

BRB No. 97-579

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| KAMEL KADEM                  | ) |                    |
|                              | ) |                    |
| Claimant-Respondent          | ) |                    |
|                              | ) |                    |
| v.                           | ) |                    |
|                              | ) |                    |
| WALASHEK INDUSTRIAL & MARINE | ) | DATE ISSUED:       |
|                              | ) |                    |
| and                          | ) |                    |
|                              | ) |                    |
| SIGNAL MUTUAL INSURANCE      | ) |                    |
| COMPANY                      | ) |                    |
|                              | ) |                    |
| Employer/Carrier-            | ) |                    |
| Petitioners                  | ) | DECISION and ORDER |

Appeal of the Order Approving Settlement of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

William E. Weigand (Law Offices of William E. Weigand, P.S.), Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Faulkner, Banfield, Doogan & Holmes), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order Approving Settlement (95-LHC-3075) of Administrative Law Judge Thomas Schneider awarding an attorney's fee 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). 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, e.g., *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back when he slipped and fell while working for employer on October 12, 1991. He was subsequently diagnosed with a herniated disc and retained the services of attorney Kevin Coluccio on November 11, 1991. Employer voluntarily paid claimant temporary total disability compensation, based on an average weekly wage of \$440, from October 16, 1991, to July 15, 1992, and from July 17, 1992, to October 28, 1992, based on an average weekly wage of \$262.75. 33 U.S.C. §908(b). Employer voluntarily provided medical benefits to claimant until February 1993. 33 U.S.C. §907. On March 16, 1993, claimant discharged Mr. Coluccio and, on April 5, 1993, retained as his attorney William Weigand. On September 15, 1993, Mr. Weigand represented claimant at an informal conference regarding unpaid medical bills and claimant's entitlement to partial disability benefits, obtaining payment of approximately \$200 in past due bills. Employer filed a Notice of Controversion regarding its liability for compensation and medical benefits on November 11, 1993.

On August 29, 1995, claimant requested a formal hearing, which was thereafter scheduled for September 24, 1996. On the morning of the hearing, the parties agreed to a settlement for a sum of \$20,000, representing \$12,500 in compensation and \$7,500 in lieu of continuing medical benefits for claimant's back injury. The parties also agreed that the administrative law judge would decide the unresolved attorney fee issue. Mr. Coluccio requested a fee of \$1,160, plus \$39.26 in costs, for services performed on behalf of claimant prior to his discharge in March 1993. Mr. Weigand requested a fee of \$19,887.50, representing 159.1 hours of services performed at \$125 per hour, plus \$3,714.04 in costs. Employer objected to these fee requests, contending that Mr. Coluccio did not engage in a successful prosecution of claimant's claim and asserting 117 specific time objections to the attorney fee petition of Mr. Weigand, as well as an objection to the hourly rate sought.

In his Order Approving Settlement, the administrative law judge reduced the fee requests of Mr. Coluccio and Mr. Weigand by approximately 25 percent. Specifically, the administrative law judge found, *inter alia*, that Mr. Coluccio's records were used by claimant's later counsel, Mr. Weigand, and thus awarded him a reduced fee of \$1,000, including costs. The administrative law judge next reduced Mr. Weigand's requested hourly rate of \$125 to \$90 and awarded a fee of \$14,319, representing the 159.1 hours requested at an hourly rate of \$90, plus \$2,964.04 in costs.

On appeal, employer challenges the fees awarded by the administrative law judge to both attorneys. Claimant responds, urging affirmance.

Employer initially contends that Mr. Coluccio is not entitled to a fee because he did not successfully prosecute the instant claim on behalf of claimant. In his Order, the administrative law judge specifically addressed and rejected employer's contention that Mr. Coluccio did not engage in a successful prosecution of the claim, finding that Mr. Coluccio presented a demand of \$15,000 to settle the claim in March 1993, which was more than employer was then offering and only \$5,000 less than the \$20,000 the case ultimately settled for. Moreover, the administrative law judge credited Mr. Weigand's statement that he used some of the records he received from Mr. Coluccio after his discharge by claimant

in prosecuting claimant's claim.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). See, e.g., *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). In order to be entitled to fee under Sections 28(a), and (b), claimant's attorney must engage in the successful prosecution of the claim. See, e.g., *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992).

In the instant case, although claimant discharged Mr. Coluccio prior to entering into a settlement agreement with employer, he performed services in good faith on behalf of claimant in furtherance of claimant's claim for benefits under the Act. Moreover, it is uncontested that claimant's claim was successfully prosecuted, as claimant received a \$20,000 settlement, and the credited statement of Mr. Weigand that he relied in part on Mr. Coluccio's work product to ultimately settle the claim constitutes substantial evidence in support of the administrative law judge's finding that Mr. Coluccio contributed to the successful prosecution of the claim. We therefore hold that Mr. Coluccio is entitled to a fee under Section 28 of the Act. See *Mayberry v. Walters*, 862 F.2d 1040, 1043 (3d Cir. 1988). Accordingly, we affirm the administrative law judge's award of a fee to Mr. Coluccio.

Employer next argues that the administrative law judge erred by not addressing its 117 specific objections to time entries contained in Mr. Weigand's fee petition. Employer divided its objections into 5 categories: 37.3 hours for research; 38 hours for conferring with claimant; 4.3 hours to draft a settlement agreement; 19 hours devoted to the average weekly wage issue; and 14.5 hours to prepare for the formal hearing. In his Order Approving Settlement, the administrative law judge summarized employer's objections as asserting that "this was a simple case, involving only average weekly wage, and that it was ultimately settled for an amount that was little more than nuisance value." See Order at 2. Next, the administrative law judge acknowledged claimant's responses to employer's objections, contained in a 36 page memorandum, finding these responses persuasive regarding the 159.1 hours requested.<sup>1</sup> Specifically, the administrative law judge found that claimant's foreign nationality required greater contact with counsel, as claimant was unfamiliar with the legal system and is not fluent in English. Finally, the administrative law judge took into consideration the fact that employer did not settle the claim until the morning of the formal hearing. He thus awarded the time requested by Mr. Weigand. However, the administrative law judge agreed with employer that a more experienced practitioner would have used his time more efficiently, and he therefore reduced the hourly

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<sup>1</sup>Mr. Weigand responded, *inter alia*, that medical care was also at issue, and that information had to be obtained from claimant's prior residence in Algeria, a country which was experiencing a civil war.

rate sought by Mr. Weigand to \$90. Accordingly, the administrative law judge reduced the fee requested by Mr. Weigand from \$19,887.50 to \$14,319.

We affirm the \$14,319 attorney's fee awarded to Mr. Weigand by the administrative law judge. In the instant case, the administrative law judge considered employer's objections to counsel's fee request as well as counsel's response. In considering the fee petition, the administrative law judge accepted counsel's responses to employer's objections to the time requested, but he reduced the hourly rate sought by approximately 28 percent, to \$90 per hour, as he agreed with employer that the amount of time spent indicated that counsel's expertise did not justify a higher rate. Pursuant to Section 702.132, 20 C.F.R. §702.132, a fee award shall be reasonably commensurate with the necessary work done. See *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n.*, 22 BRBS 434 (1989). Moreover, a fee award should be for an amount that is reasonable in relation to the results obtained. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In this case, the administrative law judge adequately addressed employer's objections, and employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in determining the amount of the fee. As the administrative law judge committed no reversible error, his attorney's fee award is affirmed.

Accordingly, the administrative law judge's Order Approving Settlement is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge