BRB No. 11-0792

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| DARREN HUGGINS | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MASSMAN TRAYLOR JOINT VENTURE | ) | DATE ISSUED: 06/27/2012 |
| | ) | |
| and | ) | |
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| TRAVELERS INDEMNITY COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Quentin McColgin, Jackson, Mississippi, for claimant.

Elton A. Foster (Waller & Associates), Metairie, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (2006-LHC-1830, 2009-LHC-978) of Administrative Law Judge Patrick M. Rosenow 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant was employed as a surveyor-rodman for employer when, on April 4, 2005, he fell and injured his left knee. Although employer voluntarily paid claimant benefits for this injury, a dispute subsequently arose regarding whether claimant's injury was covered under the Act (Case No. 2006-LHC-1830). In a Decision and Order dated September 18, 2006, which addressed only coverage, the administrative law judge determined that claimant satisfied the situs and status requirements necessary for coverage under the Act. Employer appealed this decision to the Board which, in an Order dated January 24, 2008, dismissed employer's appeal as interlocutory. *D.H. v. Massman Traylor Joint Venture*, BRB No. 08-0212 (Jan. 24, 2008) (Order). Claimant thereafter sought disability and medical benefits under the Act, contending that he is totally disabled as a result of back, knee, and psychological injuries sustained as a result of the April 4, 2005, work incident (Case No. 2009-LHC-978).

In his Decision and Order, the administrative law judge found that claimant established a causal relationship between his employment and his present knee and back conditions, but failed to establish that his April 4, 2005, fall at work aggravated his pre-existing psychological condition. The administrative law judge found, *inter alia*, that claimant's work-related back and knee conditions prevent him from returning to his usual employment duties with employer, and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from May 20 through November 18, 2005, and permanent total disability benefits from November 19, 2005, and continuing. 33 U.S.C. §908(a), (b). The administrative law judge denied both parties' motions for reconsideration.

Claimant's counsel subsequently filed a fee petition with the administrative law judge seeking a fee for 221.75 hours at an hourly rate of $300, and $2,008.26 in expenses, for legal services performed regarding the initial claim for coverage under the Act, and for 236.125 hours at an hourly rate of $300, and $8,107.52 in expenses, for legal services performed regarding claimant's claim for disability and medical benefits under the Act. Counsel additionally sought a fee for 83.5 hours of paralegal services at a rate of $75 per hour. Employer filed timely objections, and counsel replied, seeking an additional fee.

In his Supplemental Decision and Order, the administrative law judge reduced counsel's requested hourly rate to $250, and approved the requested paralegal rate of $75 per hour. With regard to the number of hours counsel requested for services on claimant's claim for coverage (Case No. 2006-LHC-1830), the administrative law judge approved 168 of the requested hours. With regard to the number of hours requested by counsel for services on claimant's claim for disability and medical benefits (Case No. 2009-LHC-978), the administrative law judge approved 238.125 hours of attorney services, and 83.5 hours of paralegal services, and reduced the resulting fee by 40 percent in order to reflect claimant's limited success. Specifically, the administrative law judge found that claimant was

successful on the knee and back injury claims, but not on the psychological injury claim. With regard to the expenses sought, the administrative law judge held employer liable for expenses totaling $10,058.80. In sum, the administrative law judge awarded claimant's counsel an attorney's fee of $77,218.75 for legal services, $3,757.50 for paralegal services, and $10,058.80 in expenses.

On appeal, claimant contends the administrative law judge erred in reducing his requested attorney's fee. Employer responds, urging affirmance.

In challenging the fee awarded by the administrative law judge, claimant contends that the administrative law judge incorrectly applied the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to reduce his requested fee for services on claimant's claim for disability and medical benefits. We agree with claimant that the rationale employed by the administrative law judge cannot be affirmed. Therefore, we remand the case for further consideration on this issue.[1]

In *Hensley,* 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. 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. 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. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley,* 461 U.S. at 435-436. These principles apply to all fee-shifting statutes, like the Act. *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.*

[1]Claimant does not challenge on appeal the administrative law judge's reduction in his requested hourly rate, or the administrative law judge's reduction of specific time entries. Accordingly, these reductions are affirmed.

*denied,* 488 U.S. 997 (1988).

In this case, the administrative law judge initially found that there were no severable issues in the claim and that, thus, only the second prong of the *Hensley* test is applicable. Supplemental Decision and Order at 5. The administrative law judge then determined that, as claimant prevailed on only two of the three injuries for which benefits were sought, the number of hours requested by counsel should be reduced by 40 percent. *Id.* at 6.

We cannot affirm this conclusion as the administrative law judge's analysis does not comport with *Hensley*. In *Hensley*, the Supreme Court upheld the district court's rejection of "'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon.'" Hensley, 461 U.S. at 435 n.11. The Court explained that "[s]uch a rationale provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested." *Id.* In this case, however, the administrative law judge used this ratio approach to reduce the fee requested by 40 percent because claimant prevailed on only two of three issues.[2]

Furthermore, in looking only to "issues" on which claimant prevailed, the administrative law judge failed to assess claimant's success in terms of the results obtained. Specifically, claimant was awarded permanent total disability benefits, which is the fullest recovery of disability compensation possible, irrespective of the administrative law judge's finding that the claimant's psychological condition is not work-related. Claimant did not succeed in obtaining all medical benefits requested, as he is not entitled to medical benefits for his non-work-related psychological condition. *Hensley* states that, under a step two inquiry, the "most critical factor" is the degree of success obtained. 461 U.S. at 436. In *Avondale Industries, Inc. v. Davis,* 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003), the Fifth Circuit stated that, pursuant to *Hensley* and Section 28(b) of the Act, 33 U.S.C. §928(b), the administrative law judge should attempt to quantify the award of benefits in comparison to the amount employer voluntarily paid in order to determine whether the "hours reasonably expended on

[2]We note, moreover, that the administrative law judge did not explain why a 40 percent reduction was warranted instead of a one-third reduction.

the litigation as a whole" provides a satisfactory basis for a fee award.[3] *Id.*, 348 F.3d at 490, 37 BRBS at 115(CRT), *citing Hensley*, 461 U.S. at 434. As the administrative law judge did not properly apply the *Hensley* analysis, we vacate the administrative law judge's decision to reduce the awardable fee by 40 percent. We remand the case for the administrative law judge to reconsider counsel's fee petition pursuant to the second prong of the *Hensley* test. The administrative law judge must determine claimant's success based on the results achieved and not solely on the basis of "successful issues." The administrative law judge then must assess the fee request in terms of this success.

Accordingly, we affirm the administrative law judge's finding that counsel is entitled to an attorney's fee based on an hourly rate of $250. However, for the reasons stated herein, we vacate the administrative law judge's attorney's fee award. The case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[3]In his brief, claimant asserts that, while employer voluntarily paid $31,357 in compensation benefits, the administrative law judge's award resulted in a lump sum payment of $170,151.08, and continuing permanent total disability benefits of $36,868 per annum. Should these weekly benefits continue throughout claimant's expected lifetime, claimant calculates that he will receive approximately $1.1 million in additional compensation. *See* Cl. Br. at 4-5.