BRB No. 10-0669

JESUS AZUA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED: 08/18/2011
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION AND ORDER

Appeal of the Attorney Fee Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law), Coronado, California, for claimant.

Roy D. Axelrod, Solana Beach, California, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Attorney Fee Order (2007-LHC-1099) of Administrative Law Judge Russell D. Pulver 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 will not be set aside unless shown by the challenging party 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).

This is the second time this case has come before the Board. Claimant injured his back on August 24, 2004, during the course of his employment as a welder. Employer paid $8,534.47 in compensation, and claimant left his job because he could no longer perform it. Claimant found alternate work; however, he filed a claim for medical benefits to undergo surgery on his back. The administrative law judge gave the opinion of Dr. Korsh, claimant's doctor, great weight and found that the proposed spinal surgery is

reasonable; accordingly, he held employer responsible for the expenses related to the surgery. Decision and Order at 20. Prior to the hearing, claimant agreed that his average weekly wage was $474.80, that he can perform his usual work, and that he is entitled to a nominal award of $1.50 per week. *Id.* At the hearing, claimant withdrew these pre-trial submissions. The administrative law judge rejected claimant's request for a higher average weekly wage -- equivalent to $18 per hour -- and found that claimant's average weekly wage is the originally-agreed $11.87 per hour or $474.80 per week. As claimant had not undergone surgery, the administrative law judge found that his condition had not reached maximum medical improvement and he cannot perform his usual work. The administrative law judge awarded claimant temporary total disability benefits at $316.53 per week from October 21 through October 31, 2004, temporary partial disability benefits at $103.20 per week from November 1, 2004, through August 15, 2005, and temporary partial disability benefits at $76.53 per week from August 16, 2005, through August 6, 2006, for a total of $8,553.96.[1] The administrative law judge found that, beginning August 7, 2006, claimant's wage-earning capacity exceeded his average weekly wage, and he is entitled to a nominal award of $1.50 per week. The administrative law judge granted employer a credit for amounts previously paid. Decision and Order at 22-27. This decision was not appealed.

Subsequently, counsel submitted a fee petition to the administrative law judge. He sought a fee in the amount of $66,057.17, representing 114.5 hours at a rate of $400 per hour (Mr. Dupree) and 60.3 hours at a rate of $200 per hour (Mr. Myers), plus $8,197.17 in costs. The administrative law judge reduced the hourly rates to $285 and $175 and approved 98 hours and 59.4 hours, respectively, and awarded a total fee of $38,325. Employer appealed and claimant cross-appealed the fee award. The Board vacated the fee award and remanded the case for the administrative law judge to address the amount of the fee award in relation to claimant's success, appropriate hourly rates in view of intervening case law, and the nature of some of the itemized entries. *J.A. [Azua] v. National Steel & Shipbuilding Co.*, BRB Nos. 08-0824/A (July 23, 2009).

On remand, counsel submitted a revised fee petition, requesting $74,298.24, representing the same hours but at the rates of $450 and $225, plus $9,205.74 in costs.[2] The administrative law judge found that counsel's exhibits did not support the $450 requested hourly rate and, based on employer's submission of the Survey of Law Firm

[1]Of the $8,553.96 awarded, employer had paid $8,534.47; therefore, claimant obtained only $19.49 in additional benefits.

[2]Counsel stated he removed $171.43 in costs that was inadvertently included in the first fee petition and added $1,180 that was inadvertently excluded.

Economics, he awarded hourly rates of $368 and $205 for work performed by Mr. Dupree and Mr. Myers, respectively, in 2008. Fee Order at 6-7. Pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the administrative law judge stated that claimant "was successful on the primary issue . . . back surgery[,]" however, he found that claimant was "markedly unsuccessful with respect to Claimant's average weekly wage, resulting in a nominal award of $1.50 per week[,]" and he concluded that a reduction in the fee of 20 percent is appropriate. Fee Order at 8. Accordingly, the administrative law judge awarded 78.4 hours, or 80 percent of the 98 hours previously approved, for Mr. Dupree at a rate of $368, and 47.52 hours, or 80 percent of the 59.4 hours previously approved, for Mr. Myers at a rate of $205, plus costs of $9,205.74, for a total fee of $47,798.54. Fee Order at 8. Claimant appeals the fee award, and employer responds, urging affirmance.

Counsel first contends the administrative law judge failed to identify the relevant market for determining the appropriate hourly rates. We reject this contention. The administrative law judge implicitly, and appropriately, found San Diego to be the relevant market. *See generally Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009).

We also reject claimant's contentions regarding the awarded hourly rates. It was rational for the administrative law judge to reject the request for an hourly rate of $450, as he reasonably found that none of the proffered evidence supported such an award. Moreover, claimant's counsel has not shown an abuse of discretion in the administrative law judge's awarding of hourly rates of $368 and $205, as those rates are within the bounds of the evidence proffered by counsel as well as that proffered by employer. *See Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Christensen v. Stevedoring Services of America*, 43 BRBS 145, 146 (2009), *modified on other grounds on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, No. 10-73574 (9th Cir. August 1, 2011); *H.S. [Sherman] v. Dep't of Army/NAF*, 43 BRBS 41 (2009); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010).

Next, counsel asserts that the administrative law judge erred with respect to reducing the requested 18 post-Decision-and-Order hours. This reduction was made in the administrative law judge's original fee award because the administrative law judge found that, although counsel is entitled to a fee for "wind-up" services, 18 hours was excessive and unreasonable. This determination and related reduction was not challenged by either party in the first appeal. In any event, the reduction was reasonable. While wind-up costs necessary to complete the case at each level are compensable, *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), it was rational for the administrative law judge to find that 18 hours of wind-up services, most of which

constituted time spent preparing and editing the time entries of the fee petition, was unreasonable. *See generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986). We therefore affirm the administrative law judge's approval of eight hours of post-Decision-and-Order time.

Counsel also contends the administrative law judge erred in applying an across-the-board 20 percent reduction due to claimant's limited success without sufficient explanation and without first "restoring" the 7.4 hours that were disapproved in the original fee award because they related to unsuccessful issues. We reject this contention.

In this case, the administrative law judge originally disapproved 7.4 hours that he considered severable and related to the losing average weekly wage issue. *See generally George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). On remand, the administrative law judge stated that it was important to realize that claimant was successful on the primary issue of obtaining back surgery but was unsuccessful on average weekly wage, residual wage-earning capacity, and claimant's motion to compel production of records. Fee Order at 7. Thus, he found that claimant's overall success in obtaining a nominal award of $1.50 per week was minimal, and he reduced the hours originally approved by 20 percent, implying that the initial specific reduction was insufficient to account for the limited success achieved. *Id.* at 8. Claimant has not demonstrated an abuse of discretion by the administrative law judge in reducing the fee requested in this case, nor has he established that the fee awarded, over $47,000, does not adequately account for the success achieved. *Hensley*, 461 U.S. 421; *see, e.g., Farrar v. Hobby*, 506 U.S. 103 (1992) (there must be tangible results to justify any fee and nominal benefits alone are not enough); *Benton v. Oregon Student Assistance Com'n*, 421 F.3d 901 (9th Cir. 2005) (a fee may be warranted where there are nominal benefits as well as some other benefit to the plaintiff or the public); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000) (one-third reduction affirmed); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999) (90 percent reduction affirmed); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (75 percent reduction affirmed). Therefore, we affirm the administrative law judge's fee award.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge