BRB Nos. 09-0126
and 09-0126A

D.T.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ROGERS TERMINAL & SHIPPING CORPORATION	)	DATE ISSUED: 09/23/2009
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Attorney Fee Order of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson, Jay W. Beattie and Kennedy K. Luvai (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Attorney Fee Order (2006-LHC-00477) of Administrative Law Judge Gerald M. Etchingham 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 a work-related left shoulder injury on January 11, 2002. Employer paid medical benefits and temporary total disability benefits for this injury. Claimant filed a claim for additional benefits, and the parties disputed claimant's average weekly wage and the extent of his disability, if any. The administrative law judge awarded claimant compensation for temporary total disability from January 12, 2002 through October 18, 2002, based on an average weekly wage of $1,365.75, and, from October 19, 2002, an ongoing award of partial disability benefits of $5.56 per week. Both claimant and employer appealed the administrative law judge's award; the Board affirmed in all respects. *D.T. v. Rogers Terminal & Shipping Corp.,* BRB Nos. 07-1003/A (Aug. 29, 2008) (unpub.).[1]

Claimant's attorney subsequently sought a fee for work performed before the administrative law judge from March 20, 2006 through September 6, 2007.[2] Employer objected on the basis that it is not liable for any attorney's fee as claimant did not obtain greater compensation than employer tendered. Employer also objected to the hourly rate and to the amount of the fee request in relation to claimant's success. The administrative law judge rejected employer's contention that it is not liable for an attorney's fee. He reduced the hourly rate for attorney services to $250 and awarded the requested hourly rate of $110 for legal assistant services. The administrative law judge did not disallow any of the claimed hours. The administrative law judge, however, reduced the overall fee by one-third on the basis of claimant's degree of success. Thus, the administrative law judge awarded claimant's counsel $14,508.23 in fees and costs payable by employer.[3]

On appeal, claimant challenges the administrative law judge's reduction of his hourly rate from $350 to $250 and the reduction of the overall fee by one-third. Employer responds, urging affirmance of the administrative law judge's award in these respects. Claimant filed a reply brief. BRB No. 09-0126. Employer, in its cross-appeal, challenges the administrative law judge's finding that it is liable for any attorney's fee to claimant's counsel. Claimant responds, urging affirmance of the administrative law

[1] This decision is on appeal to the United States Court of Appeals for the Ninth Circuit, No. 08-74397.

[2] Counsel sought a fee of $29,012.50, representing 82.75 hours of attorney services at an hourly rate of $350, and 1.25 hours of legal assistant services at an hourly rate of $110, plus an additional $624.90 in costs.

[3] The administrative law judge found the lodestar fee to be $20,825.00, which "did not bear a reasonable relationship to the additional compensation awarded" claimant. Therefore, the administrative law judge reduced the fee to two-thirds of the claim for fees. Attorney Fee Order at 4-7.

judge's determination that employer is responsible for counsel's fee. Employer filed a reply brief. BRB No. 09-0126A.

Initially, we address employer's cross-appeal. Employer contends that the administrative law judge erroneously found it liable for the payment of claimant's counsel's fee pursuant to Section 28(b) of the Act, 33 U.S.C.§928(b), as claimant did not obtain more compensation than employer tendered.[4] *See Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Employer made lump-sum settlement offers to claimant for $10,000 and subsequently for $17,500, $18,000 and $25,000. Employer offered, in the alternative to the latter two offers, to settle the claims for ongoing awards of $1 per week in order to preserve claimant's right to seek modification. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Claimant refused each offer. The administrative law judge awarded claimant an additional lump sum of $6,934.88, and ongoing benefits of $5.56 per week.

The administrative law judge declined to compare employer's tender of $25,000 to claimant's success, finding that it is appropriate only to compare to claimant's success the offer most similar to that success, *i.e.*, the $1 per week offer. The administrative law judge found that claimant's success in obtaining $6,934.88, plus ongoing benefits of $5.56 per week exceeds the offer of $1 per week such that employer is liable for claimant's fee pursuant to Section 28(b). On appeal, employer contends that the administrative law judge erred in failing to compare the $25,000 tender to claimant's success.

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[4] No party contends that Section 28(a), 33 U.S.C. §928(a), applies to this case, and, thus, the provisions of that subsection need not be addressed. Section 28(b) states, in pertinent part:

> employer shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. . . .

33 U.S.C. §928(b).

We hold that any error in the administrative law judge's decision to compare only the $1 per week tender to claimant's success is harmless. Even if the $25,000 tender is compared to claimant's success, claimant's receipt of an ongoing award that preserves his right to seek modification creates an inchoate right worth more than the lump sum settlement, as such would have foreclosed claimant's right to seek benefits in the future. *See generally E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *see Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT). Moreover, the administrative law judge did not err in finding that his award of benefits is greater than the $1 per week tendered by employer. Claimant received additional total disability benefits and an ongoing award of $5.56 per week reflecting the actual diminution in claimant's wage-earning capacity due to his injury. This recovery is greater than the $1 per week tendered by employer.

Contrary to employer's contention, the decision in *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT), does not compel a different result. In *Richardson*, employer tendered $5,000 to the claimant, which was refused. Claimant recovered an additional $932 for his knee injury, but a claim for additional benefits for a back injury was denied in its entirety. Although it was found that claimant's back injury had not been fabricated, claimant was not entitled to benefits for the injury beyond those which employer had paid.[5] The Ninth Circuit affirmed the finding that claimant did not successfully prosecute the back injury claim, so that employer was not liable for a fee under Section 28(a). The court stated that the claimant did not receive "actual relief . . ., only the possibility of future relief." In this case, however, claimant received an actual award for a present disability, and not, as employer suggests, the mere possibility of future relief.[6] We therefore affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee pursuant to Section 28(b).

[5] The court also held that because claimant failed to establish the apportionment of the settlement offer between his two injuries, the total of the settlement offer must be compared to claimant's recovery on the two claims. As the recovery, $932, was less than the tender, $5,000, employer was not liable for an attorney's fee pursuant to Section 28(b). *Richardson*, 336 F.3d at 1107, 37 BRBS at 82(CRT).

[6] Moreover, even if claimant received a nominal award, such would represent a present disability. In *Rambo II*, the Supreme Court stated that to effectuate the Act's mandate to account for the future effects of disability, there must be "a cognizable category of disability that is potentially substantial, but presently nominal in character." 521 U.S. at 135, 31 BRBS at 60(CRT).

In his appeal, claimant contends the administrative law judge erred in rejecting counsel's evidence of the "market" hourly rates of comparable attorneys in Portland, Oregon, and relying instead on hourly rate determinations made in other longshore cases. For the reasons stated in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), we vacate the hourly rate determination for attorney services, and we remand the case for the administrative law judge to determine a reasonable hourly rate consistent with these decisions. *See H.S. v. Dept. of Army/NAF*, 43 BRBS 41 (2009).

Claimant also contends that the administrative law judge erred in reducing the overall fee by one-third. The administrative law judge found the fee of $20,825, resulting from a reasonable number of hours times a reasonable hourly rate, did not bear a "reasonable relationship to the additional compensation awarded" to claimant. Attorney Fee Order at 6. The administrative law judge stated that he found no special circumstances in this case to justify an attorney's fee award "so out of proportion to the additional compensation awarded," and he awarded a fee of $14,508.23, based on a reduction of one-third. *Id.*

We affirm the administrative law judge's finding as it is within his discretion and comports with the Supreme Court's holding that the critical factors in determining the amount of an attorney's fee are the degree of success and the amount of benefits awarded. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Although claimant succeeded in obtaining additional benefits, the administrative law judge could rationally find that the amount of the fee was excessive in view of claimant's partial success on the average weekly wage and wage-earning capacity issues and the amount of benefits obtained. *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). As claimant has not demonstrated an abuse of discretion in this regard, we affirm the reduction in the fee based on the degree of success. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

Accordingly, we vacate the hourly rate awarded by the administrative law judge, and we remand the case for further consideration consistent with this decision. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge