

EDWARD M. BOGDEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 01/26/2011
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	DECISION and ORDER
Party-In-Interest)	<i>EN BANC</i>

Appeal of the Attorney Fee Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Jean E. Novak (Strassburger McKenna Gutnick & Gefsky), Pittsburgh, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2008-LHC-01403) of Administrative Law Judge Daniel L. Leland 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). This case is before the Board for the second time.

Claimant, who last worked for employer on May 8, 2002, sought benefits under the Act for a 30.938 percent binaural hearing loss, based on a May 3, 2002, audiogram. The parties stipulated that claimant sustained a work-related hearing loss but disagreed as to the extent of that loss and as to whether employer's payment of compensation for his back injury would affect claimant's entitlement to benefits for the work-related hearing loss.¹ Based on the May 3, 2002, audiogram, the administrative law judge found claimant entitled to 61.876 weeks of permanent partial disability benefits for his hearing loss commencing on May 3, 2002. 33 U.S.C. §908(c)(13). The administrative law judge determined, however, that with the exception of the period from May 3 through May 8, 2002, the scheduled award for claimant's work-related hearing loss is subsumed in the total disability award for claimant's prior back injury and, thus, is not payable. Therefore, he awarded claimant six days of benefits for his hearing loss.

Claimant appealed, challenging the administrative law judge's finding that his entitlement to a scheduled award for his hearing loss was terminated by his receipt of total disability benefits for a different injury. The Board held that claimant is entitled to the resumption of his scheduled permanent partial disability award for his work-related loss of hearing as of October 27, 2004, the date on which his permanent total disability award for his back injury converted to a permanent partial disability award for that injury. *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010). Accordingly, the Board modified the administrative law judge's decision to award claimant concurrent permanent partial disability benefits pursuant to Section 8(c)(21) and Section 8(c)(13). *Id.*

Claimant's counsel filed an application for an attorney's fee with the administrative law judge in the amount of \$10,782.50, representing 22.7 hours of work at an hourly rate of \$475. The administrative law judge denied the 1.1 hours requested by counsel to draft his fee petition but otherwise awarded the hours and hourly rate as requested. On appeal, claimant argues that the administrative law judge erred in denying counsel the 1.1 hours he expended in drafting his fee petition. Employer responds, urging affirmance.

Claimant's counsel asserts that the administrative law judge's denial of the time requested for preparation of the fee petition is contrary to the present state of the law on that issue. Counsel argues that the administrative law judge's reliance on the Board's

¹ Claimant previously sustained a work-related back injury on February 24, 2002. Claimant received temporary total, permanent total and permanent partial disability benefits for various periods. Previous proceedings regarding claimant's claim for benefits under the Act for his back injury were finally resolved by the Board's decision in *Bogden v. Consolidation Coal Co.*, BRB No. 06-0193 (Nov. 9, 2006) (unpub.).

decision in *Sproull v. Stevedoring Services of America*, 28 BRBS 271, 277 (1994)(*en banc*), is misplaced for the Board has since acceded to the proposition that general federal fee-shifting law applies to the determination of a reasonable fee under Section 28 of the Act and, thus, the Board has since stated that a reasonable amount of time spent in preparation of the fee petition is compensable. Counsel maintains that the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has determined that attorneys are entitled to a reasonable fee for time associated with the preparation of their fee petitions. In contrast, employer maintains that because the administrative law judge considered and rejected counsel's contention that *Sproull* is inapplicable, and as *Sproull* has not been overruled or addressed in a decision by the Third Circuit, the administrative law judge acted within his discretion in concluding that the time spent by counsel in preparing his fee petition is not compensable.

The administrative law judge, citing *Sproull*, observed that the Board "has held that preparing a motion for attorneys' fees is not reasonably necessary to protect claimant's interests," and thus, cannot be recouped by counsel because it is a clerical task which is part of an attorney's general overhead expense. Attorney Fee Order at 4. The administrative law judge recognized that the Board's holding in *Sproull* "is at variance from the Ninth Circuit's position," but that "[t]he *en banc* Board saw no reason to depart from its longstanding position that time spent preparing a fee petition is not compensable." *Id.* The administrative law judge thus denied counsel's request for 1.1 hours in drafting the fee application.

In *Sproull*, the Board addressed a fee petition for work performed before it and disallowed the time claimed for preparation of the attorney's fee petition, stating that this work was not reasonably necessary to protect claimant's interests. In reaching its decision, the Board rejected counsel's reliance on Ninth Circuit cases construing other statutes and observed that the fee petitions in the cases cited were necessarily more detailed than those prepared in conjunction with a claim under the Act. *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994)(*en banc*), *rev'g in part and aff'g in part on recon.* 25 BRBS 100 (1991)(Brown, J., concurring and dissenting), *aff'd in part and rev'd in part on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997);² *see also Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995) (applying *Sproull*, the Board affirms the administrative law judge's disallowance of time spent preparing fee petition).

² The Ninth Circuit did not address this issue in its decision in *Sproull*.

Subsequently, in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), the Ninth Circuit held that the Longshore Act, like other federal fee-shifting statutes, authorizes the award of a reasonable fee for time spent preparing attorney fee applications because, ultimately, uncompensated time spent in preparing a fee request diminishes the value of the attorney's fee eventually received.³ The Board has subsequently followed the position espoused by the Ninth Circuit in cases arising under the Act in all circuits and has consistently awarded an attorney's fee for reasonable time spent by counsel in preparing a fee petition. See *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006); *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*, 530 U.S. 1213 (2000); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996); see also *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd on other grounds*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003).

Although, as the parties note, the Third Circuit has not addressed this issue in the context of a case arising under Section 28 of the Longshore Act, it has held that federal fee-shifting statutes allow for an attorney's fee for preparation of a fee petition. For instance, in *Hernandez v. Kalinowski*, 146 F.3d 196 (3^d Cir. 1998), the Third Circuit states that courts consistently have interpreted federal fee-shifting statutes "to provide for reasonable fees for all time spent in the vindication of statutory or constitutional rights, including fees related to the preparation and litigation of motions for attorney's fees. . . ." *Id.* at 199; see also *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 53 (3^d Cir. 1978).

In view of the now well-settled law that it is appropriate to award a reasonable fee for time spent preparing a fee petition in a case arising under the Act, we overrule that portion of *Sproull*, 28 BRBS 271, that holds to the contrary. In light of the circumstances of this case, the 1.1 hours requested by counsel to prepare his fee petition is reasonable. We therefore reverse the administrative law judge's disallowance of this time and modify

³ We note that the regulations applicable to attorney's fee awards by administrative law judges in cases arising under the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.*, explicitly provide that, "[n]o fee approved shall include payment for time spent in preparation of a fee application." 20 C.F.R. §725.366(b). In contrast, neither the implementing regulations of the Longshore Act, 20 C.F.R. §702.132, nor the Board's attorney's fee regulation, 20 C.F.R. §802.203, preclude the recovery of a fee for the preparation of the fee application. See generally *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003) (court affirmed administrative law judge's award of attorney's fees for time spent defending fee application); *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001) (applying *Anderson*, the court awards a fee for time spent preparing fee petition to the court).

the administrative law judge's attorney's fee award to reflect an additional fee of \$522.50, representing 1.1 hours of work at the awarded hourly rate of \$475.

Accordingly, the administrative law judge's attorney's fee award is modified to reflect counsel's entitlement to an additional \$522.50, payable by employer, under Section 28 of the Act. In all other respects, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge