

BRB Nos. 07-0531
and 07-0531A

W.T.)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 12/21/2007
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Order Awarding Attorney and Paralegal Fees of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Order Awarding Attorney and Paralegal Fees (2006-LHC-00862) of Administrative Law Judge Alan L. Bergstrom 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 filed a claim alleging that he sustained a work-related left foot injury on August 2, 2005, which caused him to miss work from September 13 to October 5, 2005. Decision and Order-Awarding Benefits at 2. The administrative law judge found that claimant suffered a compensable work-related “left plantar fascial rupture injury,” and is entitled to the temporary total disability compensation claimed. The administrative law judge stated that claimant’s counsel should file her fee petition within 20 days of her receipt of the Decision and Order, with service to employer’s counsel who would then have 15 days to respond. The administrative law judge’s Decision and Order is dated August 18, 2006, and was filed in the Office of the District Director on August 22, 2006.

Claimant’s counsel, however, did not file her fee application until January 5, 2007. She requested that the administrative law judge accept the late filing based upon her having had complications from her pregnancy and the subsequent hospitalization of her baby. Counsel requested a fee of \$5,152.50 for 20.61 hours of attorney services at an hourly rate of \$250 and 5.5 hours at an hourly rate of \$95 for paralegal services. Employer filed objections, contending that: (1) the fee petition did not comply with the 20-day filing requirement set by the administrative law judge; (2) the fee petition misstated counsel’s customary hourly rate; (3) the requested hourly rate was excessive; (4) the fee petition lacked the required specificity; and (5) specific entries were duplicative. Claimant’s counsel filed a reply to employer’s objections stating that she would accept a total fee of \$3,720, based upon an hourly rate of \$200 for attorney services. She reiterated the details of her medical complications, the hospitalization of her newborn, and her prompt notification to opposing counsel after her return to work of her intent to file the fee petition.

In his Order, the administrative law judge addressed employer’s specific objections and rejected employer’s contention concerning the timeliness and sufficiency of the fee petition. The administrative law judge disallowed 3.26 hours of attorney services and ½ hour of paralegal services, awarded counsel an hourly rate of \$185.92, and awarded claimant’s counsel an employer-paid fee of \$3,720.

On appeal, employer contends that the administrative law judge erred in accepting the untimely filed fee petition and, alternatively, in accepting a petition with an inaccurate statement concerning counsel’s normal billing rate which, employer contends, casts doubt on the veracity of the entire fee petition. Claimant, responds, urging affirmance of the administrative law judge’s decision in this regard. BRB No. 07-0531. Claimant filed a cross-appeal, but, by motion dated October 10, 2007, moved to withdraw her appeal. BRB No. 07-0531A. We grant this motion and dismiss claimant’s appeal with prejudice. 20 C.F.R. §802.401.

We reject employer’s contention that the administrative law judge abused his discretion in accepting counsel’s late-filed fee petition. Neither the Act nor the

regulations specifies a time period for filing a fee petition, 33 U.S.C. §928; 20 C.F.R. §702.132, *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997), but Section 702.132(a) of the Act's regulations states that the fee application "shall be filed...within the time limits specified by . . . [the] administrative law judge. . . ." See generally *Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d 81 (6th Cir. 1985). In this case, the administrative law judge rationally accepted counsel's explanation that her medical condition and the hospitalization of her newborn prevented her from timely filing her fee petition, and the administrative law judge noted, in addition, that no prejudice ensued to employer as a result of the late filing. Employer has not established that the administrative law judge abused his discretion in this regard and, therefore, we affirm the administrative law judge's consideration of counsel's fee petition.¹ *Paynter v. Director, OWCP*, 9 BLR 1-190 (1986) (Ramsey, C.J., dissenting).

Employer next contends that counsel falsely claimed an hourly rate of \$200 from 1995 through 2001 and a rate of \$250 as of January 1, 2002, when, in fact, counsel was not admitted to the bar until March 22, 2002. Employer thus contends that this should have "cast doubt as to the veracity of the entire fee petition." Emp. Br. on App. at 4. Employer also argues that the fee petition provided no basis for the administrative law judge to assess counsel's actual hourly rate. Claimant responds that the cover letter used "form language" describing the history of the firm's billing rate, that her fee petition is for work performed beginning in the year 2005, and that her fee petition listed her actual current hourly rate as \$250. The administrative law judge noted that the fee petition did not contain the customary "Staff Code Listing" with the billing rate of each individual attorney and paralegal. Based on prior fee petitions filed by counsel's firm, the administrative law judge determined that counsel's normal billing rate in 2006 was \$200 per hour, and that to award a higher rate would prejudice employer given the delay in counsel's filing her fee petition. In view of the parties' "concessions" to a fee of \$3,720,²

¹ Contrary to employer's contention, counsel's fee petition does not demonstrate that she was working on this case during her maternity leave. The last entries on the fee petition are dated August 23, 2006, one day after the district director filed the administrative law judge's Decision and Order.

² In its objections to the fee petition, employer suggested that an appropriate fee would be \$3,720. Claimant's counsel agreed to accept this amount, but employer apparently would not agree absent the issuance of findings by the administrative law judge.

the administrative law judge found that the hours attributable to attorney services were payable at an hourly rate of \$185.92.³

We reject employer's contention that the entire fee petition should have been rejected. The administrative law judge appropriately addressed employer's contention in recognizing the "boilerplate" nature of the cover letter and in rationally looking to evidence of hourly rates claimed by claimant's counsel in other, contemporaneous cases. *See generally Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). Employer has not established any error in the administrative law judge's award of an attorney's fee in this case, *see id.*, and therefore the administrative law judge's fee award is affirmed.

Accordingly, claimant's appeal is dismissed with prejudice. The administrative law judge's Order Awarding Attorney and Paralegal Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³ The administrative law judge arrived at this figure by subtracting from \$3,720 the \$498 attributable to paralegal services and dividing the sum, \$3,222 by the number of compensable attorney hours, 17.33.