

MAX B. STEEVENS	)	BRB No. 03-0220
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOHEMIA, INCORPORATED and	)	
UMPQUA RIVER NAVIGATION	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	DATE ISSUED: <u>Nov. 14, 2003</u>
	)	
Employers/Carrier-	)	
Respondents	)	
	)	
	)	
MAX B. STEEVENS	)	BRB No. 03-0452
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOHEMIA, INCORPORATED and	)	
UMPQUA RIVER NAVIGATION	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employers/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Attorney Fees on Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor, and the Compensation Order of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky MacColl Olson, PC), Portland, Oregon,  
for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Order Awarding Attorney Fees on Remand (99-LHC-1137) of Administrative Law Judge Alexander Karst, and the Compensation Order (OWCP No. 14-128232) of District Director Karen P. Staats 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).<sup>1</sup> The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it 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).

This case is before the Board for the second time. In his first decision, the administrative law judge concluded that claimant, a voluntary retiree, was entitled to permanent partial disability benefits for a 52.81 percent binaural impairment under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), based on an average weekly wage of \$299.03, calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). Subsequently, claimant's counsel sought an attorney's fee of \$8,368.75, representing 41 hours of services at an hourly rate of \$200 and 2.25 hours of legal assistant work at an hourly rate of \$75, plus costs of \$179.05. The administrative law judge awarded an attorney's fee of \$4,197.80, representing 22 hours of attorney time at an hourly rate of \$175 plus the requested fees for legal assistant time and costs.

Both parties appealed the administrative law judge's decision to the Board. Claimant challenged the administrative law judge's refusal to apply the Section 6(b)(2), 33 U.S.C. §906(b)(2), minimum compensation rate to his award of permanent partial disability benefits, and the reduction in the number of hours and hourly rate requested in awarding an attorney's fee. Employer appealed the administrative law judge's finding that claimant had a compensable hearing impairment at the time of his retirement.

On appeal, the Board affirmed the administrative law judge's award of compensation to claimant in its entirety, but held that the administrative law judge's failure to state the reasons for his reductions in claimant's requested attorney fee's award required that his supplemental decision be vacated and case be remanded for further consideration. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

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<sup>1</sup> By Order, dated April 7, 2003, these cases were consolidated for purposes of decision only.

On remand, the administrative law judge reduced the number of hours requested by one-third, based on his estimation of the time claimant's counsel spent on the unsuccessful prosecution of his application for the minimum compensation rate and an award of interest, and reduced the hourly rate to \$175 based upon his evaluation of the quality of work performed before him.<sup>2</sup> Accordingly, he again awarded claimant's counsel a fee of \$4,197.80, representing 22 hours of attorney time at \$175 per hour plus the amount requested for legal assistant time and costs.

Following the issuance of the Board's decision, claimant's attorney filed a supplemental fee affidavit with the district director for an enhanced fee due to a delay in fee payment and for additional time spent in trying to collect previously awarded attorney fees. The district director issued a fee order on May 9, 2002, awarding claimant's counsel a fee of \$138.75 for 45 minutes of work. Counsel then sought an order of default and certified copy of the fee award to take steps to enforce payment of this fee award in the district court; however, employer paid the fee award before claimant took any action to enforce the award. Claimant's counsel then sought an additional fee for the time he spent trying to collect payment of the fees awarded by the administrative law judge and the district director.<sup>3</sup> The district director denied the fee request, as well as counsel's request that she issue a certified copy of the administrative law judge's fee award on remand.

Claimant appeals the orders of both the administrative law judge and the district director. It is claimant's contention that the administrative law judge improperly reduced both the number of hours and the hourly rate, and improperly addressed counsel's ethics as a factor affecting the amount of the fee award. BRB No. 03-0220. Claimant also contends that the district director erred in failing to award any fee for his attempts to collect previously awarded fees.<sup>4</sup> BRB No. 03-0452. Employer responds urging that both the administrative law judge and district director be affirmed.

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<sup>2</sup> Of the 41 hours requested, the administrative law judge first deducted 7.5 hours requested for preparation of claimant's Motion for Reconsideration, which claimant had since withdrawn. CX E. Of the remaining 33.5 hours, the administrative law judge disallowed 11.5 hours due to claimant's failure to prevail on the issues of the applicability of the minimum compensation rate and his entitlement to interest.

<sup>3</sup> In his Third Supplemental Affidavit for Attorney Fees and Costs, claimant's counsel requested an additional fee of \$771.88, in an effort to collect the \$138.75 fee award.

<sup>4</sup> Claimant also contended that the district director was legally incorrect in refusing to issue a certified copy of the administrative law judge's fee award. The district director denied this request, stating that as claimant had appealed the administrative law judge's

We first address claimant's appeal of the administrative law judge's award of an attorney's fee on remand. Claimant contends that the reduction in the number of hours does not bear a relationship to the work performed on the unsuccessful issues. Claimant contends that the administrative law judge irrationally arrived at the 11.5-hour reduction and that a more realistic figure would be .75 of an hour.<sup>5</sup> The administrative law judge stated that it was impossible to accurately determine the amount of time given to specific issues but that claimant's estimate of three-quarters of an hour on the minimum compensation and interest issues was unrealistic. Decision on Remand at 3. The administrative law judge, applying *Hensley v. Eckerhart*, 461 U.S. 424 (1983), reviewed the fee petition and reasoned, from the entries regarding preparation of the pre-hearing statement, researching legal issues, drafting and revising briefs, and preparation for and attendance at the hearing, that claimant spent more than a minimal amount of time on the unsuccessful issues. The administrative law judge also stated that, given claimant's limited success and the "marginal" quality of the representation, the fee requested should be reduced.

In *Hensley*, the Supreme Court stated that, under a fee-shifting scheme, where the plaintiff achieves only partial or limited success, 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; *see also 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) (1<sup>st</sup> Cir.), *cert. denied*, 488 U.S. 992 (1988). In this case, the administrative law judge properly considered claimant's degree of success, as well as the quality of counsel's representation, in determining the amount of the fee award. *See* 20 C.F.R. §702.132; *see generally Parker v. Director, OWCP*, 12

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decision on remand, the fee awarded was not yet final. Claimant's counsel subsequently filed with the Board a Motion to Compel the District Director to Issue Certified Copy of ALJ Order Regarding Attorney Fees. This motion was later withdrawn, as counsel stated that employer paid the fee awarded by the administrative law judge. *See* Claimant's Reply Brief at 1. As this issue is now moot, we need not address claimant's contentions of error in this regard.

<sup>5</sup> Claimant arrives at his calculation of the number of hours by which his request should be reduced by calculating the number of lines in his hearing brief and post-hearing memorandum as a percentage of the total number of lines in these documents and multiplying this percentage by the total time requested for the preparation of them. Claimant states that 14 lines in his hearing memorandum are devoted to the issues of interest and minimum compensation rate out of 156 lines and 18 lines out of 196 are so directed in his reply memorandum. Claimant's Memorandum in Support of Petitions for Review at 9-10.

BLR 1-98 (1987). The administrative law judge rationally rejected claimant's assertion that percentages of space utilized in submitted documents should equate to time spent on the unsuccessful issues, and claimant has not established that the administrative law judge improperly applied *Hensley* in this case. The Board has affirmed an across-the-board reduction in the requested fee where the administrative law judge determined that claimant obtained limited success, as *Hensley* affords the fact-finder considerable discretion in determining the amount of a reasonable fee. See, e.g., *Hill v. Avondale Industries, Inc.*, 32 BRBS 192 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). Accordingly, as claimant has not established an abuse of discretion, we affirm the administrative law judge's reduction of the number of hours of legal services requested.

Claimant also challenges the reduction in the hourly rate, arguing that the administrative law judge irrationally reduced his rate from \$200 to \$175 per hour. The administrative law judge based this reduction on his assessment of the quality of work performed by claimant's counsel, finding that counsel's failure to identify cases relevant to the issues presented but contrary to his position hindered the adjudication process. Claimant also contends that the administrative law judge erred in finding that counsel violated the Oregon Code of Professional Responsibility without providing counsel notice and an opportunity to be heard on this issue.

We affirm the administrative law judge's reduction in counsel's hourly rate, solely on the basis of the regulation at 20 C.F.R. §702.132(a), which provides support for the administrative law judge's action independent of his finding regarding counsel's alleged violation of the Oregon Code of Professional Responsibility.<sup>6</sup> 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, . . ." 20 C.F.R. §702.132(a). The administrative law judge found that counsel hindered the adjudication process by failing to disclose authority contrary to his position, and that therefore counsel is not entitled to an hourly rate at the higher end of the scale charged by employers in the Portland area. The administrative law judge is in the best position to determine the quality of the legal services provided, and claimant has not established that the administrative law judge abused his discretion in reducing the hourly rate pursuant to Section 702.132(a). See generally *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9<sup>th</sup> Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Accordingly, the administrative law judge's fee award on remand is affirmed in its entirety.<sup>7</sup>

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<sup>6</sup> Thus, we will not address claimant's contentions in this regard.

<sup>7</sup> We reject counsel's assertion that he is entitled to an enhancement of the previously awarded fee due to delay in payment. The Ninth Circuit, in *Anderson v.*

In his appeal of the district director's Compensation Order, claimant contends that the district director erred in failing to award him a fee for services connected with his attempt to collect the fee of \$138.75 previously awarded by the district director. Specifically, counsel's fee petition reflects, *inter alia*, time spent corresponding with employer regarding the fee and with the district director in pursuit of a certified copy of the prior fee award. The district director declined to award any fee, stating that the fee petition covered services for work performed before the administrative law judge and that, essentially, counsel did not attempt to resolve the fee issue with employer in a reasonable manner.

We cannot affirm the district director's finding that counsel is not entitled to any fee for work performed before her office. The district director stated that the appropriate action for counsel to take would be to contact employer concerning its non-payment of the fee. Counsel did so; therefore, at a minimum, counsel is entitled to a reasonable fee for his correspondence with employer concerning payment of the awarded fee. Moreover, as employer did not pay the fee until November 2002, counsel did not act irrationally in seeking a default order from the district director and this work also is compensable. The case is remanded to the district director for the entry of an award of a reasonable attorney's fee for the necessary services performed. 20 C.F.R. §702.132(a). The district director's disallowance of a fee for work performed the administrative law judge is affirmed. *See generally Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*).

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*Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3(CRT) (9<sup>th</sup> Cir. 1996), stated that enhancement is not appropriate in instances of delay in payment due to claimant's appeals of the fee award.

Accordingly, the administrative law judge's Decision and Order Awarding Attorney Fees on Remand is affirmed. The district director's denial of an attorney's fee is vacated, and the case is remanded for further consideration consistent with this decision.

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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PETER A. GABAUER, Jr.  
Administrative Appeals Judge