U.S. Department of Labor

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

BRB No. 23-0350

EUGENIO RODRIGUEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 09/30/2024
NATIONAL STEEL & SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney's Fees and Costs and the Order Denying Respondent's Motion for Reconsideration of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

Barry W. Ponticello and Samuel A. Eggleton (England Ponticello & St. Clair), San Diego, California, for Self-insured Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Attorney's Fees and Costs and his Order Denying Respondent's Motion for Reconsideration (2017-LHC-00115 and 2017-LHC-00116) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (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 applicable law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 956 (9th Cir. 2007).

Claimant filed a claim alleging cumulative traumatic bilateral knee injuries through August 7, 2009, while working for Employer.[1] The parties settled the disability portion of the 2009 claim and left medical benefits open.[2] The district director approved the settlement in October 2011.[3] In September 2015, Claimant filed a second claim against Employer, alleging new cumulative traumatic injuries to both knees through July 18, 2013. Employer controverted this claim, which proceeded to a formal hearing before the Office of Administrative Law Judges (OALJ).

In December 2018, ALJ Jennifer Gee issued a Decision and Order Denying Benefits, finding Claimant failed to establish a new injury. Claimant appealed to the Benefits Review Board, which affirmed ALJ Gee's denial of benefits for an allegedly new cumulative trauma injury. *Rodriguez v. Nat'l Steel & Shipbuilding, Co.*, BRB No. 19-0173, slip op. 4 (Jul. 26, 2019) (unpub.). However, the Board held the ALJ should have considered Claimant's alternate contention – that his disability after 2013 is the natural progression of the accepted 2009 injuries – as being a request for modification of the prior 2011 award under Section 22 of the Act, 33 U.S.C. §922. Therefore, it remanded the case for modification proceedings. *Id*. at slip op. 6.

On remand, the parties entered into a second settlement agreement, which ALJ Nordby (the ALJ) approved in April 2022, resolving all existing disputes between Claimant and Employer and leaving open future medical care for Claimant's bilateral knee injuries.

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained an injury in San Diego, California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] We incorporate the procedural history of this case as set forth in *Rodriguez v. Nat'l Steel & Shipbuilding Co.*, BRB No. 19-0173 (Jul. 26, 2019) (unpub.). Following the Benefits Review Board's remand to the ALJ, the case was appealed the United States Court of Appeals for the Ninth Circuit, where it was dismissed for lack of jurisdiction. *Nat'l Steel & Shipbuilding Co. v. Rodriguez*, No. 19-72135 (9th Cir. Dec. 16, 2019).

[3] *See* District Director's Compensation Order – Award of Compensation Under 33 U.S.C. §908(c), issued October 3, 2011.

Decision and Order Approving Section 8(i) Settlement at 1-2. The parties, however, did not reach agreement on attorney fees and costs. *Id.* at 2.

Claimant's counsel submitted an itemized fee petition to the ALJ, requesting $101,058.02 in fees and $12,982.87 in costs.[4] Fee Petition (Fee Pet.) at 2, 36. Employer filed an objection to counsel's fee petition, challenging the inclusion of time for work before the Office of Workers' Compensation Programs (OWCP), the hourly rates requested for each practitioner, and various time entries as duplicative, vague, clerical, or excessive. It also maintained that any fee award should be reduced to account for Claimant's limited success. Counsel filed a reply to Employer's objections and requested an additional fee for 0.5 hour of time spent preparing the reply.

On May 1, 2023, the ALJ issued a Decision and Order Awarding Attorney's Fees and Costs (Fee Order). He determined counsel successfully established that the hourly market rates requested for each practitioner are comparable with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. Fee Order at 10. He subtracted all time for work performed before the OWCP and reduced the fee for work deemed clerical, duplicative, excessive, and vague.[5] *Id.* at 11, 13-23. However, the ALJ rejected Employer's argument to further reduce the fee for partial success, finding Claimant's prosecution on remand was fully successful. *Id.* at 3-4. In total, the ALJ awarded a fee of $78,795.45.[6] *Id.* at 23-24. He also reduced costs associated with internal photocopying, thus awarding $12,604.12 in costs. *Id.* at 24. In total, the ALJ awarded $91,399.57. *Id.*

Employer timely sought reconsideration of the ALJ's fee award. It argued the ALJ failed to address its objection to Ms. Ellis's entitlement to an attorney's fee due to her status

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[4] Counsel sought a fee at the following rates: $556 per hour for 105.7 hours of his attorney services; $470 per hour for 50.9 hours of attorney services by Kim Ellis; $470 per hour for 32.1 hours of attorney services by Scott MacInnes; $150 per hour for 14.3 hours of legal assistant services by Diamela Lacina; and $135 per hour for 8.2 hours of legal assistant services by Heidi Cardenas. Fee Petition (Fee Pet.) at 13-35.

[5] The ALJ made the following reductions: 36.625 hours for counsel, 4.25 hours for Ms. Ellis, 1.4 hours for Mr. McInnes, 5.6 hours for Ms. Lacina, and 4.45 hours for Ms. Cardenas. Decision and Order Awarding Attorney's Fees and Costs (Fee Order) at 11, 20-23.

[6] The ALJ awarded a fee based on the following work hours: counsel's 73.075 hours, Ms. Ellis's 46.65 hours, Mr. MacInnes's 30.7 hours, Ms. Lacina's 8.7 hours, and Ms. Cardenas's 3.75 hours. Fee Order at 23-24.

as a contract attorney, and he improperly placed the burden of proof on Employer in determining the reasonableness of the time requested. Motion for Reconsideration (M/Recon.) at 3-6. Employer also asserted the ALJ improperly relied on a non-final Board fee award and erred in not reducing the overall fee award based on Claimant's partial success. *Id.* at 6-11. Finally, Employer asserted the ALJ erred in awarding a fee in gross excess of the settlement amount.[7] *Id.* at 11-12. Counsel responded in support of the ALJ's findings and requested an additional fee of $1,150.00 for time spent responding to Employer's motion.

On June 8, 2023, the ALJ issued an Order Denying Respondent's Motion for Reconsideration (Recon. Order). He rejected Employer's argument that Ms. Ellis was not entitled to her market rate because she was a contract attorney, as well as its assertion that he improperly placed the burden of proof on Employer to disprove the reasonableness of the requested hours. *Id.* at 3-7. The ALJ further rejected Employer's contention that he adopted the Board's fee award in lieu of reviewing the evidence and declined to assign a partial success reduction to counsel's fee, finding Claimant's post-remand settlement established a successful prosecution. *Id.* at 7-8. Finally, the ALJ rejected Employer's argument that he erred in awarding a fee and costs which exceeded the approved settlement amount. *Id.* at 8-9. The ALJ then awarded counsel a fee for an additional two hours of time at a rate of $556 per hour for work responding to the motion, thus amending the fee portion of the award to $79,907.45. *Id.*

On appeal, Employer contends the ALJ erred in not reducing the fee to account for Claimant's alleged partial success; in awarding a fee in gross excess of the settlement amount; and in awarding a fee to Ms. Ellis based on an hourly market rate, rather than the cost of a contract attorney.[8] Counsel responds in support of the ALJ's findings.

Partial Success Reduction

We reject Employer's argument that the ALJ should have reduced Counsel's fee because he had only "partial success" on remand. Employer's Brief (Emp. Brief) at 4-8. In his Fee Order, the ALJ noted the Board already ruled on counsel's fee petition for work performed before the Board in this case. Fee Order at 3. He noted the Board rejected Employer's partial success arguments because Claimant lost on only one theory of

[7] On remand, the parties settled the disability portion of Claimant's claim for $50,000 and left open future medical care for Claimant's bilateral knee injuries. Fee Order at 2.

[8] We affirm, as unchallenged on appeal, the ALJ's award of $12,604.12 in costs. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007); Fee Order at 24.

recovery and because the post-remand settlement for additional compensation in the amount of $50,000 and open future medical costs constituted "an excellent result." *Id*. at 3 (citing *Rodriguez*, BRB No. 19-0173, slip op. at 3). Moreover, the ALJ noted that after Claimant's successful appeal, Claimant received approval for additional surgery and received additional permanent total disability compensation during his recovery period. *Id*. The ALJ found Claimant's receipt of additional medical and disability benefits following remand and the $50,000 disability compensation settlement constituted a fully successful prosecution and, therefore, declined to reduce the fee award. *Id*. at 3-4.

On reconsideration, the ALJ found Employer "refashion[ed] its previous argument for a partial success into qualitative terms, assigning a 'true value' to Claimant's claims of $226,193.91 against which to compare Claimant's $50,000 settlement figure."[9] Recon. Order at 8. The ALJ again declined to reduce the award. He found it inappropriate to base a determination of prosecutorial success on the difference between a settlement amount and what the Claimant could have obtained in light of the "many reasons that parties choose to settle." *Id*. at 9. He also found Employer's argument "merely relitigate[d] the argument made in its initial objection," which he rejected in his Fee Order. *Id*.

On appeal, Employer argues Claimant's only theory of recovery before the ALJ – that he suffered a new cumulative injury to his knees – was unsuccessful and is unrelated to the remand for modification, which involves a completely separate burden of proof. Emp. Brief at 5. Further, Employer argues Claimant's success in having the Board remand his claim for the ALJ to address his entitlement to modification cannot constitute "full" success because he did not ultimately prevail in establishing that entitlement, instead entering into a settlement agreement. *Id*. It asserts the degree of Claimant's success, or lack thereof, is further demonstrated by comparing the settlement amount to the amount of disability benefits he would have been awarded if his modification claim had succeeded at trial. *Id*. at 6-8. We disagree.

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

[9] According to Employer's calculations, had Claimant succeeded in establishing entitlement to modification under Section 22, 33 U.S.C. §922, he would have received a total of $226,193.91 in compensation benefits, broken down as follows: an additional $111,176.47 in scheduled permanent partial disability (PPD) benefits after subtracting Employer's credit; retroactive temporary total disability (TTD) benefits in the amount of $74,051.32 for certain periods of time post-surgery or during which he was undergoing vocational training; and approximately one year of future TTD benefits in the amount of $40,966.12 for recovery time following planned knee surgery. Emp. Brief at 6-8.

the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this claim arises, has defined "successful prosecution" as follows:

> While a party need not obtain monetary relief to prevail for purposes of … fee-shifting statutes, he must obtain some actual relief that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Succeeding on an issue alone is insufficient; even obtaining declaratory judgment will not result in the award of fees, unless it causes the defendant's behavior to change for the benefit of the plaintiff.

Richardson v. Continental Grain Co., 336 F.3d 1103, 1006 (9th Cir. 2003) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992) (citations omitted)); *see also Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239, 245 (1988), *aff'd*, 920 F.2d 558 (9th Cir. 1990). If a claimant achieves only partial or limited success, however, the Supreme Court of the United States has held that a fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424, 435-436 (1983). Nevertheless, if counsel obtains an "excellent" result for his client, the fee award should not be reduced simply because he failed to prevail on every contention raised. *Id*. at 435.

Employer has not established the ALJ abused his discretion in finding Claimant obtained *Richardson*'s "actual relief" and *Hensley*'s "excellent results," despite not prevailing on one theory of recovery. As the ALJ found, Employer voluntarily entered into a settlement agreement following the remand order, pursuant to which it paid Claimant both compensation and medical benefits and promised to continue paying future work-related medical benefits as they arise. *Richardson*, 336 F.3d at 1006; *Mobley*, 20 BRBS at 245; *Kinnes v. General Dynamics Corp.*, 25 BRBS 311, 315 (1992): *see also Tahara*, 511 F.3d at 956; *Green v. Ceres Marine Terminals, Inc.*, 43 BRBS 173, 174 (2010).

Likewise, the ALJ did not abuse his discretion in rejecting Employer's calculation and comparison of benefits received to potential benefits that might have been gained had the parties not settled. The Court in *Hensley* did not define the "success" of an action in terms of the dollar amount awarded, but rather in terms of how successful the plaintiff was in achieving the claims asserted. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90, 96 (1993). Employer's explanation of how it valued Claimant's possible maximum recovery at trial is speculative and based on its own limited assumptions about certain pieces of medical evidence. Employer's Brief at 7-8. Moreover, Employer and our dissenting

colleague errantly assume that "excellent results" cannot be achieved absent maximum recovery on every issue.[10] *Hensley*, 461 U.S. at 435.

As Claimant's counsel achieved an excellent result and lost on only one theory of recovery,[11] the ALJ did not abuse his discretion in rejecting Employer's argument that Claimant obtained no success or only partial success. *Hensley*, 461 U.S. at 435-436; *see generally Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197, 199 (1994) (Decision on recon.); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139-140 (1993); Emp. Brief at 4-8. Therefore, we affirm the ALJ's finding that Claimant's counsel is entitled to an attorney's fee for work performed in his fully successful prosecution of the claim.

Amount of Fee Awarded in Relation to Compensation Payments

Employer next argues it was an abuse of discretion for the ALJ to award a fee "in gross excess" of the $50,000 settlement amount. Emp. Brief at 8-9. We disagree.

While the amount of benefits awarded is *a factor* to be considered in awarding an attorney's fee under 20 C.F.R. §702.132(a), an ALJ need not limit the fee to the amount of compensation gained, as doing so would drive competent counsel from the field. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 181 (1992); *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 252 (1991), *aff'd on recon. en banc*, 25 BRBS 346 (1992). Therefore, the ALJ permissibly rejected Employer's argument that the fee award was "unconscionable" when compared to the benefits Claimant received. He then properly awarded a fee, after considering Employer's objections, based on the number of hours he found reasonably expended and a reasonable hourly rate. Fee Order at 4 (citing *Hoda*, 28 BRBS at 199; *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89, 92 (1993)); *see also Hensley*, 461 U.S. at 437; *Christensen v. Stevedoring Services of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009); *Tahara*, 511 F.3d at 956; 20 C.F.R. §702.132(a).

In seeking reconsideration from the ALJ and in its appeal to the Board, Employer argues the cases the ALJ cited as support – *Hoda* and *Rogers* – can be distinguished from

[10] Given that settlement agreements are, by definition, compromises, Employer's argument suggests, without support, that "excellent results" can never be obtained via settlement.

[11] Again, although our dissenting colleague asserts there should have been an apportionment of the fee award under *Hensley* based on the lack of success as to Claimant's cumulative injury theory, if counsel obtains an "excellent" result for his client, the fee award should not be reduced simply because counsel failed to prevail on every contention raised. *Hensley*, 461 U.S. at 435.

this case, as both of those cases involved hearing loss claims in which the practitioners were aware at the outset of the claims that the potential awards to the clients would be nominal.[12] M/Recon. at 12; Emp. Brief at 8-9. Employer asserts fee awards should exceed awarded benefits only when there is an expectation of a nominal award, as that is when an attorney would need incentive to take a case. Emp. Brief at 8-9. Unlike that situation, Employer argues Claimant in this case had the potential for significant recovery, and there was no risk of "driving competent counsel from the field." *Id.*

The ALJ rejected this argument, finding no legal authority for the premise that a fee award cannot exceed a compensation award except in de minimis benefits cases, thus rejecting Employer's interpretation of *Hoda* and *Rogers*. Recon. Order at 9. Rather, he found "the [Act], like other federal fee-shifting statutes, is intended to encourage counsel to take Longshore cases generally, not merely in de minimis cases." *Id*. (citing *Van Skike v. Director, OWCP*, 557 F.3d 1041, 1047 (9th Cir. 2009)). The ALJ concluded Claimant's settlement of $50,000 for disability compensation is not a ceiling for an attorney's fee, and there is no reason to "arbitrarily reduce" counsel's fee award to less than the settlement amount. *Id.* at 9. We affirm the ALJ's finding.

The party challenging the reasonableness of a fee award bears the burden of demonstrating an abuse of discretion. *Battle v. A.J. Ellis Construction Co.*, 16 BRBS 329, 331 (1984). Employer has failed to show the ALJ's award is unreasonable on the grounds that it allegedly exceeds the $50,000 settlement. As the ALJ found, the settlement not only provided Claimant with $50,000 in compensation, but the parties also agreed "that future medical care is to remain open for Claimant's bilateral knees," a benefit that has already afforded Claimant payment of additional medical costs since the execution of the settlement. We hold the ALJ did not abuse his discretion in declining Employer's unsupported assertion that he should "arbitrarily" reduce the fee to no more than the dollar amount of compensation payments. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 31 (1999); *Watkins*, 26 BRBS at 181; *Snowden*, 25 BRBS at 252. We therefore reject Employer's request that the fee be further reduced. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201, 206-207 (1980).

[12] In *Hoda*, the claimant was awarded $313.12 in benefits. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197, 202 (1994) (Decision on recon.). In *Rogers*, the claimant was awarded $416.84. *Rogers v. Ingalls Shipbuilding, Inc.*, 28 BRBS 89, 97 (1993).

Entitlement to a Fee for Ms. Ellis

Employer next argues the ALJ erred in awarding Ms. Ellis a fee at an hourly market rate, contending she was an independent contractor and her time should be reimbursed as a cost. Emp. Brief at 9-11. We disagree.

The Supreme Court has held the lodestar method, by which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under federal fee-shifting statutes such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542, 551-52 (2010); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). It is well-established an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see Perdue*, 559 U.S. at 551. In the Ninth Circuit, the determination as to an appropriate hourly rate is guided by the court's decision in *Shirrod v. Director, OWCP*, 809 F.3d 1082, 1089 (9th Cir. 2015), which reiterated that in awarding a fee under the Act, an ALJ must define the relevant community and consider market rate information tailored to that market.

Employer contends the ALJ erred in using the lodestar method to calculate Ms. Ellis's fee entitlement due to her status as a contract attorney. Emp. Brief at 9. It asserts Ms. Ellis's status as an independent contractor means counsel paid her a lump sum for her work without incurring overhead charges typically associated with employees. *Id*. at 9-10. Thus, it contends paying counsel's firm for Ms. Ellis's work at an hourly market rate typically reserved for the firm's employees, rather than reimburse the firm for the actual cost incurred in hiring her, "allow[s] a secondary profit." *Id*. We disagree.

Within the jurisdiction of the Ninth Circuit, "[t]he courts have not spoken with one voice concerning the proper treatment of contract attorney costs in the calculation of a lodestar." *In re Wells Fargo & Co. Shareholder Derivative Litig.*, 445 F. Supp. 3d 508, 527-528 (N.D. Cal. Apr. 7, 2020). Nevertheless, four possible approaches have been identified: 1) award the market rate; 2) award the actual cost of services; 3) award a market rate adjusted downward to account for the attorney's status as an independent contractor; or 4) award the actual cost adjusted upward to account for overhead costs. *Id*. at 528-529.

The ALJ evaluated all four options and determined that using the market rate is the most appropriate.[13] Recon. Order at 4-5. He acknowledged this approach was "artificial"

[13] The ALJ found the second and fourth approaches – using the actual cost or adjusting the actual cost upwards to account for overhead – were not viable options in this case as the record lacked evidence of the actual amount counsel paid for Ms. Ellis's

because "'the [assigned] rate has never been paid' to the contract attorneys by a client." *Id*. at 4 (quoting *Wells Fargo*, 445 F. Supp. 3d at 528). However, he found this artificiality "insignificant," considering it is a feature of all fee awards under the Act, under which there exists no private market for an attorney's fee. *Id*. (citing *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 1076 (9th Cir. 2021); *Van Skike*, 557 F.3d at 1046)). Therefore, he concluded, "[m]arket rates constructed for [a] contract attorney's Longshore work are as artificial as those developed for an associate or partner's Longshore work." *Id*.

Moreover, while the ALJ acknowledged that billing a contract attorney's fee as a cost may save money for clients and promote judicial efficiency, he determined these justifications are "less salient" here as any cost savings accrue to Employer rather than a client. Recon. Order at 5. He also found unpersuasive Employer's argument that awarding Ms. Ellis a fee based on the market rate would create a "secondary profit center" for counsel. *Id*. The ALJ found Ms. Ellis was not a temporary contract attorney who primarily conducted document review for extremely low pay (which he noted is a reason courts have chosen to award fees at actual cost), but rather she contributed to substantial litigation tasks and performed duties at the level of an associate or partner, eliminating the risk she was being compensated for significantly less than the requested market rate. *Id.* He also found that because the actual cost of hiring Ms. Ellis is not in the record, it is not possible to default to that figure for efficiency. *Id.* The ALJ concluded the market rate, as the default approach in cases under the Act, is the most appropriate means for calculating Ms. Ellis's attorney's fee and, therefore, awarded Ms. Ellis her requested market rate of $470 per hour. *Id.* at 5-6.

As the ALJ considered all the relevant rate evidence before him and adequately explained his rationale for assessing Ms. Ellis's fee, we affirm his approval of $470 per hour for Ms. Ellis's services.[14] *See Carter v. Caleb Brett, LLC*, 757 F.3d 866, 868-869 (9th Cir. 2014); *see also Shirrod*, 809 F.3d at 1086-1087; *Christensen*, 557 F.3d at 1053; Recon Order at 3-6.

services. Recon. Order at 4. The ALJ found the third approach – adjusting the market rate downwards – too speculative. *Id*.

[14] We further affirm, as unchallenged, the ALJ's remaining hourly rate determinations. *See Scalio,* 41 BRBS at 58.

Accordingly, we affirm the ALJ's Decision and Order Awarding Attorney's Fees and Costs and his Order Denying Respondent's Motion for Reconsideration.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from my colleagues' decision as to whether Claimant's attorney fee award should have been reduced to account for his partial success. While I agree it was within the ALJ's discretion to decline to reduce fees based solely on the amount of the settlement, the ALJ failed to adequately consider Claimant's degree of success in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Claimant, here, succeeded in obtaining only potential additional compensation on his modification theory. He was unsuccessful in establishing a cumulative injury, and Employer was already liable for and paying medical benefits related to the 2009 injury by virtue of the 2011 settlement agreement. Thus, under *Hensley*, there should have been an apportionment of the fee award based on success tied to Claimant's modification theory (i.e., the 2022 settlement agreement) but lack of success as to his cumulative injury theory. *Hensley*, 461 U.S. at 440. Even though there remained some slight chance of success through appeal of the cumulative injury claim, if taken, and work performed on that theory of recovery could be said to have assisted in achieving recovery through settlement, any such additional success would be very slight and could be taken into account in making the apportionment. Further, Employer was already liable for medical benefits on an open

basis. *See Rodriguez,* BRB No. 19-0173, slip op. 6 n.8 (Jul. 26, 2019). Therefore, I would vacate the fee award and remand for further consideration of the partial success issue.

Otherwise, I concur with my colleagues' affirmance of the ALJ's Decision and Order Awarding Attorney's Fees and Costs and his Order Denying Respondent's Motion for Reconsideration.

JUDITH S. BOGGS
Administrative Appeals Judge