

BRB No. 11-0229

FARID MISAQI)
)
 Claimant-Respondent)
)
 v.)
)
 CERES MARINE TERMINALS) DATE ISSUED: 12/05/2011
)
 Self-Insured)
 Employer -) DECISION and ORDER
 Petitioners

Appeal of the Decision and Order Granting Attorney's Fees and Expenses of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Attorney's Fees (2009-LHC-01614) 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 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered serious physical and psychiatric injuries in an accident on June 8, 2008, while working for employer as a truck driver. Claimant's truck was lifted by a crane and dropped 20 to 30 feet to the ground. Claimant was ejected through the right side window and knocked unconscious. Emp. Ex. 2; Decision and Order at 2. He filed a claim for benefits. Following the formal hearing, the parties agreed to a Section 8(i), 33 U.S.C. §908(i), settlement in the amount of \$175,000 which covered claimant's past and

and future medical benefits, and past and future compensation, but left open liability for certain disputed past medical expenses.

Subsequent to the administrative law judge's approval of the settlement, claimant's counsel submitted his attorney's fee petitions to the Office of Administrative Law Judges and the Office of Workers' Compensation Programs (OWCP). Counsel requested a total fee of \$33,356.25, representing 148.25 hours of services at an hourly rate of \$225, plus \$26,854.06 in expenses for work performed before the administrative law judge and \$11,238.75 for work performed before the district director. A stipulation in the record, as well as a letter from employer's counsel to the administrative law judge, reveals that the parties agreed to an attorney's fee, payable by employer and subject to the administrative law judge's approval, of \$33,000. However, the fee petition before the administrative law judge also included costs in the amount of \$20,375 for Dr. Covert's expert witness fee. Employer filed over 400 pages in objecting to the costs associated with Dr. Covert's opinion, challenging the expert's hourly rate and the hours of services as excessive. As these objections involved issues of medical opinion, counsel for claimant had Dr. Covert respond. Attached to Dr. Covert's response is a supplemental invoice for an additional expert fee in the amount of \$10,073.13 for his time responding to employer's objections. Both employer and Dr. Covert submitted additional responses concerning this expert fee cost. Thus, the amount claimed associated with Dr. Covert's expert opinion is \$30,448.13, of which employer agreed \$4,000 is reasonable.¹

The administrative law judge addressed Dr. Covert's role in this case, finding that he is certified by the American Board of Psychiatry and Neurology and is claimant's psychiatrist who treated him for residuals from the work accident, including, *inter alia*, nightmares, anxiety, mood disorder, depressive disorder associated with a traumatic brain injury, cognitive disorder, post-traumatic migraine headaches, and post-traumatic seizure disorder. He also found that Dr. Covert is a forensic psychiatrist with over 30 years of experience and is highly credible. Accordingly, the administrative law judge credited and found reasonable Dr. Covert's explanations for all his charges, and he awarded the request for costs to cover Dr. Covert's expert services in the amount of \$30,448.13.²

¹Employer also objected to costs for psychiatric treatment rendered by Dr. Covert pursuant to Section 7 of the Act, 33 U.S.C. §907. However, in his response to the objections, Dr. Covert reduced his request to \$18,974.35, representing services at the rate set by the Office of Workers' Compensation Program medical fee schedule. The administrative law judge approved this amount. Decision and Order at 8. Thus, the medical benefits are not at issue before the Board.

²The administrative law judge noted that additional objections, including unsubstantiated personal attacks on Dr. Covert, followed, as well as Dr. Covert's reply

Decision and Order at 2-9. Employer appeals the award of costs, and claimant responds, urging affirmance.

Where a claimant is entitled to an attorney's fee payable by his employer pursuant to Section 28 of the Act, 33 U.S.C. §928, the claimant is also entitled to recover reasonable and necessary costs associated with the case pursuant to Section 28(d), 33 U.S.C. §928(d).³ See *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). The administrative law judge has broad discretion in awarding a reasonable fee for witnesses under Section 28(d), and the Board will reverse the award only if the appealing party shows the award was arbitrary, capricious or an abuse of discretion. *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983); *Sawyer v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 270 (1982).

Employer first argues that the administrative law judge erred in awarding Dr. Covert an expert witness fee based on an hourly rate of \$500. It asserts the fee instead should be based on the hourly rate awarded by the OWCP for the doctor's clinical services, approximately \$175 to \$200 per hour. Although employer argued that Dr. Covert's requested hourly rate was excessive before the administrative law judge, it asserted that the rate should be no more than the amount it paid its expert - \$350 per hour. Thus, the argument before the Board was not raised before the administrative law judge, and we need not address it. See *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

thereto. The administrative law judge explained that, although he considered all the responses to the fee petition, he did not approve any additional costs related to these filings. Decision and Order at 2 n.2.

³Section 28(d) states:

In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this chapter.

This provision applies as well when an expert gives deposition testimony in lieu of live testimony. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003).

Nevertheless, we reject employer's challenge to the expert rate as being excessive. The administrative law judge found that \$500 is less than the \$1,000 per hour which Dr. Covert stated is the prevailing national rate for a forensic psychiatrist's services and that the letter from Dr. Sajadi, a fellow Diplomate of the American Board of Psychiatry and Neurology, supported the request for an hourly rate of \$500. Decision and Order at 6. In addition to the above, the record also contains a standard contract that Dr. Covert provides his clients. The contract identifies the various clinical and forensic services he provides and their respective hourly charges. The charge for forensic services such as reviewing records, researching or participating in depositions is \$500 per hour. As the above summary represents the extent of the evidence on the prevailing hourly expert rate for a forensic psychiatrist, it was rational for the administrative law judge to award costs based on an hourly rate of \$500, and employer has not demonstrated that the administrative law judge abused his discretion in doing so. Consequently, we affirm the finding. See *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Topping*, 16 BRBS 40; *Sawyer*, 15 BRBS 270.

Employer next contends the administrative law judge approved excessive time related to Dr. Covert's depositions.⁴ Decision and Order at 7-8. Specifically, employer objected to the following charges: 1) 6 hours on May 4 and 21, 2010, for deposition preparation; 2) 4 hours on May 5, 2010, for the deposition; 3) 3.25 hours on May 17, 2010, to review a deposition transcript; 4) 3.25 hours on May 19, 2010, for the second deposition; 5) 1.25 hours on May 26, 2010, for reviewing records; 6) 2 hours on June 10, 2010, for a pre-deposition conference with claimant's counsel; 7) 1.25 hours on June 10, 2010, for a post-deposition meeting with claimant's counsel; 8) 2.25 hours on June 14, 2010, to review Dr. Inbody's deposition transcript; and 9) 2 hours on June 30, 2010, to review his third deposition transcript. The administrative law judge found that the "extreme complexity" of the case rendered the 6-hour charge on May 4 and 21, 2010, reasonable and necessary. He found that Dr. Covert reasonably justified his 4-hour charge for May 5, 2010, and that his explanation that this was the actual time he spent related to the deposition was credible. He also found credible Dr. Covert's statement regarding the time spent on May 17, 2010, and approved the time as reasonable. With regard to the deposition on May 19, 2010, the administrative law judge found that Dr. Covert explained that his request included the actual time he spent in travel, review and

⁴Before the administrative law judge, employer also challenged time requested for other specific expert services; however, those costs are not challenged on appeal.

testimony and was reasonable.⁵ Similarly, the administrative law judge rejected the objections to the hours charged on May 26 and June 10, finding the hours requested reasonable and necessary. With regard to reviewing Dr. Inbody's deposition transcript, the administrative law judge found that Dr. Covert is qualified to review the deposition, and the time spent doing so was reasonable and necessary. Finally, the administrative law judge stated that it was reasonable for Dr. Covert to review his own deposition transcript before certifying it as accurate. Thus, the administrative law judge awarded a total of 25.25 hours for Dr. Covert's expert services related to his three depositions. Decision and Order at 7-8. As the administrative law judge addressed each of employer's objections with regard to the time spent related to the depositions, and as he found the time claimed was reasonable and necessary, employer has not shown an abuse of discretion in awarding Dr. Covert an expert fee for this time. See *Duhagon*, 31 BRBS 98; *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994). Therefore, we affirm the award of \$20,375 in costs sought in counsel's original fee petition.

Employer also contends the administrative law judge erred in awarding Dr. Covert an additional \$10,073.13 in expert witness fees for responding to its objections to the requested costs and disputed medical treatment. Employer asserts that this amounts to paying Dr. Covert a fee for acting as his own attorney and should be denied in its entirety. Dr. Covert responded to employer's objections to the original petition for costs; claimant's counsel explained, and the administrative law judge accepted in this "unusual" case, that this was necessary because of the complexity of the medical issues raised in employer's objections. As he found that Dr. Covert's request was not a request for an attorney's fee but, rather, was a request for costs, and as he determined that the costs were reasonable and necessary in this case, the administrative law judge awarded Dr. Covert the additional expert fee for time he spent responding to employer's objections to the initial claim for costs. Decision and Order at 8-9; see generally *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003).

We cannot affirm the supplemental award of costs of \$10,073.13, and we remand the case for further consideration. In *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit held that physicians seeking sums owed for their medical services to a claimant entitled to medical benefits under Section 7 of the Act are entitled to an attorneys' fees for their attorneys, as medical providers suing for payment under Section 7(d)(3) of the Act are "person[s] seeking benefits for purposes of Section 28(a)." *Hunt*, 999 F.2d at 423-424,

⁵That the doctor charged employer a fee for travel to his office on a day when he was not scheduled to be in his office does not render the administrative law judge's finding unreasonable or excessive, as the administrative law judge found the charge to be reasonable in light of the situation.

27 BRBS at 90-91(CRT); *see* 33 U.S.C. §907(d)(3); *Duhagon*, 31 BRBS at 102-103. In *Duhagon*, however, the Board distinguished *Hunt* from the situation where a medical expert hired an attorney to obtain payment for the doctor's appearance at a deposition. Specifically, in *Duhagon*, Dr. Meyers participated in a deposition and sought an expert witness fee for this service; Dr. Meyers hired his own attorney to represent him in this endeavor. The administrative law judge found Dr. Meyers entitled to a witness fee based on a lower hourly rate than that sought and he denied Dr. Meyers' attorney an employer-paid fee. Dr. Meyers appealed the administrative law judge's denial of his requested hourly expert rate and the denial of a fee for his attorney payable by the employer. The Board stated that, unlike in *Hunt*, where the doctors were seeking the payment of sums they were owed for rendering medical treatment to the claimant, Dr. Meyer was seeking payment for his time, and that, significantly, is not a derivative claim for benefits under Section 7, 33 U.S.C. §907. The Board held that Section 28 does not provide for an attorney's fee for a witness's attempt to obtain payment for an appearance at a deposition, and thus the Board affirmed the administrative law judge's denial of a fee for Dr. Meyers' attorney. *Duhagon*, 31 BRBS at 103.

Although Dr. Covert is not represented by his own attorney, this case bears some similarity to *Duhagon* in that additional costs are claimed for pursuing an initial award of costs. In this case, Dr. Covert's response to employer's objections addressed arguments pertaining to sums he sought for his "various forensic and non-forensic" services. Response at 5. He argued in support of both his expert hourly rate of \$500 and his itemized invoice of forensic services, which included such activities as deposition attendance, preparation of medical reports, and review of medical reports and deposition transcripts. Dr. Covert also addressed and defended the propriety of the medical services he rendered to claimant, as they were objected to by employer. Thus, Dr. Covert's response urged the administrative law judge to award the requested medical benefits under Section 7 as well as the requested expert fees under Section 28(d). *See* n. 1, *supra*. Although, in this case, Dr. Covert is not seeking a fee for an attorney representing him, by extension, the costs for services related to the disputed medical expenses arguably are recoverable pursuant to *Hunt* and the costs for services related to the disputed expert fee arguably are not recoverable pursuant to *Duhagon*. Nonetheless, as the administrative law judge did not consider this case precedent, we vacate the supplemental expert fee of \$10,073.13, and we remand the case to the administrative law judge for further consideration pursuant to this law.

Accordingly, we vacate the award of the supplemental expert fee of \$10,073.13, and we remand the case for further consideration consistent with this opinion. In all other respects, Decision and Order Granting Attorney's Fee and Expenses is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge