

JOHN A. ATWOOD, JR.

Claimant-Petitioner

v.

CALEB BRET USA,
INCORPORATED

and

GENERAL CASUALTY INSURANCE
COMPANY

Employer/Carrier-
Respondents

DATE ISSUED: Aug. 11, 2004

DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Terrence J. Lestelle, Andrea S. Lestelle and Louis B. Gerber (Lestelle & Lestelle), Metairie, Louisiana, for claimant.

Philip J. Borne and Leslie E. Hodge (Christovich & Kearney, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (2002-LHC-2630, 2631) of Administrative Law Judge C. Richard Avery 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). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational,

supported by substantial evidence, and in accordance with law. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). 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 an oil inspector for employer since 1986. Claimant’s employment duties required him to obtain oil samples for testing from various vessels, barges and storage tanks. After obtaining the required samples, claimant would take them in his personal vehicle to a laboratory in Gretna, Louisiana, for testing. On March 5, 2001, claimant sustained an injury to his right shoulder while carrying 20 quarts of oil over a gangplank. Claimant was thereafter restricted from work until March 29, 2001, at which time he was returned to full duty. On April 28, 2001, claimant was involved in a motor vehicle accident when his truck was “rear-ended” on Interstate 10 (hereinafter I-10) in New Orleans, Louisiana, while he was transporting oil samples to the aforementioned laboratory for testing. Claimant, who was subsequently terminated by employer for failing to undergo a timely drug test, filed a claim for benefits under the Act as a result of these two distinct incidents.

In his Decision and Order, the administrative law judge initially determined that claimant’s April 28, 2001, motor vehicle accident did not occur at a location having a sufficient causal connection to the waterfront, navigable waters, or typical stevedoring locations to be a covered situs. 33 U.S.C. §903(a). Accordingly, the administrative law judge concluded that claimant could not pursue a claim for benefits under the Act for the consequences of that incident. Regarding claimant’s March 5, 2001, shoulder injury, the administrative law judge awarded claimant temporary total and partial disability compensation for various periods in March and April 2001, as well as reasonable and necessary medical expenses related to that incident. 33 U.S.C. §§908(b), 907.

Claimant’s counsel subsequently filed a fee petition with the administrative law judge seeking a fee of \$33,638, representing 152.35 hours of legal services performed at an hourly rate of \$200, 5.3 hours of legal services performed at an hourly rate of \$150, and 39.55 hours of paralegal services performed at an hourly rate of \$60, as well as expenses totaling \$4,760.81. Claimant also submitted fee petitions from his associate counsel; specifically claimant sought a fee of \$5,040 for Attorney Joyner and \$400 for Attorney Lenter, representing 25.2 and 2 hours of services rendered respectively at an hourly rate of \$200. Employer filed timely objections. In his Supplemental Decision and Order, the administrative law judge disallowed 27.15 hours of legal services and 5.3 hours of paralegal services performed by claimant’s lead counsel before the claim was transferred to the Office of Administrative Law Judges, reduced the requested \$200 hourly rate to \$175, and thereafter reduced the resulting fee by 65 percent in order to reflect claimant’s limited success;

claimant's lead counsel was thus awarded a fee of \$8,499.05. With regard to the expenses sought by claimant, the administrative law judge denied reimbursement for those charges associated with the claim relating to claimant's motor vehicle incident; accordingly, the administrative law judge held employer liable for expenses totaling \$3,460.81. Lastly, the administrative law judge declined to award a fee to either of claimant's associate counsel, finding that all of their documented services occurred prior to the transfer of the claim to the Office of Administrative Law Judges.

On appeal, claimant challenges the administrative law judge's determination that the location of his April 28, 2001, motor vehicle accident was not a covered situs under the Act. Claimant additionally contends that the administrative law judge erred in reducing his requested attorney's fee. Employer responds, urging affirmance.¹

Situs

Claimant contends that the administrative law judge erred in finding that his April 28, 2001, motor vehicle accident did not occur on a covered situs. Specifically, citing *Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 6 BRBS 265, *aff'd on reh'g en banc*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), claimant asserts that because transporting oil samples from a vessel to employer's laboratory at Gretna, Louisiana, was an integral part of the loading and unloading process and the I-10 highway connection between the waterfront and employer's Gretna laboratory was the customary route between those two locations, the site of claimant's accident was primarily used by employer and claimant for the purposes of performing work that was necessary and vital to the loading and unloading of vessels and must accordingly be found to constitute a covered situs for purposes of establishing coverage under the Act. We disagree and, for the reasons that follow, we affirm the administrative law judge's determination that claimant's motor vehicle accident did not occur on a covered situs.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a) and that his work is covered employment under Section 2(3). 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Keating v. City of Titusville*, 31 BRBS 187 (1997). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* There is no

¹ Although employer initially filed a cross-appeal of the administrative law judge's decision, BRB No. 03-0769A, it subsequently filed a motion to withdraw that appeal. In an Order dated March 12, 2004, the Board granted employer's motion and dismissed its appeal.

dispute with the administrative law judge's determination claimant's employment was maritime in nature and thus meets the status requirement. 33 U.S.C. §902(3). The only coverage issue is whether the injury claimant sustained on April 28, 2001, occurred on a covered situs.

Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 197 (1992). To be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an "adjoining area customarily used by an employer in loading, unloading, repairing dismantling or building a vessel." 33 U.S.C. §903(a).² An "adjoining area" therefore must have a maritime use, but it need not be used exclusively or primarily for maritime purposes. *Winchester*, 632 F.2d 504, 12 BRBS 719; *Melerine*, 26 BRBS 197. Under the controlling law set forth in *Winchester*, the Fifth Circuit took a broad view of "adjoining area," refusing to restrict it by fence lines or other boundaries. *Winchester*, 632 F.2d at 514-515, 12 BRBS at 726-727; *see also* *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998). Specifically, the court stated that an area can be "adjoining" if it is "close to or in the vicinity of navigable waters, or in a neighboring area. . . ." *Winchester*, 632 F.2d at 514, 12 BRBS at 727. The perimeter of an "area" is to be defined by function; thus, it must be "customarily used by an employer in loading, unloading, repairing or building a vessel." *Winchester*, 632 F.2d at 515, 12 BRBS at 727; *see* 33 U.S.C. §903(a). Using these guidelines, the Fifth Circuit held in *Winchester* that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in the loading process. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729.

We affirm the administrative law judge's finding that the location on I-10 where claimant was injured is not a covered situs pursuant to Section 3(a) of the Act. Initially, as claimant's accident on I-10 did not occur on a site specifically enumerated in Section 3(a) of

²Section 3(a), 33 U.S.C. §903(a), states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

the Act, in order for claimant's injury to be covered that location on the interstate highway must constitute an "other adjoining area." 33 U.S.C. §903(a). As this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the administrative law judge correctly determined that an injury occurring in travel on a public road would be covered under the Act only if the location of the injury met the test for coverage set forth in *Winchester*. Under *Winchester*, an area is an "adjoining area" which is covered if it is "close to or in the vicinity of navigable waters" and is customarily used for maritime purposes. Thus, the geographic location and function of the area are controlling. Claimant contends that this section of I-10 is covered under Section 3(a) because he customarily traversed it to transport oil samples to employer's laboratory, and it was therefore necessary to the performance of his employment duties and consequently integral to the loading and unloading of vessels. The fact that claimant traveled over this roadway in the course of his maritime employment cannot convert it into an area whose use is maritime in nature. A claimant's status as a maritime employee does not necessarily enlarge situs under the Act; thus, a maritime employee injured while working off a covered situs is not covered by Section 3(a) even if within the course of his employment at the time. See *Cabaleiro v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993)(accident on a public road did not occur on a covered situs, as the road neither adjoined navigable waters nor was customarily used by employer for maritime activities). Thus, the specific employment requirements concerning the use of a public road, in the instant case I-10, do not automatically bring the location of claimant's injury on that road within the coverage of Section 3(a) of the Act; rather, the situs inquiry looks to the functional relationship of the place of injury to navigable waters. *Id.*; see *Beachler v. Nat'l Lines Bureau, Inc.*, 23 BRBS 438 (1990).

The administrative law judge found that the location of claimant's motor vehicle accident on I-10 was approximately two miles from navigable waters, and that the interstate highway had no primary designation or suitability to maritime activity. Thus, the administrative law judge rationally found that the site of claimant's motor vehicle accident was not customarily used in maritime activities or commerce, nor is that location suitable for loading, unloading, repairing, dismantling or building a vessel. Decision and Order at 13. He properly concluded that the site of claimant's accident does not have a sufficient functional relationship with the waterfront, navigable waters, or typical stevedoring locations for it to be a covered situs. The administrative law judge's findings in this regard are supported by the record, as there is no evidence that the section of I-10 where claimant's motor vehicle accident occurred is a "maritime area." See *Cabaleiro*, 27 BRBS 72; *McConnell v. Bethlehem Steel Corp.*, 25 BRBS 1 (1991). Rather, the sole reference to the location of claimant's motor vehicle accident on I-10 merely establishes that that highway runs through the city of New Orleans, and that the location of the incident in question occurred near the New Orleans SuperDome. Tr. at 64-67. Thus, the site of claimant's motor vehicle accident on I-10 is not within an area customarily used in loading, unloading, repairing or building a vessel. *Sisson*, 131 F.3d 555, 31 BRBS 199(CRT).

Claimant also contends that since I-10 connects two portions of employer's operations, *i.e.*, the docks at Chalmette, Louisiana and its laboratory in Gretna, Louisiana, it must be deemed to be an integral part of the loading and unloading process and therefore covered under the Act. We disagree. Although the Board has held that a public road used as an access road between two parts of an employer's property may be a covered situs under appropriate circumstances, *see Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989)(situs established where the general area of claimant's accident is a maritime area); *Sawyer v. Tideland Welding Serv.*, 16 BRBS 344 (1984), it has also held that an "adjoining area" does not include a route that runs through the downtown area of a city. *See Alford v. MP Industries of Florida, Inc.*, 16 BRBS 261 (1984). In this case, there is no evidence that I-10 is located in a general maritime area linking parts of such a facility. As the record contains no evidence establishing that the site of claimant's motor vehicle accident has a functional relationship with navigable water, we affirm the administrative law judge's determination that the situs requirement is not satisfied with regard to the April 2001 accident. *See Sisson*, 131 F.3d 555, 31 BRBS 199(CRT); *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 18(CRT) (4th Cir. 1987); *Winchester*, 632 F.2d 504, 12 BRBS 719; *Beachler*, 23 BRBS 438.

Attorney's Fee

Claimant first challenges the administrative law judge's decision to reduce the hourly rates of his lead counsel from \$200 to \$175. This contention is rejected, as claimant has not shown that the administrative law judge abused his discretion in this regard. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Accordingly, the hourly rate awarded by the administrative law judge is affirmed.

Claimant next contends that the administrative law judge erred in reducing his requested fee by 65 percent since claimant's two claims were related and the degree of his ultimate success requires that claimant receive his requested fee. Alternatively, claimant avers that since he succeeded in establishing entitlement to benefits in one of his two claims, his requested fee should be reduced by no more than 50 percent.

Claimant's lead counsel requested a fee of \$33,638. The administrative law judge, in considering this fee request, found that claimant succeeded only in his shoulder claim, which yielded medical benefits but little success in terms of compensation,³ while claimant failed on his second claim due to a lack of coverage. Accordingly, pursuant to claimant's limited success and the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls*

³ As a result of his shoulder injury, claimant was awarded approximately \$661 in temporary total and partial disability benefits, a Section 14(e), 33 U.S.C. §914(e), penalty of \$66.10, \$16.43 in interest, and the reimbursement of his reasonable medical expenses.

Shipbuilding, Inc. v. Director, OWCP [Baker], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993)(counsel's fee award should be tailored to his limited success), the administrative law judge reduced claimant's lead counsel's requested fee to \$8,499.05, a reduction of 65 percent.

We affirm the attorney's fee awarded by the administrative law judge in view of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). 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 fee 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 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). 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); *Ezell v. Direct labor, Inc.*, 33 BRBS 19 (1999).

In the present case, the administrative law judge rationally concluded that claimant was not successful in all of his claims; specifically, the administrative law judge found that claimant, although successful in obtaining from employer a limited period of compensation and medical benefits for his shoulder claim, was unsuccessful in establishing entitlement to benefits from the injury arising from his motor vehicle accident. Thus, the administrative law judge considered, consistent with *Hensley*, claimant's failure to succeed on unrelated claims and the results ultimately obtained. Accordingly, because the administrative law judge's consideration of claimant's lead counsel's fee petition and the resulting fee award are in

accordance with applicable law, we affirm the administrative law judge's consequent award of an attorney's fee totaling \$8,499.05 in this case. See *Ezell*, 33 BRBS 19; *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

We agree with claimant's final contention, however, that the administrative law judge erred in rejecting the 23.2 hours of services sought by his associate counsel, Attorney Joyner, on the basis that the services documented by that attorney were performed before the claim was transferred to the Office of Administrative Law Judges. The Act provides that the decision-maker at each level in the resolution of a claim may award a fee for work performed at that level. See *generally* 33 U.S.C. §928(c); 20 C.F.R. §702.132. Thus, an administrative law judge may award a fee for the services rendered between the date the case was referred to the Office of Administrative Law Judges and the conclusion of the case before him. See *Stratton v. Weedon Engineering, Co.*, 35 BRBS 1 (2001) (*en banc*); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). In the instant case, a review of Attorney Joyner's fee petition reveals that he documented services rendered on behalf of claimant during the period of May 23, 2003 through June 23, 2003. It is undisputed that claimant's claim was referred to the Office of Administrative Law Judges on August 13, 2002. Accordingly, we hold that the administrative law judge erred in summarily declining to consider this counsel's fee request for services performed during the period of May 23, 2003 through June 23, 2003, during which time the case was pending before him. We therefore vacate the denial of a fee to Attorney Joyner, and we remand the case for the administrative law judge to consider Attorney Joyner's attorney fee petition.

Accordingly, the administrative law judge's Decision and Order is affirmed. The denial of an attorney's fee to Attorney Joyner is vacated, and the case is remanded for consideration of Attorney Joyner's fee petition; in all other respects, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge