

R.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT	)	DATE ISSUED: 12/16/2008
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand Awarding Attorney’s Fees of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May, L.L.P.), Glastonbury, Connecticut, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order on Remand Awarding Attorney’s Fees (2000-LHC-00209, 2003-LHC-00161) of Administrative Law Judge Daniel F. Sutton 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his head and face at work on October 22, 1998. Employer voluntarily paid claimant temporary total disability benefits from October 23, 1998, to May 27, 1999, July 8 to November 24, 1999, and May 24 to May 29, 2000, as well as medical benefits. Cl. Ex. 2. Claimant returned to work post-injury in his usual job but underwent three corrective surgeries by Dr. Lowlicht in 1998 and 1999. A dispute arose over the payment of medical bills which resulted in the case's referral to the Office of Administrative Law Judges (OALJ) and then remand to the office of the district director, where the parties reached an agreement.

On January 24, 2001, claimant's counsel submitted a fee application for work performed before Administrative Law Judge Di Nardi between September 21, 1999, and May 12, 2000. Employer objected to the fee petition, asserting that claimant's counsel was not entitled to a fee because claimant did not obtain additional benefits before Judge Di Nardi. Judge Di Nardi denied counsel's fee request, his request for a hearing on his entitlement to an attorney's fee, and claimant's motion for reconsideration of the denial of a fee.

Upon claimant's appeal, the Board vacated Judge Di Nardi's denial of an attorney's fee and remanded the case for resolution of the issue of whether claimant obtained benefits that employer initially refused to pay or benefits greater than those voluntarily paid or tendered by employer. *[R.G.] v. Logistec of Connecticut*, BRB No. 01-0612 (Apr. 22, 2002)(unpub.) (*R.G. I*). The Board held that Judge Di Nardi erred in summarily stating that claimant did not obtain greater benefits without the benefit of an evidentiary record and remanded the case for necessary findings of fact regarding employer's liability for the requested attorney's fee.

On remand, the case was reassigned to Administrative Law Judge Sutton (the administrative law judge) due to Judge Di Nardi's retirement. The administrative law judge awarded claimant's counsel an attorney's fee of \$614.75, based upon his finding that claimant received greater benefits over those voluntarily paid by employer, as his attorney obtained the prompt authorization and payment for the third surgery by Dr. Lowlicht. The administrative law judge also addressed claimant's modification claim for additional disability and medical benefits, finding that while claimant's past benefits should be paid at an average weekly wage of \$1,021.50, rather than \$974.37, claimant is not entitled to ongoing permanent partial disability benefits. The administrative law judge further found that additional treatment by Drs. Katz, Richard, and Kudej is not reasonable or necessary, that employer never refused authorization for psychological treatment with Dr. Gang, and that employer had not refused or unreasonably delayed payment for claimant's medical care.

Claimant appealed the administrative law judge's fee award, the denial of medical benefits for further treatment with Drs. Richard and Kudej, the denial of a gym membership recommended by Dr. Katz, and the denial of ongoing permanent partial disability benefits, as well as the administrative law judge's finding that employer had never refused claimant's request for authorization to treat with Dr. Gang. Employer cross-appealed the administrative law judge's fee award and his increase in claimant's average weekly wage. The Board affirmed the administrative law judge's decision and fee award in all respects. *[R.G.] v. Logistec of Connecticut*, BRB Nos. 04-0658/A (May 16, 2005)(unpub.) (*R.G. II*).

On March 30, 2006, the administrative law judge issued a supplemental decision addressing claimant's counsel's remaining fee petition which sought an attorney's fee of \$51,857.61, for legal work performed from December 29, 2000, to May 11, 2004, representing 157.4 hours for legal work performed by Attorney Kelly at \$195 per hour, 109.7 hours of attorney services by four attorneys at \$140 per hour, 42.2 hours of paralegal work at either \$50 or \$70 per hour, and \$3,684.61 in costs for work performed before the administrative law judge on remand. In addressing this fee request, the administrative law judge first excluded 50 hours of services and \$230.16 in costs incurred while the claim was not pending before the OALJ. The administrative law judge then found the remaining fee of \$40,383.43, plus costs of \$3,454.45, was excessive in relation to claimant's success, which was limited to obtaining compensation for specific periods at the increased average weekly wage and the fee for work before Judge Di Nardi. Taking into account the limited success and other relevant factors, the administrative law judge reduced the fee to \$4,383.79, representing 10 percent of the total fee requested for services performed while the claim was before the OALJ. Claimant's motion for reconsideration of the administrative law judge's fee award was denied.

Claimant appealed the administrative law judge's reduction in his requested fee, asserting that the administrative law judge erred in reducing his requested fee by 90 percent. In support of his contentions on appeal, claimant argued that over \$80,000 of medical bills were paid by employer as a result of the efforts of claimant's counsel prior to the hearing, and that the administrative law judge failed to consider these payments in assessing the extent of claimant's success. In its decision, the Board held that the administrative law judge erred by not addressing claimant's contention that his counsel's actions while the case was before the administrative law judge resulted in the payment of over \$80,000 in medical benefits. Accordingly, after noting that an across-the-board reduction in claimant's counsel's fee petition may be appropriate if the administrative law judge on remand finds that claimant obtained only limited success, the Board vacated the administrative law judge's attorney's fee award and remanded the case for the administrative law judge to address claimant's counsel's contention that numerous entries in his fee petition pertain to his obtaining employer's payment of disputed medical

benefits while the case was before the administrative law judge on remand. [*R.G.*] v. *Logistec of Connecticut*, BRB Nos. 06-0512 and 06-0784 (Feb. 16, 2007)(unpub.) (*R.G. III*).

On remand, the administrative law judge issued an Order on July 2, 2007, directing claimant to provide sufficient information to permit a ruling on his claim that there are numerous entries contained in his fee petition that represent successful efforts to obtain the payment of disputed medical benefits. In response to this Order, claimant submitted various exhibits to the administrative law judge, along with ten new fee applications, which raised claimant's counsel's requested fees and costs to a total of \$71,196.60. In his Supplemental Decision and Order on Remand, the administrative law judge found that claimant's attorney did not obtain either the authorization or payment of any disputed medical care while the case was pending before him; therefore, the administrative law judge concluded that claimant's counsel's efforts on this issue could not be regarded as necessary. The administrative law judge again concluded that an across-the-board reduction in the fee requested by claimant's counsel was warranted based upon claimant's limited success and reinstated his prior award of \$4,383.79.

On appeal, claimant contends that the administrative law judge abused his discretion by failing on remand to follow the Board's instruction that he address the entries in counsel's fee petition which claimant avers pertain to his obtaining medical benefits while this case was before the administrative law judge. Employer responds, urging affirmance.

Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operation of the Benefits Review Board, provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." In *R.G. III*, the Board specifically stated that the administrative law judge on remand was "to address claimant's counsel's contention that numerous entries in his fee petition pertain to his obtaining employer's payment of disputed medical benefits while the case was before the administrative law judge." *R.G. III*, slip op. at 6. We reject claimant's contention that the administrative law judge failed to comply with the Board's decision.

Claimant argues that the administrative law judge erred by not addressing the approximately 125 fee entries contained in claimant's response to the administrative law judge's July 2, 2007, Order directing claimant's counsel to provide documentation of his successful efforts to obtain the payment of disputed medical benefits. We reject this contention, as the administrative law judge appropriately addressed the additional evidence and arguments presented by claimant on remand. The administrative law judge quoted claimant's counsel's statement in support of his fee request and detailed multiple

examples of counsel's services relating to claimant's medical expenses as well as employer's response. Supp. Decision and Order at 9-20. The administrative law judge acknowledged that claimant suffered a serious work-related injury that has resulted in a long and complex course of medical treatment, but found that claimant's attorneys played a role in obtaining payment from employer "for the simple reason that" counsel required that all bills be submitted through him for payment.<sup>1</sup> Supp. Decision and Order at 20. The administrative law judge properly concluded that employer is not liable for a fee for this work, finding it was not necessary as there is no evidence that employer had refused or was likely to refuse payment for necessary medical care. As claimant has not shown that counsel's work directing the payment process was related to medical bills disputed by employer, the administrative law judge reasonably concluded that claimant failed to establish that the work performed by counsel was necessary to establish entitlement to benefits under the Act. He further found that counsel's efforts to ensure compliance with state orders regarding medical bills are not compensable in the absence of any showing these services were performed in order to establish entitlement under the Act. *See Roach v. New York Protection Covering Co.*, 16 BRBS 114 (1984).

We affirm the administrative law judge's decision, as he properly found counsel's services were not necessary work under the Act since claimant's counsel did not obtain the authorization or payment of any *disputed* medical care during the time at issue. 20 C.F.R. §702.132. *See Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Since this work was not necessary, the administrative law judge properly determined that claimant was not entitled to a fee for it and reduced counsel's fee to an amount appropriate for his degree of success. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983). On appeal, counsel has failed to identify error in the administrative law judge's conclusion that his efforts, while perhaps helpful to claimant, were necessary to obtain disputed or delayed payments from employer; employer is thus not liable for this work.<sup>2</sup> As the administrative law judge considered the

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<sup>1</sup> It is undisputed that claimant submitted all of his medical bills to his counsel, who then forwarded them to employer for payment.

<sup>2</sup> By way of attachments to his reply brief, claimant attempts to establish that there are presently unpaid medical bills outstanding. As these documents were not submitted into the record before the administrative law judge, they cannot be considered by the Board. *See Meinert v. Frasor, Inc.*, 37 BRBS 164 (2003). Attached to the same reply brief is a document from the Connecticut Workers' Compensation Commission awarding claimant various medical expenses; however, claimant's counsel's services performed in furtherance of claimant's state claim, even if resulting in a successful outcome, may not be charged to employer under the Act. *See generally Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996); 33 U.S.C. §928; 20 C.F.R. §702.132.

appropriate factors and is entitled to reduce the overall fee to account for claimant's limited success, his award of \$4,383.79 is affirmed. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *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) (5<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand Awarding Attorney's Fees is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGIINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge