BRB No. 05-0736

WALTER J. COLLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 05/23/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (Law Office of Scott N. Roberts), Groton, Connecticut, for claimant.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (2004-LHC-1632) of Administrative Law Judge Daniel F. Sutton 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, a shipyard test technician, has undergone several surgical procedures for injuries suffered to his right hand and wrist during the course of his employment.[1]

[1] Claimant underwent right ulnar nerve exploration and carpal tunnel release surgery in 1995. EXS 12, 13. A repeat ulnar nerve exploration and carpal tunnel release surgery was performed in 2000. *Id*. On March 13, 2003, claimant underwent a SLAC wrist reconstruction, scaphoid excision, capilate lunate hernate triqutrum and limited wrist arthrodesis. CX 2.

Following a third operation, claimant sought disability compensation for an 18 percent permanent impairment to his right hand. Employer voluntarily paid compensation for this injury based upon the 18 percent impairment rating but took a credit in the amount of its prior payments under the Act and the Rhode Island workers' compensation statute which it made after claimant's previous two surgeries.[2]

Before the administrative law judge, claimant contended he was entitled to benefits for the full 18 percent impairment to the hand as assigned by Dr. Ashmead. CX 2. Claimant also contended that employer's credit was limited to the $5,400 paid under the state act for disfigurement. Employer contended that Dr. Ashmead improperly applied the "combined values" table of the *Guides to the Evaluation of Permanent Impairment*. Employer countered that claimant was limited to an award for the totality of his combined hand/wrist impairment as assessed by Dr. Weiss. At his post-hearing deposition, Dr. Weiss explained how he arrived at a 19 percent impairment of the upper extremity (arm). In its post-hearing brief to the administrative law judge, employer conceded claimant's entitlement to benefits for a 19 percent arm impairment, but contended it was entitled to a credit for all prior payments totaling over $20,000. In his Decision and Order Awarding Benefits, the administrative law judge awarded claimant permanent partial disability benefits in the amount of $7,038.26, which represented an award of $27,163.28 for a 19 percent work-related loss of the use of his right arm, 33 U.S.C. §908(c)(1), (19), less a credit to employer in the amount of $20,125.02, pursuant to Sections 3(e) and 14(j), and the "credit doctrine." 33 U.S.C. §§903(e), 914(j); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); Decision and Order at 7.

Subsequent to the issuance of the Decision and Order Awarding Benefits, claimant's counsel filed a fee petition with the administrative law judge seeking $14,144.70, representing 51.92 hours of attorney time at $250 per hour and 6.25 hours of paralegal services at $70.00 per hour, plus expenses of $727.20. Employer argued that claimant's attorney's fee should be reduced commensurate with the compensation awarded. In his Supplemental Decision, the administrative law judge awarded claimant's attorney $7,071.94 in fees and costs due to claimant's limited success in obtaining the benefits sought.

[2] Following the first surgery, employer paid claimant for a four percent permanent impairment in the amount of $6,232.15. EX 1. After the second surgery, employer paid claimant $6,708.34, based on an additional six percent impairment. EXS 8, 9. Claimant also received a payment of $5,400.00 for disfigurement of the right wrist pursuant to an agreement under the Rhode Island Workers' Compensation Act. EX 10.

Claimant appeals, arguing that the administrative law judge erred in reducing the requested fee. Employer has not responded to this appeal.

The administrative law judge discussed *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and found that the compensation and credit issues were intertwined, and thus there were no unsuccessful, unrelated claims for a which a fee could be denied *in toto*. The administrative law judge thus addressed whether the fee request was reasonable in relation to the results obtained. The administrative law judge found that claimant obtained an additional $7,038.26 in compensation, but that employer had conceded claimant's entitlement to this amount at the outset of the hearing. The administrative law judge thus approved an attorney's fee of half of that requested, approximately $7,000, which he found to be reasonably commensurate with the necessary work done, taking into account the regulatory criteria of 20 C.F.R. §702.312(a).[3]

The amount of benefits obtained is a properly considered in determining the amount of an attorney's fee award under the Act. *See generally Farrar v. Hobby*, 500 U.S. 103 (1992); *Hensley*, 461 U.S. 424; 20 C.F.R. §702.132(a). Nonetheless, we cannot affirm the administrative law judge's fee award as claimant correctly argues that the reduction is based on the administrative law judge's improper reliance on employer's "concession" at the hearing that claimant was entitled to additional compensation of $7,038.26. Supplemental Decision at 2. Employer, in fact, did not concede claimant's entitlement to additional benefits at the formal hearing. Employer's counsel stated at the hearing, "It's going to come down to what these two doctors say [Drs. Ashmead and Weiss] and when we cross examine them, what their credibility is and how they arrived at their opinions." Tr. at 16. In its post-hearing brief, following the depositions of the doctors, employer did indeed concede claimant's entitlement to benefits for a 19 percent impairment of the arm based on Dr. Weiss's opinion but did not pay claimant any additional compensation at that time. Moreover, assuming, *arguendo*, that employer did agree to claimant's entitlement to benefits, the administrative law judge must still award a fee for the reasonable and necessary work performed in the contested claim prior to employer's concession. *See generally Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

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[3] Section 702.132(a) states that,

> Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, . . .

20 C.F.R. §702.312(a).

Therefore, we must remand this case for reconsideration of the amount of the attorney's fee to which claimant's counsel is entitled. In view of the administrative law judge's finding that claimant was not fully successful in pursuing his claim, however, the administrative law judge properly stated that the fee should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 434-435; *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.), *cert. denied*, 488 U.S. 992 (1988); 20 C.F.R. §702.132(a). Claimant correctly observes that the United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, has stated that the "lodestar method" (the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate) is the preferred starting point for assessing a fee request pursuant to *Hensley*. *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 (1st Cir. 1997). The court also stated, however, that the fact-finder is not bound by the lodestar figure. *Id*. at 337. Indeed, the administrative law judge is afforded considerable discretion in determining the amount of a reasonable attorney's fee in view of the degree of the claimant's success. *See Barbera*, 245 F.3d 282, 35 BRBS 27(CRT); *see also Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Thus, while we cannot affirm the present award on the administrative law judge's rationale, it is within the administrative law judge's discretion on remand to determine a reasonable fee for work in this case based on the record and the applicable law.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge