

MICHAEL COPPOLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT,	)	DATE ISSUED: 06/16/2005
INCORPORATED	)	
	)	
and	)	
	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Robert K. Jahn (Montstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Peter D. Quay and Maxine L. Matta (Murphy and Beane), New London, Connecticut, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (2002-LHC-0989) of Administrative Law Judge Richard D. Mills 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 *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a work-related injury on June 15, 1999, when he fell while unloading cargo. He broke his left hip and left wrist. Employer voluntarily paid claimant temporary total benefits beginning June 16, 1999, at a rate of \$217.95, the minimum compensation rate, and medical benefits under Section 7 of the Act, 33 U.S.C. §907. Thereafter, claimant filed a claim for permanent total disability benefits and medical benefits. Claimant alleged that his average weekly wage was higher than that employer used to pay benefits.

In his Decision and Order, the administrative law judge found that claimant is unable to return to his usual employment and that employer did not offer any evidence of suitable alternate employment. The administrative law judge rejected claimant's contention that his average weekly wage should be calculated based on the wages of a co-worker, pursuant to 33 U.S.C. §910(b), but applied Section 10(c) of the Act, 33 U.S.C. §910(c), in light of claimant's past earnings and inconsistent work history. For the same reason, the administrative law judge also rejected claimant's assertion that his average weekly wage is \$529.90.¹ Consequently, the administrative law judge found that an average weekly wage of \$326.93, resulting in the minimum compensation rate, is fair and reasonable on the facts of this case. The administrative law judge awarded claimant temporary total disability benefits from June 16, 1999 until January 18, 2001, and ongoing permanent total disability benefits thereafter, based on a compensation rate of \$217.95. Employer was granted relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$10,515.58, for work performed before the administrative law judge.² Employer objected to the amount of the fee based on claimant's limited success and sought to exclude all charges regarding the average weekly wage argument on which claimant did not prevail. Employer also objected to

¹ Claimant asserted that a fair and reasonable approximation of his average weekly wage could be determined by multiplying his June 1999 hourly rate of \$15.14 by a 35-hour work week.

² The fee request was for 41.40 hours at an hourly rate of \$195 for Mr. Kelly, 1.10 hours at an hourly rate of \$100 for Mr. Fryer, .40 hours for Mr. Jahn at \$135 per hour, 1.10 hours for Ms. Roberto at an hourly rate of \$70, 1.10 hours for Ms. Carson at an hourly rate of \$50, and 13.60 hours for Ms. Hall at an hourly rate of \$135, and costs of \$310.58.

charges for services rendered in claimant's state case, and it objected to various specific entries. In reply, claimant contended, *inter alia*, that some of the activities in the state claim brought collateral benefit to claimant in his federal claim.

In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded claimant's counsel an attorney's fee and costs totaling \$5,026.86. The administrative law judge disallowed all charges for work performed while the case was pending before the district director, as well as those stemming from the state workers' compensation claim. The administrative law judge found that claimant was not successful on one of the two primary issues in the case, average weekly wage, and therefore disallowed all services pertaining solely to average weekly wage, pursuant to *Hensley v. v. Eckerhart*, 461 U.S. 424 (1984). The administrative law judge stated that the charges related specifically to the issue of total disability were awarded in full. With regard to the remaining charges, the administrative law judge awarded half of the fee requested, pursuant to *Hensley*.

On appeal, claimant challenges the administrative law judge's application of *Hensley*, and the denial of a fee for those entries related to both the state and federal claims. Employer responds, urging affirmance of the administrative law judge's attorney's fee award.

In *Hensley*, the Supreme 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?

461 U.S. at 434; see *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). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award; the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

We reject claimant's contention that the administrative law judge's fee award is not in accordance with *Hensley*. The administrative law judge correctly found that claimant was not fully successful, as he did not prevail on the average weekly wage issue.³ The administrative law judge also correctly stated that he has the discretion to determine how a fee should be reduced in order to comply with *Hensley*. In this regard, the Board has affirmed the decisions of administrative law judges to make across-the-board reductions in compensable services. See, e.g., *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *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). Claimant has not established that the administrative law judge misapplied *Hensley* or that the fee awarded is unreasonable given the results obtained. See *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); see also *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). We therefore affirm the award of a reduced fee in light of claimant's limited success.

Claimant also contends that the administrative law judge erred in disallowing all entries pertaining to the state compensation claim. Claimant contends that some of these services encompassed work necessary to both the state and federal claims. Generally, claimant's counsel is not entitled to an attorney's fee under the Act for time spent on issues pertaining to a state compensation claim, unless the services also were necessary to the prosecution of the federal claim. *Roach v. New York Protective Covering*, 16 BRBS 114 (1984). Counsel is not entitled to be paid twice for the same services, however. *Id.* The administrative law judge disallowed all entries pertaining to the state claim based on employer's objection to the services and claimant's failure to state with particularity how the state services collaterally benefited claimant's federal claim. See Supp. Decision and Order at 2. Claimant has not established that the administrative law judge abused his discretion in this regard, as claimant bears the burden of establishing that the services performed in the state action were necessary to establish entitlement in the Longshore Act case. *Roach*, 16 BRBS at 116. Therefore, we affirm the administrative law judge's disallowance of a fee for these services.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

³ We reject claimant's contention that average weekly wage was a "side issue." The administrative law judge properly viewed this as one of the main issues in the case; indeed, claimant's counsel stated at the hearing that the "primary disputed issue from our point of view is average weekly wage." Tr. at 5. Employer contested claimant's entitlement to total disability benefits, but paid such benefits to claimant based on the statutory minimum.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge