BRB No. 99-0618

RENE M. DARBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Blewett W. Thomas, San Antonio, Texas, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (91-LHC-49, 97-LHC-1556) of Administrative Law Judge Richard D. Mills 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; the award will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See, e.g., Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980).

This case has a protracted procedural history which is necessary to recount. Claimant sustained left elbow and cervical spine injuries in a September 1987 work accident. Employer paid claimant temporary total disability benefits. Claimant

sought additional benefits, and Administrative Law Judge Jennings, in a 1992 decision, found claimant's thoracic spinal condition to be unrelated to the work injury. He further found that employer established the availability of suitable alternate employment with a modified job at its facility. Judge Jennings denied claimant permanent partial disability benefits for his cervical injury as claimant had no loss in wage-earning capacity. Claimant was awarded permanent partial disability benefits for a 15 percent impairment to the left arm in accordance with the schedule at Section 8(c)(1), 33 U.S.C. '908(c)(1). Judge Jennings further found that claimant's average weekly wage was higher than that utilized by employer in paying benefits. Lastly, Judge Jennings found that employer was not liable for the cost of Dr. Danielson's treatment of claimant. As a result of this proceeding, claimant was awarded an attorney=s fee of approximately $8,500, plus costs.

Claimant appealed the decision to the Board, raising issues concerning suitable alternate employment and wage-earning capacity. The Board affirmed the administrative law judge=s decision in all respects. *Darby v. Ingalls Shipbuilding, Inc.*, BRB No. 92-1547 (Feb. 24, 1995). Claimant thereafter appealed the Board=s decision to the United States Court of Appeals for the Fifth Circuit. The court affirmed the finding that employer established suitable alternate employment by virtue of a light-duty job in its facility, but remanded for further findings concerning claimant=s post-injury wage-earning capacity, stating that the administrative law judge made no determination that claimant=s post-injury wages represented his wage-earning capacity and that he therefore had no loss. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996).

Administrative Law Judge Mills (the administrative law judge) consolidated the issue on remand from the court with a claim for a new injury. Claimant injured his neck in May 1992 while working at his modified job. The administrative law judge found that claimant had no loss in wage-earning capacity resulting from the first injury, finding that claimant=s actual post-injury earnings represented his wage-earning capacity. The administrative law judge further found that, following the May 1992 injury, claimant was unable to return to the modified job in employer=s facility. He found that employer established suitable alternate employment as of August 31, 1997, when claimant became self-employed. Thus, claimant was awarded temporary total, permanent total, and ongoing permanent partial disability benefits as a result of the May 1992 injury. 33 U.S.C. '908(a), (b), (c)(21).

Claimant filed a motion for reconsideration of this decision. The administrative law judge rejected claimant=s contention that he is entitled to a nominal award for the 1987 injury. The administrative law judge also stated that the 1992 aggravation of claimant=s condition is a new injury under the Act, but that it arose out of the

1987 injury; Athus, any present loss in wage earning capacity is a product of the combination of the 1987 injury and the 1992 aggravation.@ Order Denying Recon. at 2. Claimant did not appeal the administrative law judge=s decision on remand or the order denying his motion for reconsideration.

Thereafter, claimant=s counsel requested an attorney=s fee of $132,343.75, representing 756.25 hours at an hourly rate of $175, plus expenses of $3843.11. Employer filed objections to the fee petition, to which claimant responded. The administrative law judge first stated that he considered an hourly rate of $120 appropriate for all services, based on the complexity of the legal issues in the case and on the "level of the proceedings," and that enhancement of the rate was not warranted. The administrative law judge disallowed all time performed before February 27, 1997, as services before that date were not performed before the Office of Administrative Law Judges, leaving for his consideration 371 hours.[1]

[1]Claimant=s counsel contends on appeal that the administrative law judge's failure to inform him promptly that he would not consider services performed before other tribunals prejudiced his ability to seek a fee from those tribunals. This contention is without merit for two reasons. First, the law is well-established that counsel must seek a fee from the tribunal before whom the work was performed. 33 U.S.C. §928(c); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). Secondly, counsel filed petitions for an attorney=s fee for work performed before the Board and the Fifth Circuit. In an Order dated May 24, 1999, the Board denied claimant=s counsel a fee, stating that claimant was unsuccessful on appeal.

The administrative law judge next considered employer=s contention that the fee should be reduced because claimant was not fully successful in that he did not obtain benefits for the 1987 injury after the case was remanded by the Fifth Circuit. The administrative law judge agreed that the fee should be tailored to the degree of success, and therefore stated he would reduce the fee by 25 percent, after deductions were made based on other valid objections. The administrative law judge reduced or disallowed requested time for telephone calls, file review, tasks he found to be clerical in nature, personal service of subpoenas, writing the brief and preparing for the hearing, and vocational work performed by counsel. The administrative law judge reduced entries in order to comply with the unpublished orders of the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished), and disallowed all time counsel spent on the motion for reconsideration, noting that the motion was entirely unsuccessful. With regard to the requested expenses, the administrative law judge disallowed the claimed $813.04 for photocopying and long distance telephone charges as being a part of the attorney=s overhead costs. The administrative law judge thus concluded 242.125 hours should be allowed at an hourly rate of $120, for a total of $29,055, plus expenses of $3,030.07. Subtracting 25 percent due to claimant=s limited success, the administrative law judge awarded counsel a fee of $21,791.25, and expenses of $2,272.55. Claimant appeals the administrative law judge=s fee award, and employer responds, urging affirmance.

Claimant filed a motion for reconsideration of this Order. The Board denied the motion in an Order dated August 20, 1999, explaining the basis for its statement that claimant did not obtain any further benefits for his 1987 injury by virtue of his appeal to the Board, his subsequent appeal to the Fifth Circuit or the remand to the administrative law judge. We note, moreover, that the Fifth Circuit summarily denied claimant's request for an attorney's fee for work performed before the court, as well as claimant's motion for reconsideration thereof. Claimant may apply for a fee for work performed before the district director at any time.

We first address claimant's challenge to the administrative law judge's determination that the fee should be reduced by 25 percent to account for the degree of success. The administrative law judge properly recognized that a fee award should be tailored based on claimant's level of success. *Hensley v. Eckerhart*, 461 U.S. 421 (1983); *see Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where, as here, claims involve a common core of facts, or are based on related legal theories, the focus should be on the significance of the overall relief obtained in relation to the hours reasonably expended on litigation. If a claimant has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the claimant achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. Under the Act, the second prong of the *Hensley* test requires the administrative law judge to award a reasonable fee after consideration of employer's objections and the regulatory criteria, 20 C.F.R. §702.132. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)*(en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995).

In this case, the administrative law judge properly recognized that claimant was unsuccessful in obtaining further benefits for his 1987 injury as a result of the proceedings on remand. The administrative law judge found that claimant has no loss in wage-earning capacity due to the 1987 injury, and is not entitled to a nominal award for this injury. The fact that the administrative law judge stated on reconsideration that the present loss in wage-earning capacity is due to both the 1987 and 1992 injuries does not make claimant successful for the period of time prior to the second injury. It was only after the 1992 "aggravation" (which is a "new" injury under the Act) that claimant became entitled to disability compensation based on a loss in wage-earning capacity. Thus, the mere fact that the two injuries may be anatomically related based on the medical evidence of record did not result in any greater benefit to claimant; the interrelatedness of the claims does not prevent the administrative law judge from reducing the overall fee to reflect the degree of success. *See Hensley,* 461 U.S. at 435-436; *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hill v. Avondale Industries, Inc.,* 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790 (5th Cir. 1999). Accordingly, we affirm the

administrative law judge's decision to reduce the fee by 25 percent in light of claimant's lack of success on the 1987 claim.

We must, however, vacate the administrative law judge's decision to reduce as well the awarded costs by 25 percent. The Board held in *Ezell*, 33 BRBS at 31, that the analysis of costs compensable under Section 28(d) of the Act, 33 U.S.C. §928(d), involves only inquiry into whether the costs are reasonable and necessary; thus, requested costs should not be reduced based on limited success. Moreover, we agree with counsel that the administrative law judge erred in summarily denying his photocopying and long distance expenses as being a part of office overhead. In *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989)(order), the Board stated that an administrative law judge is not mandated either to award or to disallow photocopying costs as a part of office overhead. Rather, the administrative law judge must evaluate the expenses such as those for photocopying or long distance telephone calls in a given case to determine whether they are separately compensable and may award actual reasonable costs for these services. In this case, the administrative law judge gave no reason for finding that these expenses should be included as office overhead. Thus, since the administrative law judge erred in reducing the requested costs based on a limited success analysis, and because he gave no reason for his finding regarding the photocopying and long distance expenses, we remand this case to the administrative law judge for further findings.

Next, claimant contends the administrative law judge erred in awarding an hourly rate of $120. Counsel's fee petition was based on an hourly rate of $175. The administrative law judge stated that a rate of $120 is reasonable based on the complexity of the legal issues involved and the level of the proceedings. He also stated he found no basis on which to award an enhanced hourly rate.

We remand the case for reconsideration of counsel's hourly rate, as the basis for the administrative law judge's reasoning is flawed in this regard. Claimant was not seeking an enhanced rate to account for delay in payment for services rendered after February 27, 1997, before the administrative law judge, but was seeking his normal billing rate of $175 per hour.[2] The applicable regulation, 20 C.F.R. §702.132(a), states that the fee application should state the normal billing hour of the person performing the work. Moreover, although the fee awarded should be reasonably commensurate with the necessary work performed and take into account the quality of the representation,

[2]Claimant was seeking an enhanced fee for services performed before 1995, but, as noted, *see* n.1, *supra*, the administrative law judge properly found that these services were not performed before his office and thus were not for his consideration.

the complexity of the legal issues involved, and the amount of benefits awarded, 20 C.F.R. §702.132(a), the administrative law judge stated he reduced the hourly rate based on the complexity of the legal issues involved, and the "level of the proceedings." This latter consideration is not explained and does not appear in the regulation. On remand, therefore, the administrative law judge should consider that claimant was seeking a fee based on his normal billing rate, and address his finding in terms of the regulatory criteria. We note, however, that the administrative law judge is not required to award counsel the hourly rate claimed if he determines that the number of hours requested times the normal billing rate would result in an excessive fee given the degree of success. *See Hensley*, 461 U.S. at 435-436; *Stowars v. Bethlehem Steel Corp.,* 19 BRBS 134 (1986).

We now direct our attention to claimant's contentions regarding the administrative law judge's reduction in the number of hours requested. We affirm the administrative law judge's reduction of time, totaling approximately 87.5 hours, for telephone conferences with claimant, exhibit preparation and filing, file review, miscellaneous tasks, preparation of claimant's response to employer's motion to consolidate and his brief to the administrative law judge, and preparation for the hearing. The administrative law judge rationally disallowed this time as excessive for the tasks specified, *see generally Welch v. Pennzoil Co.,* 23 BRBS 395, 401 (1990), or as the fee petition's being insufficiently specific as to their necessity. Claimant has not established an abuse of discretion by the administrative law judge in this regard.[3] *See Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194, 197 (1986). Similarly, we affirm the administrative law judge's disallowance of 7.25 hours counsel spent personally traveling to New Orleans to obtain subpoenas and to Pascagoula to serve the subpoenas, as the administrative law judge rationally found that claimant was not required to handle such duties personally in view of the ability to obtain and serve subpoenas by mail. Counsel contends on appeal that "time was of the essence" in regard to the subpoenas. We note, however, that overnight mail service is widely available, and employer should not have to bear the costs of counsel's time consuming efforts when less costly methods are available.

[3]Contrary to claimant's contention, the administrative law judge is not required to hold a hearing in order for claimant to explain his fee petition. *See generally Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded on other grounds*, 433 U.S. 904 (1977), *reaff'd on other grounds*, 575 F.2d 79 (5th Cir. 1978), *aff'd on other grounds sub nom. P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979); *see also Parks v. Newport New Shipbuilding & Dry Dock Co.,* 32 BRBS 90 (1998), *aff'd mem.*, No. 98-1881 (4th Cir. Dec. 16, 1999); *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

Claimant next contends the administrative law judge erred in denying a fee for the 9.25 hours he spent preparing his motion for reconsideration/clarification. The administrative law judge denied this time based on the fact that he denied claimant's motion for reconsideration. Claimant contends that inasmuch as the administrative law judge indeed clarified his decision, the time spent in preparation of the motion is compensable. We reject the contention that the administrative law judge erred in disallowing this time. As discussed, *supra*, the motion for reconsideration was unsuccessful in increasing claimant's award. We therefore affirm the administrative law judge's denial of a fee for the time spent preparing the motion. *See generally Brooks*, 963 F.2d at 1532, 26 BRBS at 161(CRT).

We agree with claimant, however, that the administrative law judge erred in disallowing all time expended by counsel in investigation of the labor market. Employer objected to the time counsel personally spent contacting maritime employers in Mobile, Alabama, and in Louisiana, and in researching the job market through the Mississippi Employment Security Commission, contending he should have hired a vocational expert to perform this work. The administrative law judge agreed with employer, and disallowed the 16.75 hours requested for this work. We reject the reasoning employed by employer and the administrative law judge. One of the issues before the administrative law judge was the availability of suitable alternate employment following the 1992 injury. Claimant was not required to obtain a vocational expert in order to research the job market or to submit his own labor market survey. As counsel correctly contends, he is entitled to a reasonable fee for necessary work performed in preparation for cross-examining employer's vocational expert. We, therefore, vacate the administrative law judge's denial of all fees for this time, and remand for the administrative law judge to award counsel a reasonable fee for these services. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55, 62 (1989). We also remand for the administrative law judge to award counsel a reasonable fee for time spent preparing a response to employer's objections to the fee petition. Merely because employer's objections "were not frivolous and without merit," Supp. Decision and Order at 5, does not mean claimant's response was unnecessary. Indeed, some of employer's objections were rejected on the basis of claimant's response. *See generally Hill*, 32 BRBS at 192-103 (fee petition compensable); *Jarrell v. Newport New Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982) (counsel entitled to fee on appeal for defending entitlement to a fee).

Finally, claimant's counsel makes a vague constitutional challenge to the way in which fee awards are determined under the Act. Counsel contends that limitations on fee awards due to the size of the compensation recovery or due to findings by adjudicators that "necessary" services are excessive has the effect of restraining a claimant's right to

competent counsel.[4] This constitutional challenge was rejected by the Supreme Court in *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720-721 (1990), a case in which the Court addressed Section 28 of the Longshore Act, 33 U.S.C. §928, as incorporated into the Black Lung Act, 30 U.S.C. §932, and its implementing regulation at 20 C.F.R. §725.366. The Court held that mere assertions, as here, that limits on fee awards impede a claimant's right to competent counsel are insufficient to establish a denial of due process. We note, moreover, that the United States Court of Appeals for the Tenth Circuit has held that an attorney has no property interest in the claimed hourly rate or in the requested number of hours, but only in a "reasonable fee," *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997), and that the regulation at 20 C.F.R. §702.132(a) provides the attorney with "all the process which [is] due." *Id.,* 124 F.3d at 1380, 31 BRBS at 135(CRT). Claimant's contention therefore is rejected.

[4]Counsel has standing to raise this issue. *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720-721 (1990).

Accordingly, the administrative law judge's award of an attorney's fee and costs is vacated. The case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge