

SAMUEL ANDERSON)
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 Claimant-Respondent)
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 v.)
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 HALTER MARINE CORPORATION) DATE ISSUED: 02/04/2010
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 and)
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 RELIANCE NATIONAL INDEMNITY)
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 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order on Remand and Second Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Ron M. Feder (Davis & Feder, P.A.), Gulfport, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and Second Supplemental Decision and Order Awarding Attorney's Fee (2005-LHC-00613, 2005-LHC-00614, 2005-LHC-00615) of Administrative Law Judge Lee J. Romero, Jr., 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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, a welder, alleged that he injured both knees, back, and right shoulder in three separate incidents at work in 1999. The administrative law judge found that only the left knee, right shoulder and back injuries arising from the June 1999 incident are compensable. The administrative law judge rejected employer's contention that an aggravation of claimant's shoulder condition in May 2000 while claimant was in a swimming pool constituted an intervening cause relieving employer of liability for disability attributable to the shoulder condition. The administrative law judge awarded claimant disability and medical benefits.¹ Subsequently, claimant's counsel was awarded an attorney's fee by both the administrative law judge and the district director.

Employer appealed the administrative law judge's decision on the merits, as well as the fee awards of the administrative law judge and the district director. In its decision, *S.A. [Anderson] v. Halter Marine Corp.*, BRB Nos. 07-0326, 07-0404 (Dec. 19, 2007), the Board affirmed the finding that claimant's claims are not barred by Section 12 of the Act, 33 U.S.C. §912. The Board affirmed the administrative law judge's finding that claimant injured his left knee and right shoulder in June 1999. The Board affirmed the finding that the aggravation of claimant's shoulder injury in a May 2000 swimming pool incident was not an intervening cause of claimant's disability, as the administrative law judge rationally found that the injury occurred while claimant was exercising his shoulder pursuant to medical advice. Thus, the Board affirmed the finding that employer remains liable for disability attributable to claimant's shoulder injury.

Nonetheless, the Board vacated the administrative law judge's finding that claimant's back injury is compensable and remanded the case for reconsideration of this issue. The Board also remanded for the administrative law judge to reconsider his findings regarding the date employer established the availability of suitable alternate employment and as to whether claimant requested prior authorization for treatment of his left knee injury. As to the fee awards, the Board stated that the administrative law judge

¹The administrative law judge found that claimant's disabling shoulder condition reached maximum medical improvement on December 12, 2001, that claimant is unable to return to his usual employment as a welder due to this work-related condition and that employer established the availability of suitable alternate employment as of May 9, 2003. The administrative law judge awarded claimant benefits for total disability for various periods, and for continuing permanent partial disability from May 9, 2003, for the shoulder injury.

and district director should reconsider the amount of the attorney's fees awarded to counsel if claimant obtained a lower award on remand. The Board denied employer's motion for reconsideration.

On remand, the administrative law judge found that claimant's back injury is not compensable and that employer established suitable alternate employment as of December 21, 2001. Therefore, the administrative law judge awarded claimant permanent partial disability benefits as of December 21, 2001, rather than May 8, 2003. The administrative law judge also found that claimant did not request prior authorization for medical treatment for his left knee injury and thus that employer is not liable for treatment of this condition. Based on his findings on remand, the administrative law judge reduced his prior award of an attorney's fee from \$9,077.15 to \$5,016.25, plus costs of \$474.65.

Employer appeals the administrative law judge's decision on remand and his award of an attorney's fee. Claimant responds, urging affirmance of the decisions.

On appeal to the Board, employer again contends that the administrative law judge erred in finding that claimant's disabling shoulder injury is compensable, as employer contends that the May 2000 pool incident was an intervening cause of claimant's disability that relieves it of liability for disability benefits. The Board thoroughly addressed this issue in its previous decision and found that the administrative law judge's findings are supported by substantial evidence. *Anderson*, slip op. at 6-8. The Board's previous decision on this issue constitutes the law of the case, and employer offers no basis for finding this principle inapplicable. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Ravalli v. Pasha Maritime Services*, 36 BRBS 91, *denying recon. in* 36 BRBS 47 (2002). As to the administrative law judge's fee award, employer contends only that the award should be stayed pending the outcome of its appeal to the Board on the merits. It is well-established that a fee award is not final and enforceable until all appeals are exhausted, and thus an administrative law judge may enter a fee award while an appeal is pending. *See generally Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). As employer raises no other contentions concerning the administrative law judge's decisions, we affirm the Decision and Order on Remand and Second Supplemental Decision and Order Awarding Attorney's Fee.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in the prior appeals, BRB Nos. 07-0326 and 07-0404. Counsel requests a fee of \$3,230, representing 16.15 hours of attorney services at \$200 per hour, plus costs of \$187.17. Employer has filed objections, contending that the fee request should be

reduced to reflect claimant's limited success in defending his award on appeal. Employer also contends that an appropriate hourly rate would be \$175 to \$185 and that some of the itemized costs should be denied. Claimant's counsel has filed a reply brief in support of his fee petition.

We reject employer's summary contention that the requested hourly rate of \$200 is excessive for the Gulfport, Mississippi area. Counsel avers that he has been in practice for 20 years and that his usual rate takes into account the contingency nature of his practice. *See generally City of Burlington v. Dague*, 505 U.S. 557 (1992). We find that the requested rate is reasonable for the geographic area where the services were rendered. 20 C.F.R. §802.203(d)(4).

We disallow the following itemized entries as the work was not performed before the Board in response to employer's appeals: (1) January 22, 2007: .25 hour to review the district director's fee order; (2) March 9, 2007: .05 hour to review correspondence from the administrative law judge; (3) March 12, 2007: .10 hour to review the administrative law judge's fee order; (4) June 24, 2008: .10 hour to review correspondence concerning settlement of a medical lien; and (5) July 22 and 28, 2008: .20 hour for correspondence with employer's counsel concerning settlement of the district director and administrative law judge attorney's fee issues.² Thus, we find potentially compensable 15.45 hours of attorney services, for a lodestar fee of \$3,090.

We next address employer's contention that an award of the lodestar fee would be excessive in this case given claimant's limited success in defending his award on appeal. Where, as here, the issues presented to the Board involve a common core of facts or are based on related legal theories, a fee award should be based on the significance of the overall relief obtained by claimant in relation to the hours reasonably expended on litigation. If claimant has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. The fee awarded should be for an amount that is reasonable in relation to the results obtained, as the degree of success is the most critical factor in assessing the amount of an attorney's fee. *Hensley v. Eckerhart*, 461 U.S. 421, 435-440 (1983); *see generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

We find that claimant obtained "excellent" results and is entitled to the full lodestar fee of \$3,090, notwithstanding claimant's lack of success on all issues raised in employer's appeal. Claimant was unsuccessful in defending his award of medical

² Items 4 and 5 involved services performed while the case was on remand to the administrative law judge.

benefits for his back and knee injuries, and 18 months of his total disability award was mitigated to partial. However, claimant successfully defended his ongoing award of permanent partial disability benefits against employer's appeal of the Section 12 and intervening cause issues. This fee is reasonable in relation to the result obtained given employer's vigorous assertion that it has no continuing liability to claimant because of the swimming pool incident. Therefore, we award claimant's counsel an attorney's fee of \$3,090 for work performed in the prior appeals.

With regard to the petition for costs, we agree with employer that the mileage cost of \$48 on June 29, 2006, was not for work performed before the Board but was for counsel's attendance at the formal hearing. Thus, we disallow this charge. We also disallow FedEx charges totaling \$62.37 as this does not relate to work performed before the Board.³ We award counsel the remaining cost of \$76.80. 33 U.S.C. §928(d).

Accordingly, the administrative law judge's Decision and Order on Remand and Second Supplemental Decision and Order Awarding Attorney's Fee are affirmed. Claimant's counsel is awarded an attorney's fee and costs of \$3,166.80 for work performed before the Board in BRB Nos. 07-0326 and 07-0404, payable directly by employer to counsel. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³ The Board did not receive any documents from claimant within several weeks of any of the dates listed on the petition for costs.