BRB Nos. 06-0408
and 06-0408A

JOHN PHILLIPS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS	)	DATE ISSUED: 12/20/2006
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Richard M. Slagle (Slagle Morgan LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Supplemental Decision and Order Awarding Attorney's Fees (2004-LHC-02473) of Administrative Law Judge Alexander Karst 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back on April 3, 2002, during the course of his employment for employer as a mechanic. Employer voluntarily paid compensation for temporary total disability while claimant was unable to work. Claimant was released to return to work with a 50-pound lifting restriction, which prevented further employment as a mechanic. He returned to light-duty longshore employment on October 6, 2003. Claimant filed a claim for permanent partial disability compensation based on a loss of wage-earning capacity. *See* 33 U.S.C. §908(c)(21). After a formal hearing, the parties settled the claim, and the administrative law judge issued a decision approving the settlement. *See* 33 U.S.C. §908(i).

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of $15,927.50, representing 54.25 hours of attorney time at $275 per hour, 7.25 hours of legal assistant time at $110 per hour, and costs of $211.25. In his supplemental decision, the administrative law judge reduced the hourly rate for claimant's counsel to $235, and the hourly rate for the legal assistant to $100. The administrative law judge rejected employer's objection to its liability for any fees for time expended prior to its controverting the claim on November 4, 2003. The administrative law judge also rejected employer's objections to specific itemized entries. Accordingly, employer was held liable for an attorney's fee totaling $13,473.75, and costs of $211.25.

On appeal, employer challenges the administrative law judge's finding that it is liable for a fee for time expended by counsel during the period it voluntarily paid claimant compensation for temporary total disability. BRB No. 06-0408. Claimant responds, urging rejection of this contention. Claimant cross-appeals the administrative law judge's reduction of the hourly rate for attorney time to $235. BRB No. 06-0408A. Employer responds, urging affirmance.

Employer contends that, inasmuch as it was voluntarily paying claimant compensation for temporary total disability and medical benefits prior to claimant's returning to work on October 6, 2003, pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), the administrative law judge's finding that it is liable for attorney time expended prior to the date it controverted the claim for permanent partial disability compensation on November 4, 2003, is not in accordance with law. In his supplemental decision, the administrative law judge found that, inasmuch as claimant filed a claim for permanent partial disability compensation on October 8, 2003, which employer controverted on November 4, 2003, employer's liability for a fee is controlled by Section 28(a) of the Act, 33 U.S.C. §928(a). The administrative law judge stated that employer is liable for pre-controversion legal work that is reasonable and necessary to the successful prosecution of

the claim, pursuant to *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997) (*en banc*) (Smith & Dolder, JJ., dissenting). The administrative law judge found that legal services performed prior to employer's controversion of the claim for permanent partial disability on November 4, 2003, were in anticipation of the claim, and were therefore reasonable and necessary. The administrative law judge concluded that employer is liable for claimant's counsel's fee for pre-controversion legal work.

Initially, there is no support in the file for the administrative law judge's finding that claimant filed a claim for permanent partial disability compensation on October 8, 2003. The record indicates that employer voluntarily paid claimant compensation for temporary total disability until September 2002, when it terminated benefits based on the September 17, 2002, report of Dr. Brett, who stated that claimant was released to return to work with a 50-pound lifting restriction. Thereafter, claimant retained Charles Robinowitz as his attorney. On October 8, 2002, Mr. Robinowitz informed the district director that he represented claimant, that employer had terminated compensation but that he understood employer was in the process of reinstating compensation for temporary total disability. He also asserted a claim for permanent partial disability compensation, stating the claim would be supplemented after he obtained additional medical and earnings information. Thereafter, employer voluntarily paid temporary total disability benefits until October 5, 2003, when claimant returned to work. On November 4, 2003, employer filed a Form LS-207, Notice of Controversion of Right to Compensation, in which employer stated that a request for temporary partial disability benefits was controverted inasmuch as claimant was not making himself available for work that is within his physical restrictions. On April 27, 2004, claimant wrote to the district director asserting a claim for weekly compensation for permanent partial disability of $344.85 as of October 6, 2003. The administrative law judge issued his decision approving a settlement of the permanent partial disability claim on December 20, 2005.

We must remand the case for further findings regarding employer's liability for the fee. The administrative law judge's finding that employer is liable for a fee under Section 28(a) is predicated on his statement that claimant filed a claim for permanent partial disability on October 8, 2003, whereas the record indicates that claimant first asserted a claim for permanent partial disability on October 8, 2002, as supplemented by the claim on April 27, 2004. Moreover, the administrative law judge did not address the effect on employer's fee liability of its terminating compensation for temporary total disability in September 2002 and reinstating compensation in October 2002 after claimant retained counsel. In addition, the administrative law judge's reliance on *Liggett* to award claimant's counsel an attorney fee under Section 28(a) for pre-controversion legal work is in error as that case has been effectively overruled. *Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002) (*en banc*) (McGranery and Hall, JJ., dissenting); *see also Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 853, 37 BRBS 116, 119(CRT) (5th Cir.

2003), *aff'g Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (*en banc*), *aff'd on recon. en banc*, 36 BRBS 65 (2002); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002).

We therefore vacate the administrative law judge's finding that employer is liable for an attorney's fee for services performed prior to employer's November 4, 2003, controversion, and we remand this case for the administrative law judge to address employer's liability for these services pursuant to Sections 28(a) and (b). Under Section 28(a), employer's fee liability accrues only after: (1) employer declines to pay any compensation on or before the 30th day after receiving notice of the claim from the district director; and (2) thereafter, the claimant utilizes the services of an attorney in the successful prosecution of the claim.[1] *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT). That employer voluntarily paid compensation before claimant filed a claim does not affect employer's liability for an attorney's fee pursuant to Section 28(a) if it declines to pay compensation after the claim is filed. *Id.*; *see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Pursuant to Section 28(b), generally when an employer pays or tenders compensation without an award and thereafter a controversy arises over additional compensation due, the employer will be liable for a fee for reasonable and necessary work by counsel if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer.[2] *See, e.g., Matulic v. Director,*

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[1] Section 28(a) of the Act states:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a).

[2] Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the

OWCP, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *National Steel & Shipbuilding Co. v. United States Department of Labor,* 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).

In his cross-appeal, claimant challenges the hourly rate awarded by the administrative law judge for attorney time. Claimant's counsel requested $275 for his services. The administrative law judge found the requested hourly rate excessive. The administrative law judge found that, while claimant received a lump sum settlement of $40,000, the sole issue of the extent of claimant's permanent partial disability was not especially complex. The administrative law judge concluded that an hourly rate of $235 is reasonable for claimant's counsel's services. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Finnegan v. Director, OWCP,* 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995); *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). We reject claimant's assertion that pursuant to *Blum v. Stenson*, 465 U.S. 886 (1984), wherein the United States Supreme Court held that neither complexity nor novelty of the issues "is an appropriate factor in determining whether to *increase* the basic fee award," *id.* at 898-899 (emphasis added), a requested hourly rate cannot be reduced due to the lack of complexity of a case as the converse of a proposition is not always true. Section 702.132(a) explicitly identifies "the complexity of the legal issues involved" as a relevant factor in setting a fee award and thus the administrative law judge is not precluded from reducing the hourly rate to account for this factor. Moreover, we reject claimant's argument based on the "*Laffey* Matrix" as the Ninth Circuit, in whose jurisdiction this case arises, has held it inapplicable to determining an attorney's fee under fee-shifting statutes in cases within its jurisdiction. *See Maldonado v. Lehman*, 811 F.2d 1341 (9th Cir. 1987), *cert. denied*, 484 U.S. 990 (1987). Thus, we affirm the awarded hourly rate of $235 as the administrative

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> controversy. If the employer or carrier refuse [*sic*] to accept such written recommendation, within fourteen days after its receipt by them, they 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).

law judge adequately addressed the relevant factors, and claimant has not shown that the administrative law judge abused his discretion in reducing the hourly rate based on the regulatory criteria. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated in part, and the case is remanded for the administrative law judge to address employer's liability for a fee for work performed prior to November 4, 2003, in accordance with this opinion. In all other respects, the administrative law judge's supplemental decision 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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JUDITH S. BOGGS
Administrative Appeals Judge