BRB Nos. 03-0855
and 03-0855A

MICHAEL LEE Claimant-Respondent Cross-Petitioner v. BAY CITY MARINE and MAJESTIC INSURANCE COMPANY Employer/Carrier- Petitioners Cross-Respondents	)	DATE ISSUED: Sept. 15, 2004 DECISION and ORDER

Appeals of the Supplemental Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree (Dupree Law, plc), San Diego, California, for claimant.

Rudy H. Lopez (Trovillion, Inveiss, Ponticello & Demakis), San Diego, California, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Supplemental Decision and Order (2001-LHC-3172, 3173, 3174, 3175) of Administrative Law Judge Richard K. Malamphy 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer as a rigger since 1999. Claimant filed four separate claims for benefits under the Act, alleging work-related injuries since he began his current employment. Following a formal hearing, the administrative law judge issued a decision awarding claimant continuing temporary total disability compensation, commencing on December 18, 2000, at a weekly rate of $334.36, and all medical expenses related to the work accident. 33 U.S.C. §§908(b), 907.

Claimant's counsel thereafter sought an attorney's fee of $76,166.05, representing 202.75 hours of services by Attorney Dupree at an hourly rate of $300, 2.3 hours of services by Attorney Galichon at an hourly rate of $200, 4.3 hours of work by Ms. Closson at an hourly rate of $75, and 2.1 hours of work by Ms. Baja, at an hourly rate of $75, plus expenses of $14,401.05.[1] Employer filed objections to this fee request. In his Supplemental Decision and Order, the administrative law judge, after considering employer's objections, reduced the number of hours requested and Attorney Dupree's requested hourly rate to $225. Accordingly, the administrative law judge awarded claimant's counsel a total fee of $48,278.51, representing $34,332 in services rendered, and $13,946.51 in costs.

Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant cross-appeals, arguing that the administrative law judge erred in reducing counsel's requested hourly rate, and time for various entries. Employer responds to claimant's cross-petition, urging affirmance of the administrative law judge's findings on the points raised by claimant.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Parrott v. Seattle Joint Port Labor Relations Committee of the Maritime Ass'n*, 22 BRBS 434 (1989).

In challenging the administrative law judge's fee award, employer initially argues that claimant's counsel's fee petition fails to meet the requirements of 20 C.F.R. §702.132 and 20 C.F.R. §802.203. Specifically, employer asserts that the administrative

[1] At the time this case was referred to the Office of Administrative Law Judges, Mr. Dupree and Mr. Galichon were associated in a professional law corporation. On April 1, 2002, Mr. Galichon disassociated. Mr. Dupree's fee petition was therefore submitted in two parts: the first for services when the firm was known as Dupree Galichon, and the second, for services performed by Dupree Law after the April 1, 2002 disassociation. Ms. Closson was counsel's paralegal, and Ms. Baja a law student.

law judge erred in concluding that claimant's counsel did not improperly utilize unit or incremental billing when documenting his fee. Section 702.132 of the Act's implementing regulations, which governs the requirements for submitting fee applications at the administrative law judge level,[2] provides that a complete fee application must contain a statement of the extent and character of the necessary work done and the professional status and billing rate of each person performing that work. 20 C.F.R. §702.132. In addressing this specific objection, the administrative law judge found that claimant's counsel's fee petition was sufficiently detailed to comply with the regulatory requirements, that the requested hours were for the most part adequately and properly documented, and that counsel's descriptions of the services performed are clear and sufficiently specific to establish that such tasks were reasonable and related to the claim. Pursuant to these findings, the administrative law judge concluded that rather than charging a unit fee for each task without indicating who performed the task, as employer charges, counsel for claimant indicated who performed each task and for how long. The administrative law judge therefore rejected employer's argument that claimant's counsel's fee petition did not comply with the regulations. Supp. Decision at 7. As the administrative law judge's conclusion that claimant's counsel's fee petition complies with the requisite regulation is rational and supported by substantial evidence, we reject employer's initial allegation of error. *See generally Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

In his cross-appeal, claimant contends that the administrative law judge erred in disallowing 5.2 hours of services performed before the state Workers' Compensation Appeals Board. Claimant alleges that although these services concerned a discovery dispute in a different case involving the same parties, they were necessary to protect claimant's Longshore Act claim.[3] The Board has held that an attorney is entitled to a fee for services which relate to state claims, as long as the services are also necessary to the claim under the Act and counsel has not been previously paid for them. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the instant case, the administrative law judge found that counsel for claimant did not submit any evidence or arguments that demonstrate that the work performed before the state tribunal was necessary to claimant's claim under the Act and, accordingly, he disallowed the fee requested for this service. Supp. Decision at 8. It is within the administrative law judge's purview as fact-finder to

[2] 20 C.F.R. §802.203 sets out the requirements for fee petitions filed with the Board.

[3] Claimant's counsel asserts that he was forced to defend motions made by the current employer to protect claimant from being forced to give testimony under oath that could be used against him in the Longshore case.

determine whether the time expended in the state suit was necessary to further claimant's claim under the Longshore Act, and claimant has not demonstrated reversible error in this regard. Accordingly, the administrative law judge's denial of a fee for this entry is affirmed.

Claimant next asserts that the administrative law judge, without citing any authority or providing an explanation, arbitrarily reduced certain entries for time requested and billed in quarter-hour increments to .13 of an hour. We disagree. Contrary to claimant's contentions, the administrative law judge reduced certain quarter-hour entries to .13 hours because he deemed the tasks they represented to be small, and as a result the time requested to be excessive, rather than relying on specific case law. Supp. Decision at 8. Accordingly, claimant's objections in this regard are rejected.

Employer has incorporated into its appellate brief the specific objections to claimant's counsel's fee petition which it raised before the administrative law judge; as acknowledged by the administrative law judge in his 19-page decision, employer challenged 104 of the 108 entries submitted by claimant's counsel. A review of the administrative law judge's decision reflects that, after thoroughly addressing employer's objections, the administrative law judge reduced the number of hours for attorney services performed by claimant's counsel by over 25 percent. Supp. Decision and Order at 9-15. As for the remainder of the entries which he approved, the administrative law judge found that those hours were reasonable, necessary, and appropriate at the time the services were rendered, and he further found that claimant's counsel provided detailed support for those services. As 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 this regard, we decline to further reduce or disallow the hours addressed by the administrative law judge. *Pozos v. Army & Air Force Exch. Service*, 31 BRBS 173 (1997); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Next, both employer and claimant challenge the hourly rate awarded to counsel by the administrative law judge. Employer avers that based upon the prevailing rates in San Diego at the time the services were performed, the community standards, the lack of complexity of the legal issues and the benefits of approximately $38,000 awarded to date, an hourly rate of $175 is sufficient. Claimant conversely argues that the administrative law judge erred in reducing the hourly rate sought by Attorney Dupree from $300 to $225, since he did not account for the challenge of representing claimant, given claimant's psychiatric condition,[4] and that the rate awarded is not commensurate with counsel's qualifications. In addressing the issue of counsel's hourly rate, the administrative law judge specifically considered the complexity of the legal issues involved

[4] Claimant allegedly became upset and felt humiliated by questions posed to him by counsel at the hearing and thereafter created a threatening atmosphere. *See* Cl. Petition for Review and Memorandum of Law at 8-9.

in the case at bar, the qualifications of claimant's counsel and the prevailing rate for attorneys in the area, the results obtained and the duration of the case. Pursuant to these considerations, the administrative law judge concluded that an hourly rate of $225 for Mr. Dupree was commensurate with the services performed.[5] Supp. Decision at 6. As the administrative law judge considered the requisite factors in reducing counsel's requested fee, we reject both parties' contentions and affirm the administrative law judge's hourly rate award. *See Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Watkins*, 26 BRBS 179.

Lastly, employer contends that the administrative law judge erred in awarding the costs requested by claimant's counsel in this case as neither counsel, in his fee petition, nor the administrative law judge, in awarding these costs, provided a sufficient explanation or rationale as to why the requested costs were reasonable and necessary to the litigation of claimant's claims. In support of its position on appeal, employer alleges that it is only liable for $750 of Dr. Seelig's $1,500 deposition cost, asserting that it only requested Dr. Seelig's attendance for one hour and should not have to pay an additional $750 for claimant's retention of Dr. Seelig for a second hour. Employer also challenges the witness fee awarded for Dr. Seelig's trial testimony and the examination fee of Dr. Dores. We affirm the administrative law judge's award of costs payable by employer. Section 28(d) of the Act, 33 U.S.C. S928(d), provides that where an attorney's fee is awarded against an employer or carrier, there may be a further assessment against such employer or carrier for costs, fees, and mileage for necessary witnesses attending the hearing at the instance of claimant. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Section 28(d) requires an analysis of the reasonableness and necessity of the costs incurred by counsel in litigating the case. In this case, the administrative law judge addressed employer's specific objections and determined that the $1,500 witness fee claimed for Dr. Seelig's deposition is reasonable, in that the time spent deposing that physician for the purpose of gathering information regarding claimant's medical condition was entirely necessary, and that although claimant's counsel's questioning of Dr. Seelig resulted in an additional charge, the fee shifting nature of the Act renders employer responsible for that physician's time. We hold that the administrative law judge acted within his discretion in finding the additional hour of Dr. Seelig's deposition to be necessary and his fee to be reasonable; we therefore affirm the administrative law judge's determination that employer is liable for that cost. 33 U.S.C. §928(d). The administrative law judge likewise concluded that the remainder of claimant's documented costs are reimbursable as they were necessary for the successful prosecution of the claim. Employer has not established that the administrative law judge erred in awarding these costs. *See generally Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989)

[5] The administrative law judge specifically found employer's suggested hourly rate of $175 for an attorney with experience in the San Diego area to be substantially low and unreasonable. Supp. Decision at 6.

(Order). Therefore, the administrative law judge's determination that employer is liable for these costs is affirmed.

Accordingly, the administrative law judge's Supplemental Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge