BRB No. 11-0340

JOHN S. MARSHALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 01/20/2012
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Jerry R. McKenney and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration (2009-LDA-00315) of Administrative Law Judge Larry W. Price 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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., Roach v. New York Protective Covering Co.,* 16 BRBS 114 (1984).

The following history of this claim has been gleaned from the pleadings and attachments filed with the administrative law judge and the Board by the parties. Claimant sought compensation for a neck injury sustained on March 26, 2007, which he alleged was due to repetitive trauma associated with his employment as a welder for employer. Employer controverted claimant's entitlement to benefits under the Act. Following the referral of the claim to the Office of Administrative Law Judges, the parties reached a settlement which was approved by the administrative law judge pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), on May 13, 2010. Under the terms of the settlement agreement, employer paid claimant $8,000 to resolve all liability for claimant's disability compensation and $12,000 for future medical benefits. Pursuant to the settlement agreement, the administrative law judge retained jurisdiction to determine a reasonable attorney's fee for claimant's counsel to be paid by employer.

Subsequently, claimant's attorney filed a fee petition with the administrative law judge requesting an attorney's fee of $36,642.90, representing 85.6 hours of attorney time at an hourly rate of $425, one-tenth of an hour of paralegal time at an hourly rate of $165, and costs of $246.40. Employer filed objections to claimant's counsel's fee request, and claimant's counsel in turn filed a reply brief and a supplemental affidavit in support of his fee request.

In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge reduced the hourly rates sought by claimant's counsel to $300 for attorney services and $95 for paralegal services. The administrative law judge then addressed employer's objections to specific entries contained in the fee petition, and disallowed 5.45 hours of attorney time on the basis that the work was unnecessary, excessive, duplicative, or represented traditional clerical work.[1] The administrative law judge further addressed the amount of an appropriate fee in light of the level of success achieved pursuant to the principles set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and reduced the remaining 80.15 hours of attorney time by 25 percent to reflect the degree of success achieved by claimant. Accordingly, the administrative law judge awarded claimant's counsel a fee of $18,289.65, representing 60.1125 hours of attorney time at $300 per hour, one-tenth of an hour of paralegal time at $95 per hour, and $246.40 in costs.

[1]Claimant does not challenge on appeal the administrative law judge's disallowance of these 5.45 hours.

Claimant filed a motion for reconsideration, requesting that the administrative law judge reconsider his hourly rate determination for attorney services and his decision to implement a 25 percent across-the-board reduction of the number of hours approved. In his Order Denying Claimant's Motion for Reconsideration, the administrative law judge considered the additional evidence submitted by claimant on reconsideration in support of his requested hourly rate and affirmed his finding that $300 represents a reasonable rate for the services performed in this case. The administrative law judge further affirmed his conclusion that the 25 percent reduction in the number of hours of services performed by claimant's counsel is justified pursuant to the decision of the United States Supreme Court in *Hensley*.

On appeal, claimant challenges the administrative law judge's hourly rate determination for the attorney services performed in this case and the 25 percent reduction in the number of hours performed by counsel. Employer responds, urging affirmance of the fee award. Claimant has filed a reply brief.

We first address claimant's contention that the administrative law judge erred in reducing the requested hourly rate of $435 to $300. The United States Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; *see also Kenny A.*, 130 S.Ct. at 1672. The burden falls on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B & G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008); *Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010)(Order).[2]

[2]This case arises in the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has not addressed the specific methodology for determining an appropriate hourly rate for cases arising under the Act.

In this case, claimant has not shown an abuse of discretion in the administrative law judge's determination that $300 represents a reasonable hourly rate, as that rate is within the range of prevailing hourly rates established by the evidence proffered by both claimant and employer.[3] *See, e.g., McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011). Moreover, hourly rates for one attorney can vary from case to case and, within one case, from level to level. *See B & G Mining, Inc.*, 522 F.3d 657, 42 BRBS 25(CRT); *Christensen v. Stevedoring Services of America*, 44 BRBS 75 (2010)(Order). Thus, contrary to claimant's contention on appeal, the fee orders submitted by claimant's counsel in support of his requested hourly rate, which awarded him a higher hourly rate in other cases, are not dispositive of the hourly rate determination in this case. *Id.* Accordingly, as claimant has not shown that the administrative law judge abused his discretion in determining that an hourly rate of $300 is supported by the evidence submitted regarding prevailing market rates and is reasonably commensurate with the services performed in this case, we affirm the rate awarded by the administrative law judge. *See McDonald*, 45 BRBS at 51.

Claimant also contends that the administrative law judge erred in applying an across-the-board 25 percent reduction in his counsel's hours based on claimant's limited success. The Supreme Court held in *Hensley* that 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. 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);

[3]Claimant contends that the administrative law judge impermissibly based his hourly rate determination on prevailing rates for attorneys located in Houston, Texas, where the hearing in this case was scheduled to be held, rather than on the prevailing rates in Fort Lauderdale, Florida, where counsel is located and his services were performed. We reject this contention of error. In his Supplemental Decision and Order, the administrative law judge determined that an hourly rate of $300 is consistent with the prevailing rate in the community where this case was to be tried. Supplemental Decision and Order at 2. However, in his Order Denying Reconsideration, the administrative law judge analyzed the rate information contained in the 2010 edition of *The Small Law Firm Economic Survey*, which claimant's attorney attached as an exhibit to his motion for reconsideration. The administrative law judge reasonably relied on the billing rates listed in this survey for attorneys practicing in the South region, which he specifically noted includes both Texas and Florida. Order Denying Reconsideration at 3. As the $300 hourly rate awarded by the administrative law judge falls within the range of prevailing rates for the region encompassing both Florida and Texas, claimant's arguments regarding the appropriate geographic market for setting counsel's hourly rate are unavailing. *See generally Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS 67 (2010); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009).

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 courts have recognized the broad discretion of the adjudicator in assessing the amount of an attorney's fee pursuant to the principles espoused in *Hensley*. *See, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). Where the adjudicator has determined that the claimant has achieved only limited success, he may make an across-the-board reduction in claimant's counsel's fee. *See B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129, 134 (2009); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91, 94 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192-193 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 794, 33 BRBS 184, 186-187(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

We affirm the administrative law judge's reduction in the number of hours requested by claimant's counsel in view of the administrative law judge's rational determination that the requested fee was not commensurate with the degree of success achieved by claimant. Contrary to claimant's contentions on appeal, the administrative law judge did not abuse his discretion in making an across-the-board reduction to reflect claimant's limited success without identifying specific work performed on issues that were not successfully litigated. When claimant's success is limited in comparison to the litigation as a whole, the administrative law judge may award a reduced fee that is commensurate with the degree of success, even if itemized entries cannot be identified with the unsuccessful issues. *See Hensley*, 461 U.S. at 436-437; *see also Holloway*, 43 BRBS at 134; *Fagan*, 33 BRBS at 94; *Ezell*, 33 BRBS at 30-31; *Hill*, 32 BRBS at 192-193.

Moreover, we need not reach claimant's contention that the administrative law judge erred in finding that claimant intended to litigate his claims for ongoing future disability and medical benefits at the formal hearing scheduled in this case.[4] Notwithstanding claimant's contention that he sought only a fixed period of temporary total disability benefits while his claim was before the administrative law judge, claimant

[4]Having found that claimant intended to litigate claims for future disability and medical benefits, the administrative law judge found that claimant's acceptance of $8,000 in disability benefits and $12,000 in medical benefits in settlement of his claims did not amount to the full amount sought by claimant. Order Denying Reconsideration at 5. The administrative law judge therefore concluded that claimant achieved only limited success in pursuit of his claims, warranting a reduced fee to claimant's counsel in accordance with *Hensley*. *Id.*

has not established an abuse of discretion by the administrative law judge in reducing claimant's counsel's fee on the basis of his limited success. Documentation submitted by claimant in support of his motion for reconsideration reveals that claimant sought an 11-week period of temporary total disability benefits, totaling approximately $11,714.34.[5] Claimant ultimately accepted $8,000 in full settlement of his claim for disability compensation, approximately 68 percent of the value of the temporary total disability benefits which he sought.[6] In addition, claimant agreed to accept $12,000 in full settlement of his claim for medical benefits, thus compromising any entitlement to future medicals. Under these circumstances, claimant has not demonstrated an abuse of discretion by the administrative law judge in reducing the fee requested in this case, nor has he established that the fee awarded, over $18,000, does not adequately account for the success achieved. *Hensley*, 461 U.S. 421. We therefore affirm the administrative law judge's fee award in its entirety.

[5]Claimant submitted to the administrative law judge an undated prehearing statement and stipulations form which indicated that claimant's average weekly wage at the time of his injury was $1,597.41, that claimant is currently employed by another employer without any loss of wage-earning capacity, and that his work-related injury resulted in only a single period of temporary total disability from April 5 to June 20, 2007. *See* Exhibit C to Claimant's Motion for Reconsideration; Order Denying Reconsideration at 3. Based on claimant's asserted average weekly wage, the compensation rate for temporary total disability benefits would be approximately $1,064.94 per week. 33 U.S.C. §908(b). An 11-week period of temporary total disability benefits at that compensation rate would thus total approximately $11,714.34.

[6]Contrary to claimant's contention on appeal, *see* Petitioner's Reply Brief at 15-16, employer did argue before the administrative law judge that claimant's acceptance of a reduced percentage of the value of 11 weeks of temporary total disability benefits supports a 25 percent reduction in the fee awarded to his counsel. *See* Employer/Carrier's Response to Claimant's Motion to Reconsider at 9-10.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and the Order Denying Claimant's Motion for Reconsideration are 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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REGINA C. McGRANERY
Administrative Appeals Judge