BRB Nos. 03-0302
and 03-0761

BRUCE W. CHRISTENSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: Jan. 12, 2004
	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order, the Supplemental Order Awarding Attorney's Fee, and the Order on Reconsideration of Attorney's Fees of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order, the Supplemental Order Awarding Attorney's Fee, and the Order on Reconsideration of Attorney's Fees (2000-LHC-2200 and 2201) of Administrative Law Judge Jeffrey Tureck rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended,

33 U.S.C. §901 *et seq.* (the Act).[1] 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant began working as a longshoreman in 1966. He sustained a back injury in the course of his employment for employer on April 19, 1997. Claimant was out of work from April 20, 1997 through August 11, 1997, and received temporary total disability compensation for that period. 33 U.S.C. §908(b). He returned to work on August 12, 1997. Claimant again injured his back while working for employer on April 9, 1999, and has not worked since that date. Claimant filed claims for disability resulting from both work-related injuries with employer, and on May 22, 2000, the case was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing.[2] Thereafter, employer requested and was granted two continuances of the hearing. Pre-trial statements were filed by claimant on October 29, 2001 and by employer on October 30, 2001, indicating that the parties disputed the nature and extent of claimant's

[1] We hereby consolidate for purposes of decision claimant's appeal of the administrative law judge's Decision and Order, BRB No. 03-0302, and his appeal of the administrative law judge's Supplemental Order Awarding Attorney's Fee and Order on Reconsideration of Attorney's Fees, BRB No. 03-0761.

[2] At the time the case was transferred to the OALJ, employer had not filed a pre-hearing statement. Claimant's pre-hearing statement dated April 28, 2000 indicated that the parties had reached agreement on the issues of jurisdiction and notice of injury and that the issues to be presented for resolution at the formal hearing were permanent total disability, average weekly wage calculation, payment of medical expenses, and attorney fees.

disability,[3] the dates claimant reached maximum medical improvement,[4] claimant's average weekly wage at the time of both injuries,[5] and employer's liability for claimant's past and future psychiatric treatment. Subsequent to the filing of the parties' pretrial statements, the parties reached agreement on all of the previously disputed issues except the calculation of claimant's average weekly wage for the 1999 injury.[6] An additional disputed issue as to whether claimant's concurrent benefits for permanent partial and permanent total disability are subject to the maximum compensation rate set forth in Section 6(b)(1), 33 U.S.C. §906(b)(1), arose after the parties' pretrial statements were

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[3] In his pre-trial statement, claimant asserted his entitlement to compensation for temporary total disability from April 20, 1997 to August 11, 1997, for temporary partial disability from August 12, 1997 to June 30, 1998, and for permanent partial disability from July 1, 1998 and continuing. With respect to his 1999 injury, claimant claimed entitlement to benefits for temporary total disability from April 10, 1999 to June 21, 2000, and for permanent total disability from June 22, 2000 and continuing. Employer maintained in its pre-trial statement that claimant is entitled to permanent partial disability benefits from May 19, 2001.

[4] In his pre-trial statement, claimant stated that he reached maximum medical improvement with respect to his 1997 injury on July 1, 1998, and with respect to his 1999 injury on June 21, 2000. Employer's position, as reflected in its pre-trial statement, was that claimant reached maximum medical improvement with respect to the 1997 injury on December 18, 1998, and with respect to the 1999 injury on May 18, 2001.

[5] Claimant asserted in his pre-trial statement that his average weekly wage at the time of the 1997 injury was $1,576.52, and at the time of his 1999 injury was $1,142.86. Employer maintained in its pre-trial statement that the correct average weekly wage for the 1997 injury was $1,240.25, and for the 1999 injury was $665.16.

[6] At the hearing, counsel for claimant and employer stated that they had reached agreement that claimant reached maximum medical improvement with respect to his 1997 injury on January 7, 1998, and that his average weekly wage for that injury is $1,576.72. *See* Hearing Tr. at 4-5. They further agreed, concerning the 1997 injury, that claimant is entitled to temporary total disability from April 20, 1997 to August 11, 1997, to temporary partial disability from August 12, 1997 to January 7, 1998, and to permanent partial disability beginning January 8, 1998, and continuing. *See* Hearing Tr. at 5-9. With regard to the 1999 injury, the parties reached agreement that claimant reached maximum medical improvement on June 21, 2000, and that he is entitled to temporary total disability from April 10, 1999 to June 21, 2000 and to permanent total disability thereafter. *See* Hearing Tr. at 9-11. Employer also agreed to accept liability for claimant's past and future psychiatric treatment. *See* Hearing Tr. at 7.

filed. Thus, the only issues presented for resolution by the administrative law judge were claimant's average weekly wage for the 1999 injury and the application of the Section 6(b)(1) maximum compensation rate. *See* Decision and Order at 2.

In his Decision and Order, the administrative law judge awarded claimant disability and medical benefits in accordance with the agreement reached by the parties. With respect to the two contested issues, the administrative law judge first agreed with claimant that the applicable average weekly wage for his 1999 injury is $1,140.59, an amount based on claimant's actual earnings for the 52 weeks prior to that injury.[7] Next, the administrative law judge rejected claimant's contention that Section 6(b)(1) does not limit the amount of compensation claimant may receive for concurrent awards; he therefore found that claimant's total compensation is subject to the Section 6(b)(1) limitation to 200 percent of the applicable national average weekly wage. *See* Decision and Order at 4-6.

Claimant's attorney subsequently submitted a fee petition to the administrative law judge requesting a fee of $15,345.00, representing 63 hours of attorney time at an hourly rate of $237.50, and 4.5 hours of legal assistant time at an hourly rate of $85, plus an additional amount of $4,169.78 for expenses. Employer filed a response to this requested fee in which it objected to the requested hourly rate for attorney services in excess of the prevailing community rates for similar services. Employer next challenged 2.5 hours of the five hours of legal services itemized for the preparation of claimant's closing argument on the basis that claimant's attorney is not entitled to a fee for his preparation of argument on the distinct issue of the Section 6(b)(1) maximum compensation rate on which claimant failed to prevail before the administrative law judge. Employer also argued that the three hours itemized for preparation of the attorney fee application were excessive. Lastly, employer challenged certain items claimed as costs. Claimant thereafter replied to employer's objections, agreeing that a 2.5 hour reduction in attorney time for preparation of closing argument regarding Section 6(b)(1) on which he did not prevail and a reduction in costs from $4,169.78 to $3,972.23 was proper, but otherwise urging that his fee as originally requested be approved. Claimant also requested an additional $475, representing two hours at $237.50 per hour, for his reply to employer's objections. In a Supplemental Order Awarding Attorney's Fee, the administrative law judge first reduced counsel's hourly rate to $200 on the basis that claimant was not fully successful in this litigation. Next, the administrative law judge deducted 2.5 hours for time spent preparing argument on the Section 6(b)(1) issue on which claimant was unsuccessful. The administrative law judge disagreed with employer's objection to the time itemized for preparation of the fee petition, but agreed with employer's objections to the payment of certain of the costs sought by claimant. Accordingly, the administrative

[7] The administrative law judge rejected employer's position that claimant's average weekly wage for the 1999 injury should be $1,096.11, an amount based on claimant's residual wage-earning capacity following his 1997 injury.

law judge awarded claimant's counsel a total fee of $16,214.73, representing 60.5 hours of attorney time at $200 per hour, 4.5 hours of legal assistant time at $85 per hour, and $3,732.23 in expenses.

Claimant filed a motion for reconsideration, as well as a supplemental fee request, with the administrative law judge wherein claimant averred that the administrative law judge did not consider the additional $475 requested for claimant's reply to employer's objections, that the administrative law judge erred in reducing the hourly rate for attorney services on the basis of his lack of success on a single issue where time spent on that unsuccessful issue was also deducted, and that the administrative law judge erred in deducting $240 from the $3,337.50 expense billed by claimant's vocational expert. Lastly, claimant requested an additional fee of $1,068.75, representing 4.5 hours at $237.50 per hour, for preparation of the motion for reconsideration.[8] In an Order on Reconsideration of Attorney's Fees, the administrative law judge reaffirmed his reduction of counsel's hourly rate from $237.50 to $200, on the basis that claimant was unsuccessful in the more significant of the two issues before the administrative law judge. The administrative law judge awarded claimant's attorney an additional $50 for his reply to employer's objections to his initial fee petition and an additional $150 for time spent attempting to settle the attorney fee dispute. He further found that counsel is not entitled to a fee for the services related to the motion for reconsideration on the basis that the motion was almost completely unsuccessful.

On appeal, claimant challenges the administrative law judge's finding that the statutory maximum compensation rate set out in Section 6(b)(1) of the Act is applicable to this case. BRB No. 03-0302. Employer responds, urging affirmance of the administrative law judge's finding that claimant's concurrent awards are subject to the maximum compensation rate. Claimant also appeals the administrative law judge's attorney's fee award. BRB No. 03-0761. Employer responds, urging affirmance of the administrative law judge's orders awarding attorney's fees.

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[8] Employer filed a response to claimant's motion for reconsideration and claimant replied to employer's response with both parties presenting argument on the issues of the cost of the vocational expert's bill, the reduction of counsel's hourly rate based on his lack of success on the Section 6(b)(1) issue, and counsel's request for additional fees. Claimant requested an additional fee of $356.25, representing 1.5 hours at $237.50 per hour, for his reply to employer's response to the motion for reconsideration. Thereafter, the parties attempted to settle the attorney fee dispute pursuant to the request of the administrative law judge; the parties reached agreement only on the issue of counsel's entitlement to $200 of the $240 deducted by the administrative law judge from the vocational expert's expense. Claimant then requested an additional fee of $178.13, representing .75 hour at $237.50 per hour for time spent attempting to settle the attorney fee dispute.

Section 6(b)(1)

Claimant contends that the administrative law judge's determination that his combined awards for permanent partial disability resulting from his 1997 injury and permanent total disability resulting from his 1999 injury are subject to the statutory maximum of Section 6(b)(1) of the Act is not in accordance with law. Specifically, in support of his contention of error, claimant avers that the term "compensation for disability" used in Section 6(b)(1) refers to a single award for disability resulting from an individual injury, and not to concurrent awards resulting from more than one injury.[9] We disagree. The precise issue raised in the instant case by claimant was recently addressed by the Board in *Carpenter v. California United Terminals,* BRBS , BRB Nos. 03-0213/A (Nov. 25, 2003). In *Carpenter*, the administrative law judge ruled that the Section 6(b)(1) statutory maximum compensation rate is not applicable to the total amount of concurrent awards, but rather applies separately to each award for individual injuries. In its decision, the Board initially agreed that since claimant sustained an injury which resulted in permanent partial disability, and subsequently suffered a second injury, resulting in permanent total disability, claimant was entitled to concurrent awards for the two resulting disabilities. *Carpenter,* slip op. at 7; *see Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 905 (1980); *Finch v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 196 (1989). The Board, however, rejected the administrative law judge's interpretation of Section 6(b)(1), holding that where claimant receives concurrent awards of disability compensation resulting from two injuries, the total disability benefits awarded cannot exceed the Section 6(b)(1) maximum compensation rate. *Carpenter,* slip op. at 10-11. For the reasons stated in *Carpenter,* we affirm the administrative law judge's determination that claimant's concurrent awards are subject to the Section 6(b)(1) limitation, and his related finding that employer is entitled to a credit for the amount which exceeds the Section 6(b)(1) maximum rate of compensation.

Attorney's Fee Award

In challenging the administrative law judge's award of attorney's fees, claimant contends, first, that the administrative law judge committed legal error in reducing counsel's hourly rate on the basis that he did not prevail on the Section 6(b)(1) issue where the administrative law judge had also segregated the hours spent on that issue and disallowed those hours. Claimant further avers that the administrative law judge erred in denying him a fee for the time spent preparing claimant's responses to employer's objections to his fee request and for work related to his subsequent motion for reconsideration.

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[9] Claimant's motion to allow citation of additional authorities regarding this legal issue is granted.

In *Hensley v. Eckerhart*, 461 U.S. 421 (1983), a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. '1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3d Cir. 2001); *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. 1988), *cert. denied*, 488 U.S. 997 (1988). In the instant case, it is undisputed that the Section 6(b)(1) issue on which claimant failed to prevail is unrelated to the claims on which claimant did succeed. Accordingly, the administrative law judge, in accordance with the first prong of the *Hensley* case, properly severed the work performed by claimant's attorney on that unsuccessful issue and disallowed the 2.5 hours itemized for that work. *See Brooks*, 963 F.2d at 1538-1540, 25 BRBS at 167-171(CRT).

The administrative law judge was then required to consider the second prong of the *Hensley* inquiry, *i.e.*, to consider the reasonableness of the fee in light of the degree of success achieved on the successful issues. *See Brooks*, 963 F.2d at 1540, 25 BRBS at 171-172(CRT). Claimant's failure to prevail on the unrelated Section 6(b)(1) issue is not determinative at this point in the analysis, as the hours itemized for work on that issue had already been severed and disallowed in their entirety. The administrative law judge's reduction of claimant's attorney's hourly rate, however, was based solely on his lack of success on the Section 6(b)(1) issue rather than on a finding as to a reasonable rate under the regulatory criteria, 20 C.F.R. §702.132. Moreover, the administrative law judge disregarded counsel's work with respect to other issues on which the parties did not reach agreement until shortly before the hearing. *See* n. 2-6, *supra*. Although the administrative law judge acknowledged that the nature and extent of claimant's disability was at issue until shortly before the hearing, he did not evaluate claimant's overall success as required by the second prong of the *Hensley* test. The administrative law judge thus did not consider the fact that claimant obtained concurrent ongoing permanent partial disability and permanent total disability awards or his obtaining medical benefits for his past and future psychiatric treatment. Claimant's success cannot be measured by considering only those issues which remained in dispute as of the date of the formal hearing, but must also reflect counsel's work on issues which were resolved in his favor during the period following referral of the case to the OALJ and prior to the hearing.

We therefore agree with claimant that the administrative law judge's reduction of counsel's hourly rate is inconsistent with the legal standards set forth in *Hensley*. *See Brooks*, 963 F.2d at 1540, 25 BRBS at 171-172(CRT); *see also Barbera*, 245 F.3d at 290 n.27, 35 BRBS at 32 n.27(CRT)(*dicta*). The administrative law judge's reduction of claimant's attorney's hourly rate from the requested rate of $237.50 to $200 is vacated, and the case is remanded for a determination of an appropriate fee for work performed on the issues on which claimant prevailed in accordance with *Hensley* and the regulatory standards, 20 C.F.R. §702.132.

Lastly, claimant challenges the administrative law judge's disallowance of time spent responding to employer's fee objections and preparing claimant's motion for reconsideration. The administrative law judge's disallowance of these hours was largely based on his rejection of claimant's argument that the administrative law judge committed legal error in reducing counsel's hourly billing rate on the basis of his failure to prevail on the Section 6(b)(1) issue. In light of our decision vacating the administrative law judge's reduction of counsel's hourly rate, we also vacate the administrative law judge's disallowance of the time itemized for claimant's response to employer's objections to the fee request and work related to the motion for reconsideration. On remand, the administrative law judge must also reconsider claimant's request for a fee for those services.

Accordingly, the administrative law judge's finding that the statutory maximum of Section 6(b)(1) is applicable to claimant's concurrent awards is affirmed. BRB No. 03-0302. The administrative law judge's Supplemental Order Awarding Attorney's Fee and Order on Reconsideration of Attorney's Fees are vacated in part, and the case is remanded for reconsideration consistent with this opinion. BRB No. 03-0761.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge