BRB Nos. 03-0477
and 03-0477A

JOHN LESICA	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SEALAND SERVICES,	)	
INCORPORATED	)	DATE ISSUED: April 7, 2004
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Frank S. Hlavenka (Hlavenka & Weisberg), Woodbridge, New Jersey, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Supplemental Decision and Order Awarding Attorney Fees (2001-LHC-2009) of Administrative Law Judge Ralph A. Romano 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 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).

Claimant suffered a work-related injury to his back on July 16, 1993, while working for employer as a refrigerator mechanic. Pursuant to the parties' stipulations, the district director awarded claimant permanent total disability benefits beginning on January 2, 1995. Subsequently, employer filed a petition for modification under Section 22 of the Act, 33 U.S.C. §922, alleging that claimant was able to return to his usual employment.[1] Alternatively, employer alleged that claimant was able to perform suitable alternate employment and therefore is only partially disabled.

In his Decision and Order Modifying Benefits, the administrative law judge found that claimant remains unable to perform his usual work, but that employer identified alternate employment suitable for claimant given his restrictions. The administrative law judge rejected each party's proposed calculation of claimant's wage-earning capacity and found that the fairest method for determining claimant's wage-earning capacity is to take the average salary of the ten jobs employer identified in Exhibit F and the nine jobs employer identified in Exhibit G. Therefore, the administrative law judge found that claimant's weekly post-injury wage-earning capacity was $283.34, with a compensation rate of $636.06, as of January 12, 2001, and is $404.70, with a compensation rate of $555.15, as of January 15, 2002. Accordingly, the administrative law judge modified claimant's permanent total disability award to one for permanent partial disability, consistent with these findings, effective January 12, 2001. Neither party has challenged the administrative law judge's decision on the merits.

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge seeking an attorney's fee of $50,820, representing 169.40 hours of services rendered at a rate of $300 per hour, plus $3,988.43 in costs. By correspondence dated March 26, 2003, claimant's counsel advised the administrative law judge that he had inadvertently included in his fee petition work performed before the district director. Employer filed objections to the fee petition on the ground that claimant was not successful in defending his award. Employer also contended that neither Section 28(a) nor 28(b) provides a basis for fee liability under the circumstances of this case, and that therefore claimant should be held liable for the fee pursuant to Section 28(c). 33 U.S.C. §928(a)-(c). Finally employer contended that the fee request was not commensurate with claimant's degree of success.

[1] Employer was awarded relief from continuing compensation liability, pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Pursuant to Sections 8(f)(2)(B) and 22, employer retains the right to seek modification notwithstanding the payment of benefits by the Special Fund. 33 U.S.C. §§908(f)(2)(B), 922.

The administrative law judge found that claimant successfully defended his award in that his benefits were not terminated as argued by employer and claimant retained a compensation rate in excess of that urged by employer. Accordingly, the administrative law judge found that employer is liable for claimant's attorney's fee. The administrative law judge disallowed the time requested for work performed before the district director. With respect to the requested hourly rate, the administrative law judge reduced it from $300 to $200, finding a rate of $200 to be "more reflective of the quality of representation and complexity of issues involved than the $300 claimed." Supp. Decision and Order at 2. Accordingly, the administrative law judge found employer liable for an attorney's fee of $29,940, for 149.7 hours of attorney services at $200 per hour. Finally, the administrative law judge awarded claimant the requested costs of $3,988.43.

On appeal, employer challenges the administrative law judge's determination that it is liable for claimant's attorney's fee, and argues that any fee to which claimant's counsel may be entitled should be paid by claimant as a lien on his compensation. Employer also contends that the fee award is excessive given the degree of claimant's success. In his cross-appeal, claimant contends that the administrative law judge erred in reducing his requested hourly rate from $300 to $200.

Employer first contends that claimant is not entitled to an attorney's fee because he was wholly unsuccessful in that he did not retain entitlement to total disability benefits. The administrative law judge rejected this contention, observing that employer sought to terminate claimant's benefits or, alternatively, to have claimant's wage-earning capacity set at $505.88 per week, with a compensation rate of $487.70. The administrative law judge found that claimant remains unable to perform his usual work and has a post-injury wage-earning capacity lower than that proposed by employer. Thus, the administrative law judge found that claimant successfully defended his entitlement to benefits against employer's modification request. We affirm this finding, and therefore we reject employer's contention that claimant did not successfully defend his claim. Although claimant's benefits were reduced, they were not terminated or reduced to the extent employer sought and claimant therefore is entitled to an attorney's fee in this case.[2] *See generally E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Sanders v. Marine Terminals Corp.*, 31 BRBS 19 (1997) (Brown, J., dissenting).

[2] Although employer argues that its request for termination of benefits was only *pro forma*, it did argue in its post-hearing brief that the administrative law judge should reject claimant's "incredible" testimony concerning his physical limitations and credit Dr. Vigman's opinion that claimant can return to his usual work. Emp. Post-Hearing Brief at 48.

Employer further contends that that it cannot be held liable in this case as neither Section 28(a) nor Section 28(b) is applicable. Employer, citing *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 609, 4 BRBS 79, 88 (3d Cir. 1976), avers that Section 28 authorizes the assessment of an attorney's fee against an employer only "in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or increasing compensation in formal administrative or judicial proceedings." Employer contends that as it was paying compensation for total disability at all times, and as claimant did not prevail in establishing liability or increasing his compensation, he is not entitled to a fee award payable by employer.

We reject this restrictive construction of Section 28. Section 28(b) states that "if the claimant is successful in review proceedings before the Board or court" a fee award may be assessed against employer. It is well established that claimant is entitled to a fee payable by employer for successfully defending an award against employer's appeal. *See, e.g., Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 28 BRBS 18(CRT) (5th Cir. 1994); *Atlantic & Gulf Stevedores*, 542 F.2d at 610, 4 BRBS at 89; *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *LaPlante v. General Dynamics Corp.*, 15 BRBS 83 (1982). It is appropriate to analogize this case, in which employer sought to modify an award of benefits, to those in which an employer appeals, in that in both instances employer initiates proceedings to alter the award of benefits. If, as here, the claimant is successful in defending his award against employer's challenge via the Act's modification provisions, fee liability is properly borne by employer just as it is when claimant successfully defends an award on appeal. Consequently, we affirm the administrative law judge's finding that claimant's counsel is entitled to an attorney's fee payable by employer.[3] *Id.*

Nonetheless, we agree with employer's final contention that the administrative law judge did not adequately address its contention that the fee award should be tailored to claimant's degree of success. The administrative law judge reduced the hourly rate requested in light of the quality of the representation and the complexity of the issues involved, *see* discussion *infra*, but did not take into account the amount of benefits, *see* 20 C.F.R. §702.132, or address employer's contention regarding the applicability of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Supreme Court stated that

[3] As employer is liable for claimant's attorney's fee, the administrative law judge also properly held employer liable for the requested costs, pursuant to Section 28(d), 33 U.S.C. §928(d). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

the overarching consideration in awarding a fee under a fee-shifting statute is the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435; *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) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). The fact-finder has discretion in determining the amount of a reasonable fee under *Hensley*, as he is in the best position to assess the services provided in relation to the overall success. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). Therefore, as the administrative law judge did not address employer's objection in this regard, we remand the case so that the administrative law judge may do so.

Finally, we reject claimant's contention on cross-appeal that the administrative law judge erred in reducing his requested hourly rate from $300 per hour to $200 per hour. Specifically, claimant's counsel alleges that it was irrational for the administrative law judge to compliment him and employer's counsel for "good lawyering," *see* Tr. at 158, and then to reduce his hourly rate. Claimant's counsel also submits copies of decisions in other cases wherein he was awarded an hourly rate higher than $200. In reducing the hourly rate sought by claimant's counsel, the administrative law judge stated that "an hourly rate of $200 is more reflective of the quality of the representation and complexity of issues involved, than the $300 claimed." Supp. Decision and Order at 2.

As to the administrative law judge's compliment to counsel as proof that the administrative law judge irrationally reduced the requested hourly rate, we note that the quality of the representation is but one factor in determining a reasonable attorney's fee. *See* 20 C.F.R. §702.132. Moreover, the administrative law judge is not bound by the rates awarded counsel in other cases, as the facts of each case warrant individual consideration under the relevant criteria. *See generally Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994). Because the administrative law judge provided an adequate rationale for the reduction of the hourly rate requested, and as claimant's assertions do not establish an abuse of the administrative law judge's discretion, we affirm the awarded hourly rate of $200. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997)*; Ferguson v. Southern States Cooperative*, 27 BRBS 17 (1993); *Welch v. Pennzoil Co.*, 23 BRBS 95 (1990); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

Accordingly, we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee and his determination of counsel's hourly rate. However, we vacate the fee award and remand the case to the administrative law judge so that he may address employer's contention that the fee should be reduced in view of the degree of success obtained.

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