonishment that "the determination of fees 'should not result in a second major litigation.'" *Fox v. Vice*, 563 U.S. 826, 838 (2011), quoting *Hensley*, 461 U.S. at 437. The essential goal in shifting fees . . . is to do rough justice, not to achieve auditing perfection." *Id*. at 838. Given the district director's "superior understanding of the litigation" and the "substantial deference" to which his fee decisions are entitled, I would affirm his determination that the 31.35 hours counsel, his associate, and his paralegal expended on this claim before the district director is reasonable in light of the success they achieved for Claimant. *Hensley*, 461 U.S. at 435.

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge

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hourly rate of $130, which equates to 2.5 hours. Employer's Brief to the District Director at 13-14.

[11] This amount is calculated as follows: 11.75 hours conceded by Employer, multiplied by counsel's unchallenged rate of $515 per hour, equals $6,051.25; 6.5 hours conceded by Employer, multiplied by counsel's associate's unchallenged rate of $385 per hour, equals $2,502.50; and 2.5 hours conceded by Employer, multiplied by counsel's paralegal's unchallenged rate of $130 per hour, equals $325.