

RONALD E. LEWIS)
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 Claimant-Petitioner)
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 v.)
)
 HORIZON OFFSHORE CONTRACTORS,) DATE ISSUED:FEB 28, 2005
 INCOPORATED)
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 and)
)
 ALASKA NATIONAL INSURANCE)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

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

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

Michael D. Murphy (Hays, McConn, Rice & Pickering, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees (2002-LHC-2921) 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). 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, a crane operator, sustained a work-related leg injury on September 6, 2001. Employer voluntarily paid claimant temporary total disability benefits from November 1, 2001 to March 4, 2002, at a compensation rate of \$373.33 per week. Employer also paid some medical benefits under Section 7 of the Act, 33 U.S.C. §907. Employer terminated claimant's benefits on March 4, 2002, based on Dr. Bernauer's January 31, 2002, report in which the doctor opined that claimant was able to return to his usual employment without restrictions. Thereafter, on April 4, 2002, claimant filed a claim for benefits under the Act.

The case was referred to the Office of Administrative Law Judges for a formal hearing. In his Decision and Order, the administrative law judge found that, although claimant's traumatic leg injury had healed, he still needed physical therapy and medical care under Section 7 so that he could discontinue his use of narcotic pain medication. The administrative law judge found employer liable for Dr. Gorin's medical treatment. The administrative law judge found that claimant is unable to return to his usual work, and, moreover, that he is temporarily totally disabled due to his dependence on pain medication; therefore, he rejected employer's evidence of suitable alternate employment. The administrative law judge found that claimant's complaints of back pain are not credible and that such pain is unrelated to his September 6, 2001, work accident. In calculating claimant's average weekly wage, the administrative law judge utilized Section 10(c), 33 U.S.C. §910(c). The administrative law judge rejected claimant's argument that his average weekly wage should be calculated by using either the wages from a co-worker who worked the entire year prior to claimant's injury or claimant's wages from the three weeks he worked for employer. The administrative law judge also disagreed with employer that it was necessary to calculate claimant's average weekly wage with reference to all of claimant's wages back to 1997. Therefore, the administrative law judge divided claimant's 2000 wages of \$35,805.62 by 52 weeks to arrive at an average weekly wage of \$688.57.¹ The administrative law judge's decision was not appealed.

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge, requesting a fee for 14.85 hours of attorney services at an hourly rate of \$250 per hour for Mr. Barton, 164.20 hours of attorney services at an hourly rate of \$225 per hour for Mr. Price, and costs of \$1,247.43, totaling \$41,940.93, for work performed before the

¹ Employer's calculation would have resulted in an average weekly wage of \$544.53. Employer had voluntarily paid claimant disability compensation based on an average weekly wage of \$560. Use of claimant's wages from his three weeks of employment would have resulted in an average weekly wage of \$1,458.84. Claimant argued that use of his co-worker's wages would result in an average weekly wage of \$938.34.

administrative law judge. Employer responded, objecting to the requested hourly rates for attorney services; to counsel's one-quarter hour minimum billing method for various entries detailing one page letters; to the amount of the fee based on claimant's limited success; and to excessive time claimed on January 30, 2003 for receipt and review of Dr. Gorin's medical records (54 pages).

In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel an attorney's fee totaling \$21,699.12, plus costs of \$1,247.43. The administrative law judge reduced the hourly rates for Mr. Barton from \$250 to \$200 and for Mr. Price from \$225 to \$175. Next, the administrative law judge reduced the fee request by 3.875 hours to reflect compliance with the Fifth Circuit's rule concerning minimum billing increments. Finally, the administrative law judge reduced the allowable hours by 30 percent in order to tailor the fee to the success claimant achieved. The administrative law judge stated that while claimant was found to be temporarily totally disabled due to his drug dependency, he did not prevail in establishing that his back injury was work-related and in achieving the average weekly wage he sought.

On appeal, claimant challenges only the administrative law judge's 30 percent reduction in the fee. Specifically, claimant contends that the holding of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1984) regarding the award of attorney's fees under fee-shifting statutes is not applicable to a fee awarded pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Claimant further contends that if *Hensley* applies the administrative law judge erred in determining the degree of claimant's success. Employer responds, urging affirmance of the fee award.

The administrative law judge did not state whether he was awarding an attorney's fee pursuant to Section 28(a) or 28(b). We will assume, *arguendo*, that Section 28(a) applies. Employer voluntarily paid claimant temporary total disability benefits from November 1, 2001 to March 4, 2002. Claimant filed a claim on April 14, 2002. It is undisputed that employer did not pay claimant any benefits after it received notice of the claim for compensation. *See Pool Co. v. Cooper*, 274 F.3d 173,

35 BRBS 109(CRT) (5th Cir. 2001).² Section 28(a) states that when claimant successfully prosecutes his claim under such circumstances, employer is liable for a “reasonable attorney’s fee.” Claimant argues that the reasonableness component of Section 28(a) applies only to the hours charged and the hourly rate requested, and not to the level of success achieved.

We reject claimant’s contention that *Hensley* is inapplicable to the amount of an attorney’s fee awardable pursuant to Section 28(a). *Hensley* is not applicable in determining whether an employer is liable for claimant’s attorney’s fee under the Act, which has specific statutory provisions governing such determinations. *Clinchfield Coal Co. v. Harris*, 149 F.3d 307 (4th Cir. 1998); *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004).³ Once liability for an attorney’s fee has shifted to employer, however, it is liable only for a “reasonable” fee. 33 U.S.C. §928(a), (b). At this juncture, the dictates of *Hensley* are applicable. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has noted the applicability of *Hensley*’s reasonableness test to the Longshore Act, which has a mandatory fee-shifting mechanism. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319 (5th Cir. 1995), *cert. denied*, 516 U.S. 682 (1995), citing *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). Indeed, the Supreme Court has stated that, “our case law construing what is a ‘reasonable’ fee applies uniformly” to all fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *see also Marek v. Chesney*, 473 U.S. 1 (1985); *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*,

² It also is arguable that employer is liable for claimant’s attorney’s fee pursuant to Section 28(b). Employer voluntarily paid benefits, and then ceased paying. The case went to an informal conference before the district director, who recommended that employer pay temporary total disability benefits. CX 2 at 14. Employer did not pay any additional benefits and claimant obtained greater compensation as a result of the proceedings before the administrative law judge. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

³ In *Clark*, 38 BRBS 67, the Board rejected the contention that liability for an attorney’s fee does not shift to employer unless the claimant is a “prevailing party” as defined by the Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, 532 U.S. 598 (2001). The Board held that the plain language of Section 28(a) of the Act requires only “successful prosecution” of the claim. The Board also held, in the alternative, that the claimant was a “prevailing party” given the informal and administrative context of the Act.

488 U.S. 992 (1988). Thus, claimant's contention that *Hensley* does not apply to the amount of the attorney's fee awardable pursuant to Section 28(a) is without merit.

In discussing, *inter alia*, the amount of a reasonable attorney's fee, the Supreme Court in *Hensley* 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. Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the 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. *Id.*; *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001). 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; 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 generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000); *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) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000).

We agree with claimant that the administrative law judge did not properly apply the principles of *Hensley*, and therefore we must remand the case. The administrative law judge did not determine what constitutes claimant's ultimate success or state specifically why he determined that a 30 percent reduction is appropriate. The administrative law judge stated that while claimant was found to be temporarily totally disabled due to his drug dependency due to the work injury, he did not prevail in establishing he sustained a work-related back injury, nor did he achieve the average weekly wage he sought. Supp. Decision and Order at 2. On remand, the administrative law judge must first determine if the claims for the leg injury and back injury are interrelated or involve a common core facts, and whether, notwithstanding claimant's lack of success on the back injury claim, he achieved an "excellent" result. *See Barbera*, 245 F.3d 282, 35 BRBS 27(CRT); *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT). Moreover, we cannot affirm the administrative law judge finding that claimant failed to succeed on the average weekly wage issue. Employer stopped paying benefits, which had been based on an average weekly wage of \$560. The administrative law judge awarded temporary total disability benefits based on average weekly wage of \$688.57. Claimant therefore was fully successful on the average weekly wage issue even though

he advocated an even higher average weekly wage than that found by the administrative law judge. *See* n.1, *supra*. Finally, claimant was successful in obtaining contested medical benefits. Thus, we vacate the administrative law judge's fee award and we remand this case for reconsideration of the amount of the attorney's fee consistent with *Hensley* and its progeny. The administrative law judge also should consider the regulation at 20 C.F.R. §702.132(a) which states that "Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved and the amount of benefits awarded." *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

Accordingly, we vacate the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and remand this case to the administrative law judge for proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge