

BRB No. 05-0923

WALTER L. FISHER)
)
Claimant-Respondent)
)
v.) DATE ISSUED: 06/28/2006
)
SHELL OFFSHORE, INCORPORATED)
)
Self-Insured)
Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery,
Administrative Law Judge, United States Department of Labor.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley),
Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2002-LHC-2605) of Administrative Law Judge C. Richard Avery 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On July 31, 2003, the administrative law judge issued a decision approving the Section 8(i), 33 U.S.C. §908(i), settlement between claimant and employer. Thereafter, claimant's counsel filed a petition for an attorney's fee for 133.6 hours of work at a rate of \$200 per hour. Employer objected to numerous entries, the hourly rate and the non-conformance of the fee petition. After ordering counsel to file a conforming fee petition and considering the renewed objections filed by employer, the administrative law judge determined that an hourly rate of \$175 is reasonable; however, he reduced the time allowed to 70.15 hours and awarded a fee of \$12,276.25. Employer appealed the fee award to the Board. In its decision, the Board vacated the fee award as it pertained to

nine specific entries and remanded the case for the administrative law judge to reconsider these requests and employer's objections thereto. In all other respects, including the hourly rate, the Board affirmed the administrative law judge's attorney's fee award. *Fisher v. Shell Offshore, Inc.*, BRB No. 04-0642 (Mar. 18, 2005).

On remand, the administrative law judge agreed with employer's objections to the nine items and disallowed the 24 hours in question. Thus, he reduced the hours awarded from 70.15 to 46.15. However, the administrative law judge stated that, due to the "significant passage of time since the work was performed[,]” claimant's counsel is "entitled to enhancement of his hourly rate" from \$175 to "the \$200 he first requested[.]” Decision and Order on Remand at 6. Thus, the administrative law judge awarded claimant's counsel an attorney's fee of \$9,230. *Id.* Employer appeals the increase in the awarded hourly rate. Claimant has not responded.

Employer contends the administrative law judge erred in increasing, *sua sponte*, the hourly rate for this fee for several reasons. Employer argues that the Board previously affirmed the administrative law judge's award of an hourly rate of \$175, making that determination final. It also asserts that any delay in claimant's counsel receipt of his fee was caused by counsel's failure to file an attorney's fee application in conformance with the regulation, 20 C.F.R. §702.132, and by the time required by the appellate process. Additionally, employer argues that claimant's counsel did not file a brief, request an enhancement to his fee, or successfully prosecute this case while it was on remand before the administrative law judge. We reject employer's assertions of error.

In this case, with the exception of the items the Board ordered the administrative law judge to address on remand, it affirmed, as reasonable, the administrative law judge's fee award, including the hourly rate of \$175. Nevertheless, the fee award, and thus the hourly rate, was not, as employer argues, "final," because the award was remanded to the administrative law judge and no fee had been paid to claimant's counsel. The administrative law judge retains the discretion to augment a fee award where he concludes the passage of time warrants such action so long as he does so within a reasonable time. *See Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Counsel's fee petition establishes that the work in this case was performed between 2001 and 2003. It is now 2006, and claimant's counsel has not received payment for his services. Consequently, the administrative law judge reasonably determined that counsel's fee should be based upon his originally-requested hourly rate of \$200. *Id.* Employer has shown no abuse of discretion by the administrative law judge

in the award of this attorney's fee; therefore, employer is liable for an attorney's fee in the amount of \$9,230.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge