

BRB Nos. 99-1121
and 99-1190

FRANK SCHILLINGER)
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 Claimant-Respondent)
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 v.)
)
 CERES TERMINALS, INCORPORATED) DATE ISSUED:
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 and)
)
 SCHAFFER INSURANCE ADJUSTERS)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeals of the Supplemental Decision and Order Granting Attorney Fees of Rudolf L. Jansen, Administrative Law Judge, and Compensation Order Award of Attorney's Fees of Thomas C. Hunter, District Director, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (96-LHC-786) of Administrative Law Judge Rudolf L. Jansen and the Compensation Order Award of Attorney's Fees (Case No. 10-34501) of District Director Thomas C. Hunter 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 may be set aside only if the challenging party shows it 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, a crane operator, injured his right foot at work on March 9, 1995. Employer

voluntarily paid claimant temporary total disability benefits from March 10 to July 14, 1995, and some medical bills. The administrative law judge awarded claimant a scheduled permanent partial disability award under Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4), for a 50 percent impairment to the right foot. After the administrative law judge, on reconsideration, amended the award to reflect the maximum rate under Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), claimant obtained an award of approximately \$78,000.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of \$11,020, representing 42 hours of attorney services performed in 1996 and 1997 at \$150 per hour, 29.5 hours of attorney services performed in 1998 and 1999 at \$160 per hour, and \$1,922.05 in expenses. In his Supplemental Decision and Order Granting Attorney Fees, the administrative law judge awarded claimant's counsel the entire fee requested after addressing employer's numerous objections to the fee request.

Claimant's counsel also filed a fee petition with the district director, requesting an attorney's fee of \$2,137.50, representing 14.25 hours of attorney services at \$150 per hour. In his Compensation Order Award of Attorney's Fees, the district director awarded this sum in its entirety, but did not address employer's specific objections.

On appeal, employer challenges the fee awards of the administrative law judge, BRB No. 99-1121, and the district director. BRB No. 99-1190.¹ Claimant responds in support of both fee awards.

¹The Board consolidated employer's appeals of the administrative law judge's fee award, BRB No. 99-1121, and the district director's fee award, BRB No. 99-1190, in an Order dated October 5, 1999.

We first address employer's challenge to the district director's award of an attorney's fee. Employer argues that it is not liable for the entire 14.25 hours of services requested under Section 28(b) of the Act, 33 U.S.C. §928(b), or if it is, it is not liable for seven hours of services related to medical bills as it voluntarily paid them. 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 already paid or tendered by the employer. See *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995), *aff'g* 24 BRBS 84 (1990); 33 U.S.C. §928(b). The administrative law judge's award to claimant of scheduled permanent partial disability benefits and future medical benefits supports employer's liability for a fee under Section 28(b). See *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT)(9th Cir. 1998); *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999). Moreover, the district director properly held employer liable for the seven hours of services related to medical bills since employer had not paid all medical bills at the time of the district director's referral of the case to the Office of Administrative Law Judges and claimant subsequently obtained payment of these bills.² See Letter to the district director from claimant's counsel dated January 24, 1996. Thus, we affirm the district director's award of an attorney's fees payable by employer.³ *Rihner*, 41 F.3d at 997, 29 BRBS at 43 (CRT).

We next address employer's challenges to the administrative law judge's award of an attorney's fee. Employer initially challenges the administrative law judge's award of three hours for time spent preparing the fee petition. The United States Court of Appeals for the Ninth Circuit held in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT)(9th

²At the time of the hearing before the administrative law judge all outstanding medical bills had been paid. See Decision and Order at 5, 8.

³Employer's reliance on *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT)(9th Cir. 1991) is misplaced. In *Watts*, the parties reached an agreement over the amount of compensation due claimant at the informal conference and the only remaining issue concerned the attorney's fee. The court concluded in *Watts* that Section 28(b) does not authorize the payment of an attorney's fee for services performed by claimant's attorney unless there remains a dispute over claimant's compensation at the conclusion of informal proceedings and claimant obtains additional benefits through formal proceedings. See *Watts*, 950 F.2d at 607, 25 BRBS at 65 (CRT). In the instant case, employer paid temporary total disability benefits until July 14, 1995. In addition, the parties did not agree as to the amount of compensation due claimant at the informal conference and the case went on to a hearing and decision by the administrative law judge, who awarded more compensation to claimant than employer had voluntarily paid. See *Matulic*, 154 F.3d at 1052, 32 BRBS at 148 (CRT).

Cir. 1996), that time spent preparing a fee petition is compensable. The Board applies this holding in all circuits. See *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*, 120 U.S. 2215 (2000). Thus, the administrative law judge properly held this time compensable, and moreover, employer has not shown an abuse of discretion in the administrative law judge's finding that the requested three hours for this service is reasonable.

Employer additionally challenges the administrative law judge's award of \$354 in costs associated with claimant's counsel's research on jury verdicts in cases involving Drs. Fischer and Dwyer. Under Section 28(d) of the Act, 33 U.S.C. §928(d), costs may be awarded where claimant prevails, and the costs are necessary and reasonable. See *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); 20 C.F.R. §702.135. As employer has shown no abuse of discretion in the administrative law judge's finding that these costs are entirely proper, we affirm the administrative law judge's award of these costs.

Employer further challenges the amount of the fee award in light of the simplicity of this case, and the number of hours requested by claimant's counsel and approved by the administrative law judge. In this regard, employer contends that time spent on May 24 and 28, 1996, March 18, 1997, and May 5, 1998, is unnecessary, that time spent on March 26, April 2, July 15, 24, and 30, and August 2, 1996, April 24, May 13, 1997, February 19, March 19 and 25, May 14, 22, 27 and 29, 1998, and February 23 and 24, 1999, is excessive, and that time spent on March 4, July 10, 1996, and March 19, 24, and 26, and April 1, 1997, is not compensable as time spent performing clerical functions is not compensable. Pursuant to Section 702.132, 20 C.F.R. §702.132, a fee award shall be reasonably commensurate with the necessary work done given the quality of the representation and the complexity of the issues involved. 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); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); 20 C.F.R. §702.132.

We reject employer's contention that the administrative law judge erred in finding that this case did not involve merely a simple question concerning the extent of claimant's permanent partial disability, as he rationally stated that litigation would not have been necessary if that were so. Moreover, employer has shown no abuse of discretion in this regard, and in any event, the complexity of the case is related to the amount of benefits awarded, and the fee awarded should be commensurate with claimant's degree of success. That claimant obtained additional compensation before the administrative law judge in the amount of \$78,000 supports a fee award of \$11,000. See *Hensley*, 461 U.S. at 424.

Moreover, in considering counsel's fee petition, the administrative law judge adequately addressed employer's specific objections to the number of hours requested. Because employer has failed to show on appeal an abuse of discretion by the administrative law judge in awarding time for these services, having specifically considered each of employer's objections, we reject these item-specific contentions and decline to reduce the administrative law judge's fee award.⁴ *See generally O'Kelley v. Dep't of the Army/NAF*, BRBS , BRB No. 99-0810 (May 2, 2000). Thus, his attorney's fee award is affirmed.

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fees is affirmed. The district director's Compensation Order Award of Attorney's Fees also is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

⁴As employer did not raise objections before the administrative law judge to the services performed on April 14, 16, and 17, 1997, it cannot raise them for the first time before the Board on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).