BRB No. 97-0803

MICHAEL CASTELLANO	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Granting Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor and the Compensation Order - Findings of Fact of Richard V. Robilotti, District Director, United States Department of Labor.

Henry A. Martuscello (Kalmus & Martuscello) New York, New York, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (95-LHC-2534) of Administrative Law Judge Gerald M. Tierney and the Compensation Order - Findings of Fact (Case No. 2-115506) of District Director Richard V. Robilotti 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 injured his ribs and liver during the course of his employment on November 17, 1994, when he was pinned between a container and a tractor. On February 6, 1995, Dr. Greifinger, who examined claimant at employer's request, reported that claimant was physically able to return to work. Employer voluntarily paid temporary total disability compensation to claimant until February 7, 1995. 33 U.S.C. §908(b). On March 1, 1995, claimant began treating with a psychiatrist for symptoms, subsequently diagnosed as post-traumatic stress syndrome. Claimant returned to his usual longshore employment on September 26, 1995. The issues presented for adjudication before the administrative law judge included claimant's entitlement to continuing compensation from February 8, 1995, to September 26, 1995, medical expenses, and employer's reduction of claimant's compensation rate to reflect employment-related payments claimant received while injured.

In his Decision and Order, the administrative law judge credited evidence that claimant was physically able to return to work on February 7, 1995, and that claimant has no work-related psychological injury. Decision and Order at 5. These findings are not appealed. Claimant prevailed only in one issue, as the administrative law judge found that employer improperly reduced claimant's compensation rate by taking a credit for employment-related payments claimant received while he was disabled. Thus, claimant's successful prosecution of his claim was limited to these additional benefits.

Claimant's counsel thereafter filed a fee petition with the administrative law judge requesting a fee of $28,447.75, representing 86.5 hours of services performed at an hourly rate of $300, and costs of $2,497.75. In a supplemental decision, the administrative law judge disallowed $6,900 for work performed at the district director level, and awarded counsel $19,050, which represents the remaining hours requested at the requested hourly rate. Thereafter, claimant's counsel filed a fee petition with the district director on March 14, 1997, requesting a fee of $6,750 for work performed at the district director level. In his Compensation Order, which was filed on March 21, 1997, the district director reduced the requested hourly rate to $250, disallowed 3 hours claimed on June 16, 1995, and awarded counsel a fee of $4,825.

On appeal, employer challenges the fee awards of both the administrative law judge and the district director. Claimant responds, urging affirmance of the administrative law judge's fee award.

District Director Fee Award

Employer contends that the district director's failure to allow it a reasonable time to respond to claimant's fee petition deprived employer of due process. We agree. It is well-established that due process requires that employer be given a reasonable time to respond to a fee request. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Harbour v. C & M Metal Works, Inc.*, 10 BRBS 732 (1978). In the instant case, it is undisputed that claimant's counsel's fee petition was filed on March 14, 1997,

and that a fee was awarded by the district director on March 21, 1997.[1] As employer was not afforded a reasonable opportunity to respond to the fee request, we vacate the district director's attorney's fee award, and remand for the district director to reconsider the fee after allowing employer a reasonable time to file a response to counsel's fee petition.

Administrative Law Judge Fee Award

In challenging the fee awarded by the administrative law judge, employer argues, citing *Hensley v. Eckerhart,* 461 U.S. 421 (1983), and *George Hyman Const. Co. v. Brooks,* 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), that since claimant was only partially successful before the administrative law judge, the fee awarded by the administrative law judge cannot be upheld. In support of this assertion, employer notes that claimant prevailed on only one issue before the administrative law judge, and that the amount of his success was nominal. We agree with employer that the fee awarded by the administrative law judge cannot be affirmed in light of the decision of the United States Supreme Court in *Hensley*.

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 fees 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 Const. Co.*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *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. As the Supreme Court stated in *Hensley,* the most critical factor is the degree of success obtained. *Hensley,* at 437.

In the present case, employer raised the applicability of *Hensley* before the

[1]Employer contends that it received counsel's fee petition on March 19, 1997.

administrative law judge. In addressing this objection, the administrative law judge summarily stated: "Employer fails to consider the totality and inter-relatedness of the issues presented before this court..." Supplemental Decision and Order at 1. This rationale is inadequate. The conclusion that the credit issue on which claimant prevailed is related to the causation and extent of disability issues on which claimant did not prevail cannot be sustained. There is no relation in law or fact between the issues of whether employer properly reduced its compensation payments to claimant to offset special employment-related payments claimant received while disabled and claimant's unsuccessful contentions that he remained disabled due to orthopedic and work-related psychological conditions from February 8, 1995, until he returned to his usual employment on September 26, 1995. In fact, the administrative law judge resolved this credit issue simply by attaching a two-page Order from another case involving the same claimant to his Decision and Order. Thus, this issue is clearly severable from the other issues the administrative law judge addressed in his Decision and Order. Accordingly, we vacate the administrative law judge's finding of interrelatedness.

Moreover, although the administrative law judge subsequently considered "the nature of the issues involved, the degree of skill with which the Claimant was represented, the amount of time and work involved, and other relevant factors," *see* Supplemental Decision and Order at 1-2, in awarding counsel the fee which he requested, the administrative law judge did not specifically consider whether the fee sought by counsel is reasonable in relation to the results obtained by claimant. In its objections filed with the administrative law judge, employer properly raised claimant's limited success and the amount of benefits obtained, arguing, *inter alia,* that the fee sought by counsel was "patently ludicrous" and an "outrageous demand" when compared to the additional benefits obtained by claimant.[2] *See* Employer's Counsel's letter dated January 31, 1997. Under the Act, the second prong of the *Hensley* test requires consideration of the extent of claimant's success in relation to the fee requested. *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). Thus, as the administrative law judge did not adequately address the degree of success as required by *Hensley* when awarding counsel his requested fee, we vacate the administrative law judge's fee award and remand the case for reconsideration of the fee petition. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27 BRBS 24 (1993).

[2]The administrative law judge's decision resulted in a gain of $699.36 to claimant.

Accordingly, the administrative law judge's Supplemental Decision and Order and the district director's Compensation Order are vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge