RAYMOND GERTE	)	BRB No. 06-0512
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT	)	DATE ISSUED: 02/16/2007
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
RAYMOND GERTE	)	BRB No. 06-0784
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Compensation Order Award of Attorney Fees and the Denial of Employer's Motion for Reconsideration of David Groeneveld, District Director, and the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees and the Denial of Employer's Motion for Reconsideration (Case No. 01-145307) of District Director David Groeneveld (BRB No. 06-0512) and claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration (2000-LHC-00209, 2003-LHC-00161) of Administrative Law Judge Daniel F. Sutton (BRB No. 06-0784) 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, a longshoreman, injured his head and face at work on October 22, 1998. Employer voluntarily paid claimant temporary total disability benefits from October 23, 1998, to May 27, 1999, July 8 to November 24, 1999, and May 24 to May 29, 2000, as well as medical benefits. Cl. Ex. 2. Claimant returned to work post-injury in his usual job but underwent three corrective surgeries by Dr. Lowlicht in 1998 and 1999. A dispute arose over the payment of medical bills which resulted in the case's referral to the Office of Administrative Law Judges (OALJ) and then remand to the office of the district director, where the parties reached an agreement.

On January 24, 2001, claimant's counsel submitted a fee application for work performed before Administrative Law Judge Di Nardi between September 21, 1999, and May 12, 2000. Employer objected to the fee petition, asserting that claimant's counsel was not entitled to a fee because claimant did not obtain additional benefits before Judge Di Nardi. Judge Di Nardi denied counsel's fee request, his request for a hearing on his entitlement to an attorney's fee, and claimant's motion for reconsideration of the denial of a fee.

Upon claimant's appeal, the Board vacated Judge Di Nardi's denial of an attorney's fee and remanded the case for resolution of the issue of whether claimant

obtained benefits that employer initially refused to pay or benefits greater than those voluntarily paid or tendered by employer. *Gerte v. Logistec of Connecticut*, BRB No. 01-0612 (April 22, 2002) (unpub.). The Board held that Judge Di Nardi erred in summarily stating that claimant did not obtain greater benefits without the benefit of an evidentiary record and remanded the case for necessary findings of fact regarding employer's liability for the requested attorney's fee.

On remand, the case was reassigned to Administrative Law Judge Sutton (the administrative law judge) due to Judge Di Nardi's retirement. The administrative law judge awarded claimant's counsel an attorney's fee of $614.75, based upon his finding that claimant received greater benefits over those voluntarily paid by employer, as his attorney obtained the prompt authorization and payment for the third surgery by Dr. Lowlicht. The administrative law judge also addressed claimant's modification claim for additional disability and medical benefits. 33 U.S.C. §922. The administrative law judge found that claimant's past benefits should be paid at an average weekly wage of $1,021.50, rather than $974.37. The administrative law judge, however, denied claimant ongoing permanent partial disability benefits. The administrative law judge further found that additional treatment by Drs. Katz, Richard, and Kudej is not reasonable or necessary and that employer never refused authorization for psychological treatment with Dr. Gang.

Claimant appealed the administrative law judge's fee award, the denial of medical benefits for further treatment with Drs. Richard and Kudej, the denial of a gym membership recommended by Dr. Katz, and the denial of ongoing permanent partial disability benefits. Claimant also contested the administrative law judge's finding that employer had never refused claimant's request for authorization to treat with Dr. Gang. Employer cross-appealed the administrative law judge's fee award and his increase in claimant's average weekly wage. The Board affirmed the administrative law judge's decision and fee award in all respects. *Gerte v. Logistec of Connecticut*, BRB Nos. 04-0658/A (May 16, 2005) (unpub.).

Claimant's counsel subsequently sought an attorney's fee of $51,857.61 for legal work performed from December 29, 2000, to May 11, 2004, representing 157.4 hours for legal work performed by Attorney Kelly at $195 per hour, 109.7 hours of attorney services by four attorneys at $140 per hour, 42.2 hours of paralegal work at either $50 or $70 per hour, and $3,684.61 in costs for work performed before the administrative law judge on remand. The administrative law judge excluded 50 hours of services and $230.16 in costs incurred while the claim was not pending before the OALJ on remand. The administrative law judge found that the remaining fee of $40,383.43, plus costs of $3,454.45, is excessive in relation to claimant's limited success. The administrative law judge therefore awarded a total fee of $4,383.79, representing 10 percent of the total fee requested. Claimant's motion for reconsideration of the fee award was denied.

Claimant's counsel also filed a fee petition for work performed before the district director from October 29, 1998, to December 6, 2000, in which he requested an attorney's fee of $6,294.40, representing 32.5 hours for legal work performed by Attorney Kelly at $165 per hour, 3.8 hours for legal work performed by James Moynihan at $140 per hour, 6 hours of paralegal work at $50 per hour, and costs of $99.90. The district director disallowed 14.6 hours of attorney services and 3.6 hours of paralegal work as excessive in view of the benefits obtained for claimant. Costs of $99.90 for "Miscellaneous Fees book" were disallowed as office overhead. Claimant's counsel was awarded a total fee of $3,700.05. Employer's motion for reconsideration of this fee award was denied.

On appeal, employer challenges the fee awarded by the district director. Claimant responds, urging affirmance. BRB No. 06-0512. Claimant appeals the attorney's fee awarded by the administrative law judge. Employer responds, urging affirmance.[1] BRB No. 06-0784.

We first address claimant's appeal of the administrative law judge's award of an attorney's fee. Claimant contends that the administrative law judge erred by applying *Hensley v. Eckerhart*, 461 U.S. 421 (1983), to reduce by 90 percent the total number of hours awarded. Specifically, claimant argues that over $80,000 of medical bills were paid by employer as a result of the efforts of claimant's counsel prior to the hearing, and the administrative law judge failed to consider these payments in assessing the extent of claimant's success. In *Hensley*, the Supreme Court held that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434; *see also 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.), *cert. denied*, 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The administrative law judge has considerable discretion in setting the amount of the attorney's fee where claimant's success is only partial. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

In accordance with *Hensley*, the administrative law judge reduced the total number of hours awarded by 90 percent inasmuch as claimant only achieved partial success. Specifically, the administrative law judge determined that claimant was successful in establishing entitlement to an attorney's fee of $614.75 for work performed while the

[1] By Order dated August 11, 2006, the Board consolidated for decision claimant's appeal with employer's appeal.

case was pending before Judge DiNardi, and in obtaining an adjustment to claimant's average weekly wage from $974.37 to $1,021.50, which resulted in $1,602.42 in additional compensation. The administrative law judge found that claimant was unsuccessful in his remaining claims for ongoing compensation for permanent partial disability and for additional medical care; the administrative law judge found that these issues resulted in the vast majority of the time and costs delineated in the fee petition.[2] The administrative law judge concluded, after consideration of the factors contained in 20 C.F.R. §702.132(a), and the particular facts and issues of this case, that claimant is entitled to a fee for 10 percent of the total allowable fee and costs requested. On reconsideration, the administrative law judge declined to address claimant's counsel's contention that he obtained additional medical benefits for claimant. The administrative law judge found that claimant's counsel had nine months to reply to employer's limited success objection, but he failed to do so. The administrative law judge concluded that claimant's argument may therefore not be raised for the first time in a motion for reconsideration.

In his decision on the merits, the administrative law judge found that additional treatment by Drs. Katz, Richard, and Kudej is not reasonable and necessary and that employer never refused authorization for psychological treatment with Dr. Gang. The Board affirmed the administrative law judge's decision in all respects. In his supplemental decision, the administrative law judge found that the claims for ongoing compensation for permanent partial disability and for additional medical care accounted for the vast majority of the time and costs itemized in the fee petition. In his motion for reconsideration, claimant asserted that the primary dispute between the parties was over medical bills and treatment and that claimant's counsel's efforts resulted in the payment of over $80,000 in medical benefits. It is well established that claimant's attorney is entitled to an employer-paid fee for time reasonably expended on issues that were resolved in claimant's favor without a formal hearing while the case was pending before the administrative law judge. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). We hold that the administrative law judge erred by not addressing

[2] On appeal, claimant further asserts that the administrative law judge included employer's entitlement to a Section 3(e) credit, 33 U.S.C. §903(e), for state compensation payments to offset claimant's award of additional compensation under the Act in determining the extent of claimant's success. In his supplemental decision, however, the administrative law judge correctly noted that establishing entitlement to compensation constitutes a successful prosecution even if claimant does not actually receive additional compensation due to the operation of a Section 3(e) credit. Supplemental Decision and Order at 5 n.2; *see E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

claimant's contention, raised in his motion for reconsideration. There is no requirement that claimant respond to employer's fee objections in order to preserve a challenge to the administrative law judge's findings concerning the objections. A motion for reconsideration is a proper method of challenging an adverse finding in the administrative law judge's order. Moreover, even absent a motion for reconsideration, claimant could properly raise the adverse finding on appeal to the Board, which he has done. We cannot address this argument without further findings by the administrative law judge. Accordingly, we vacate the administrative law judge's attorney's fee award, and we remand for the administrative law judge to address claimant's counsel's contention that numerous entries in his fee petition pertain to his obtaining employer's payment of disputed medical benefits while the case was before the administrative law judge on remand.[3]

We note, however, that an across-the-board reduction in claimant's counsel's fee petition may be appropriate if the administrative law judge again finds that claimant obtained only limited success. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999)(50 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999)(90 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits); *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)(75 percent reduction in attorney's fees is reasonable given claimant's failure to succeed in the prosecution of his primary claim for permanent total and partial disability compensation).

In its appeal, employer challenges the attorney's fee awarded by the district director. We reject employer's contention that claimant is not entitled to any employer-paid attorney's fee for claimant's counsel's efforts before the district director. The administrative law judge determined that claimant was successful in establishing entitlement to an attorney's fee of $614.75 for work performed while the case was pending before Judge DiNardi, and in obtaining an adjustment to claimant's average weekly wage from $974.37 to $1,021.50, which resulted in $1,602.42 in additional compensation. Claimant's ultimate success on these issues before the administrative law judge renders employer liable for all necessary work performed leading to that success.

[3] We reject employer's response that the administrative law judge found in his prior decision that employer had timely paid medical benefits, as claimant raised and this prior decision addressed whether claimant's counsel assisted claimant in obtaining medical benefits while the case was before Judge Di Nardi. *See* Decision and Order on Remand Awarding Benefits at 9-10; Claimant's Post-Hearing Brief at 6-7, 29-31.

Hole v. Miami Shipyard Corp., 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). Employer did not pay any benefits on claimant's modification claim, which is processed as a new claim. 33 U.S.C. §922; 20 C.F.R. §702.371. Thus, employer is liable for claimant's fee pursuant to Section 28(a), 33 U.S.C. §928(a), and we reject employer's contention that it is not liable for claimant's attorney's fee because no informal conference was held on the average weekly wage issue which subsequently was resolved in claimant's favor by the administrative law judge. Moreover, employer concedes that claimant's counsel resolved in claimant's favor a dispute regarding the amount of Dr. Lowicht's charges while the claim was pending before the district director. *See Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). We also reject employer's contention that the district director is bound by the fee determination of the administrative law judge as the fee for legal services at each level of the proceedings is within the discretion of the tribunal before which the work was performed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); 33 U.S.C. §928(c). The fee petition also fulfills counsel's burden to provide a complete, sworn statement of the professional status of each person performing such work, and the normal billing rate for such person, and we reject employer's assertion that claimant's counsel has a greater burden of proof. *See generally National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988); 20 C.F.R. §702.132.

Finally, employer argues that the fee award violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as the district director did not fully discuss its numerous objections to the fee petition. In particular, employer asserts the district director failed to address its contention that the fee award should be reduced due to claimant's limited success. Pursuant to Section 19(d) of the Act, 33 U.S.C. §919(d), the APA is not strictly applicable to fee awards issued by the district director. *See generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000). We nonetheless agree with employer that the district director did not sufficiently address the extent of claimant's success. The district director's order states in pertinent part:

> I have reviewed the fee application taking into consideration the complexity of the case, the issues involved and the results obtained, the actual necessary work performed and other factors including the expertise of the attorney.
>
> Taking all factors mentioned into consideration, the fee requested has been reduced: A total of 14.6 hours of attorney services and 3.6 hours of paralegal services were deleted as excessive in light of the benefits obtained.

Compensation Order Award of Attorney Fees at 1. Given the cursory nature of the district director's order and his summary denial of employer's motion for reconsideration, we must vacate the district director's fee award and remand this case for further consideration. On remand, the district director should fully discuss employer's objections based on a limited success theory and provide an adequate rationale for his findings. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration are vacated, and the case is remanded for further proceedings consistent with this opinion. BRB No. 06-0784. The district director's Compensation Order Award of Attorney Fees and his denial of employer's Motion for Reconsideration are vacated, and the case is remanded for further proceedings consistent with this opinion. BRB No. 06-0512.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge