BRB No. 96-1466

IRVIN P. FABRE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
McDERMOTT, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees and Order Denying Motion for Reconsideration of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Mac Trelles, Jr. (Mac Trelles and Partners), Baton Rouge, Louisiana, for claimant.

J. Louis Gibbens (Gibbens, Blackwell & Stevens), New Iberia, Louisiana, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees and Order Denying Motion for Reconsideration (92-LHC-1757) of Administrative Law Judge Quentin P. McColgin 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). 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).

On April 19, 1989, claimant injured his left knee during the course of his employment with employer as a quality control inspector. Arthroscopic surgery was performed on May 24, 1989, and December 5, 1989, by Dr. Rhymes. In July 1990 claimant reported back complaints to Dr. Rhymes, which Dr. Rhymes attributed to stress placed on claimant's back from favoring the left knee. Employer voluntarily provided medical benefits and paid compensation to claimant for temporary total disability, 33 U.S.C. §908(b), from April 19, 1989, to June 30, 1990, and, pursuant to the impairment rating of Dr. Rhymes, compensation for a 20 percent permanent partial disability of the left knee, 33 U.S.C.

§908(c)(2), (19), commencing on June 1, 1990.

Claimant continued to complain of left knee pain for which Dr. Rhymes recommended a diagnostic arthroscopy; employer, however, refused to authorize this procedure. Claimant again complained of back pain on February 29, 1992, which Dr. Rhymes attributed to claimant's favoring the injured left knee and he prescribed pain medication which employer also refused to authorize. At the formal hearing, employer contested whether claimant required a third arthroscopy, and the date claimant's knee reached maximum medical improvement. Employer stipulated that claimant's back complaints are related to his left knee injury; however, after the hearing, employer submitted a report from Dr. Cenac which stated, *inter alia*, that claimant's back complaints are not related to the work injury. The administrative law judge granted claimant's subsequent request that the record remain open to introduce evidence pertaining to the now contested back injury issue.

In his Decision and Order, the administrative law judge found that claimant's knee sustained a twenty percent work-related impairment and reached maximum medical improvement on June 1, 1990; therefore, claimant is not entitled to any additional compensation over the amount employer had voluntarily paid. Moreover, the administrative law judge found that a third diagnostic arthroscopy is not reasonable and necessary; accordingly, employer was found not obligated to pay for the procedure. Finally, the administrative law judge found that claimant's back pain is related to his compensable knee injury, and that employer is thus liable for medical expenses related to treatment of the back pain.

Claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $13,402.55, representing 53.4 hours of services rendered at $150 per hour, 5.5. hours for the formal hearing at $300 per hour, 28 hours of travel time at $45 per hour, mileage expenses of $382.50, and other expenses totaling $2,100.05. Employer filed objections to the fee requested. Specifically, employer asserted that claimant's attorney is only entitled to a fee for time and expenses expended after the formal hearing insofar as they relate to claimant's successful back injury claim. In support of this contention, employer asserted that all attorney time and expenses incurred prior to the formal hearing related only to the unsuccessful claims for a third arthroscopy and additional compensation. Claimant replied to employer's objections, stating that the back and knee injury issues are interrelated; therefore, he requested approval of the entire fee petition.

In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge agreed with employer that only attorney time and expenses incurred by claimant after October 27, 1992, are compensable. The administrative law judge found that because claimant's pre-hearing statement did not identify a claim for the back injury, the back injury claim did not become controverted until after the formal hearing; moreover, the administrative law judge found that claimant is not entitled to a fee for time and expenses expended on the unsuccessful knee injury issues. Additionally, pursuant to employer's objections, the $250 charge for long distance telephone calls was reduced to $100.

Accordingly, the administrative law judge found that claimant's counsel is entitled to a fee of $5,685, representing 26.9 hours of services rendered subsequent to the formal hearing at $150 per hour and 5.5 hours of services rendered for the formal hearing at $300 per hour, plus expenses of $511.30.

Claimant moved for reconsideration of the fee award, stating that, although the back injury claim was not raised in his pre-hearing statement, the deposition testimony of record establishes that some attorney time was expended on the back injury issue prior to the date of the October 27, 1992, formal hearing. Claimant also requested that the administrative law judge reconsider his finding that the knee and back injury issues are severable for purposes of awarding an attorney's fee, and that the administrative law judge also reconsider and explain his reduction in the requested expenses.

In his Order Denying Motion for Reconsideration, the administrative law judge agreed with claimant's counsel that he failed to explain the reduction in counsel's disallowed expenses; the administrative law judge thereafter explained that he disallowed all expenses incurred prior to October 27, 1992, because they related to the unsuccessful knee injury issues. Regarding claimant's contention that he should reconsider whether any attorney time expended prior to October 27, 1992, was related to the back injury issue and that the knee and back injury issues are severable, the administrative law judge declined to reconsider his prior findings, reasoning that claimant should have raised his arguments in his reply to employer's objections to the attorney fee petition. Accordingly, except for his explanation on reconsideration of the disallowed expenses, the administrative law judge denied claimant's motion for reconsideration, and he affirmed his Supplemental Decision and Order Awarding Attorney Fees. On appeal, claimant contends that the administrative law judge erred in refusing to consider all of the contentions raised in his motion for reconsideration. Employer responds, urging affirmance.

In the instant case, the administrative law judge declined to address claimant's specific contentions on reconsideration that attorney services were rendered regarding the back injury issue prior to the formal hearing and that the issue was raised prior to the formal hearing, as evidenced by the parties' stipulations at that hearing. These contentions directly challenge the administrative law judge's findings in his Supplemental Decision and Order that the back injury claim was not raised until the October 27, 1992, hearing and that claimant's counsel is not entitled to a fee for attorney time and expenses incurred prior to that date. In refusing to address claimant's argument on reconsideration, in his Order Denying Motion for Reconsideration, the administrative law judge reasoned that these issues should have been presented in claimant's reply to employer's objections to the fee petition and thus would not be considered in order to discourage "piecemeal litigation and adjudication of secondary issues." We agree that the administrative law judge erred in not explicitly addressing the contentions set forth in claimant's motion for reconsideration. Claimant's motion for reconsideration properly stated arguments relevant to the conclusions in the original order and were thus properly before the administrative law judge on reconsideration.

However, under the facts of this case, the administrative law judge's error in failing to address all of the contentions set forth in claimant's motion for reconsideration is harmless. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), 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. Specifically, 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; *see also George Hyman Construction 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. 1988), *cert. denied*, 488 U.S. 992 (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. 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 Bullock v. Ingalls Shipbuilding, Inc.,* 27 BRBS 90 (1993)(*en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc,* 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27 BRBS 24 (1993).

In the present case, the administrative law judge, citing *Horrigan*, 848 F.2d at 321, 21 BRBS at 73 (CRT), found that claimant was not successful in all of his claims; specifically, while claimant obtained from employer reimbursement for pain medication prescribed in the past for his back condition and the right to future medical treatment for that condition, claimant was unsuccessful in establishing his claim for an additional arthroscopy of the left knee and for additional compensation for his left knee injury. As claimant's sole success was thus an award of reimbursement for pain medication prescribed by Dr. Rhymes and the right for future treatment of his back condition, the awarded fee of $5,685 plus $511.30 for expenses is clearly reasonable for the results obtained in this case. As the amount of the fee is reasonable under the Supreme Court's decision in *Hensley*, it is affirmed.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge