BRB No. 05-0426

ALBERTO GAMES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED: 01/31/2006
	)	
and	)	
	)	
TRAVELERS PROPERTY & CASUALTY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Concerning Attorney's Fees of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

William C. Saacke (McNulty & Saacke), Torrance, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Concerning Attorney's Fees (2001-LHC-2340) of Administrative Law Judge Russell D. Pulver (the administrative law judge) 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 the law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, while working for employer on October 21, 1974, sustained a severe crush injury to his head and shoulder. Employer conceded liability for permanent total disability benefits but challenged the scope of its liability for certain medical care. On August 13, 1981, Administrative Law Judge Alexander Karst issued a Decision and Order Awarding Benefits, in which claimant was awarded medical benefits for treatment related to his work injuries.

Additional disputes arose regarding past and future attendant care and medical treatment for diseases and conditions which manifested after claimant had been declared permanent and stationary with regard to the work injuries sustained on October 21, 1974. In his decision, the administrative law judge ordered employer to reimburse the Games Family Partnership (GFP) for past home attendant care provided to claimant from October 31, 1997, to November 3, 2003, and further determined that employer is liable for the medical treatment of claimant's diabetes, hypertension, and coronary heart disease as those conditions were aggravated and accelerated by the effects of the industrial injury, as well as for the other medical benefits which claimant requested. The Board affirmed the administrative law judge's Decision and Order Awarding Benefits. *Games v. Todd Shipyards Corp.*, BRB No. 04-0622 (Apr. 27, 2005) (unpub.).

Claimant's counsel thereafter submitted an attorney's fee request seeking the greater of $57,519.87, representing 257 actual hours of attorney time at an hourly rate of $200, plus $6,164.87 in costs, or an amount equal to 15 percent of the total award of benefits, which he calculated to be roughly $450,000. Counsel then modified his request by arguing that he should receive an attorney's fee totaling $132,077.69, representing either an estimated 300 hours at an hourly rate of $440.26, or 257 actual hours at an hourly rate of $513.92, plus $6,164.87 in costs. Employer filed objections to counsel's fee petitions. In his decision, the administrative law judge found employer liable for an attorney's fee totaling $63,989.87, representing 257 hours at an hourly rate of $225, plus the requested costs of $6,164.87.

On appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimant responds, urging affirmance.

Employer initially contends that counsel's fee petition includes services spent on two collateral actions which fall beyond the scope of the Act, one creating a California partnership, the GFP, to act as an intervener in the cause of action by claimant, and the second advocating two conservatorships under the laws of the California. Employer argues that even if these services are compensable, the fee petition lacks sufficient specificity to enable the administrative law judge to determine the reasonableness and necessity of the work allegedly performed. In addition, employer asserts that the administrative law judge has violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as he did not conduct a hearing on employer's liability for an attorney's

fee, nor did he adequately discuss and render findings regarding its specific objection that counsel's contingency fee agreement with GFP violates Section 28(e), 33 U.S.C. §928(e). Employer further argues that the administrative law judge's reliance on *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), to hold it liable for counsel's fee for services provided to the third-party medical provider, the GFP, is misplaced for in *Hunt*, unlike the instant case, the third-party medical providers retained separate counsel.

The administrative law judge addressed employer's objections regarding the reasonableness and necessity of counsel's work relating to the conservatorship and the GFP, particularly as it relates to claimant's claim for benefits under the Act. With regard to the conservatorship issues, the administrative law judge found that they "were integral to the resolution of claimant's case as claimant's mental status is a direct result of his serious industrial injury to his head." Decision and Order at 5. The administrative law judge similarly found that counsel's work for the GFP was necessary for, as a third-party medical provider, the GFP performed services for claimant that were ultimately deemed compensable pursuant to Section 7 of the Act. Moreover, review of claimant's counsel's fee petition reveals that the entries pertaining to the work in question provide sufficient documentation pursuant to Section 702.132(a) to enable the administrative law judge to make the appropriate evaluation regarding the reasonableness and necessity of that work.[1] *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). We thus affirm the administrative law judge's finding that claimant's counsel is entitled to an attorney's fee for work performed with regard to the conservatorship and GFP issues as it is rational and supported by substantial evidence.

Contrary to employer's contention, the administrative law judge adequately addressed employer's argument "that all requests for fees equal to a percentage of claimant's award is not in accordance with the law and should be disallowed," and moreover that "any separate fee agreement with claimant or his family, as well as with the medical providers, is prohibited by the Act and is not assessable against" employer. Decision and Order at 2. In addressing these contentions, the administrative law judge found that the Act, 33 U.S.C. §928(e),[2] its accompanying regulations, 20 C.F.R.

[1] Specifically, counsel's itemized fee petition dated January 9, 2004, contains approximately 12 entries totaling 4.7 hours of work attributed to conservatorship issues and roughly 4 entries denoting 5.3 hours spent on GFP issues. Each of these entries contains a brief statement of the work performed, *e.g.*, "telephone call," or "draft letter," as well as a notation of "conservatorship" or "attendant care."

[2] 33 U.S.C. §928(e) states:

> **Unapproved fees; solicitation; penalty.**
> A person who receives a fee, gratuity, or other consideration on account of services rendered as a representative of a claimant, unless the consideration

§702.133, and relevant case law on the issue specifically indicates that an attorney's fee award cannot be contingent or based on a fixed percentage of the compensation award. *City Burlington v. Dague*, 505 U.S. 557 (1992); *Enright v. St. Louis Ship,* 13 BRBS 573 (1981). He thus concluded that the "contingency agreement between counsel and the GFP is disallowed because it represents a contract and is contrary to the Act, regulations and pertinent case law."[3] Decision and Order at 3. We affirm the administrative law judge's consideration of the relevant evidence pursuant to Section 28(e), and consequent finding that the contingency fee between claimant's counsel and the GFP is invalid as it is rational, supported by substantial evidence, and in accordance with law.[4] 33 U.S.C. §928(e).

Additionally, as demonstrated above, the administrative law judge discussed employer's objections regarding counsel's contingency fee agreements, *see* Decision and Order at 2, and independently analyzed and discussed all of the relevant evidence on this issue in terms of the appropriate provisions of the Act, its accompanying regulations and judicial interpretations thereof.[5] Decision and Order at 2-3. Moreover, the administrative law judge articulated the rationale for his findings on this issue. Decision and Order at 3. We thus hold that the administrative law judge's decision comports with the requirements

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> is approved by the deputy commissioner, administrative law judge, Board, or court, or who makes it a business to solicit employment for a lawyer, or for himself, with respect to a claim or award for compensation under this Act, shall, upon conviction thereof, for each offense be punished by a fine of not more than $ 1,000 or be imprisoned for not more than one year, or both.

[3] The administrative law judge also concluded that any agreement between counsel and the various other medical providers "falls outside the realm of this hearing," since claimant's counsel did not prosecute any claims on their behalf, and "no medical providers participated in the hearing." Decision and Order at 3.

[4] Nevertheless, as claimant's counsel's request for an attorney's fee for work performed for the GFP is not limited to the contingency fee agreement, but rather is contained in the valid fee petition submitted to the administrative law judge, we hold it was proper for the administrative law judge to otherwise consider counsel's entitlement to a fee under Section 28(a) for the work performed on behalf of the GFP in this case.

[5] In this regard, the administrative law judge specifically noted, in contrast to employer's assertion, that claimant's "counsel submitted various letters supplementing the original fee petition," seeking an attorney's fee calculated as a percentage of the total benefits awarded in this case. Decision and Order at 1, n. 1.

of the APA.[6] *See* 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Furthermore, we reject employer's contention that *Hunt* does not provide for an attorney's fee for work performed on behalf of the GFP. In *Hunt*, the claimant's physicians intervened in claimant's claim for benefits, seeking payment for medical services rendered after the date the employer ceased paying benefits. The United States Court of Appeals for the Ninth Circuit held that Section 7(d)(3), 33 U.S.C. §907(d)(3), grants medical providers standing to " 'seek benefits' on behalf of an employee where the benefits are owed to the provider for medical services rendered." *Hunt*, 999 F.2d at 424, 27 BRBS at 91(CRT). As such, the providers are "person[s] seeking benefits" within the meaning of Section 28(a), entitling the providers' counsel to an attorney's fee payable by employer. As the administrative law judge determined herein, the GFP's action against employer for medical benefits is clearly derivative of claimant's claim for benefits, and as such it is akin to the physicians' intervention in the *Hunt* case. *See Pozos v. St. Mary's Hospital & Medical Center*, 31 BRBS 173 (1997). Thus, contrary to employer's argument, the GFP, like the physicians in *Hunt*, sought and ultimately obtained medical benefits under Section 7 of the Act for their services, thus entitling their counsel to seek a reasonable attorney's fee. *Hunt*, 999 F.2d at 424, 27 BRBS at 91(CRT).

Contrary to employer's contention, the Ninth Circuit's decision in *Hunt* cannot be interpreted to require that a medical provider procure his own counsel in order to obtain medical benefits and an attorney's fee under the Act. In *Hunt*, the Ninth Circuit held that the Board erred in concluding, without offering any satisfactory explanation, that claimant's attorney could have adequately represented claimant's physicians before the administrative law judge and that therefore the attorney they retained did not serve a "necessary" function. In making this determination, the *Hunt* court found that it "was more than reasonable for the [physicians] to hire separate counsel to pursue their claims," since claimant's counsel therein had "no particular incentive" to represent the interests of the physicians and that thus "from a tactical standpoint his best stance may have been neutrality."[7] *Hunt*, 999 F.2d at 424, 27 BRBS at 91(CRT). In contrast, the administrative

[6] We also reject employer's argument that the administrative law judge was required to hold a hearing in this case, as employer had notice of the fee request and an opportunity to respond. *See, e.g., Carroll v. Hullinghoist Industries, Inc.*, 12 BRBS 401 (1980), *aff'd*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

[7] The court's finding that the retention of separate counsel was "more than reasonable" implies a case by case consideration of the relevant facts in assessing the

law judge herein found that "the GFP should not be separated from claimant as these family members of the claimant are real parties in interest," Decision and Order at 3, and as such share common interests in pursuit of their claims under the Act. Given this mutuality in goals, the administrative law judge rationally found that a single attorney could adequately represent claimant and the GFP. Consequently, we affirm the administrative law judge's rational finding that claimant's counsel is entitled to attorney's fees for work performed on behalf of the GFP, an intervening medical provider in this case, payable by employer so long as they are reasonable and necessary. *See* 33 U.S.C. §928; *Hunt*, 999 F.2d at 424, 27 BRBS at 91(CRT); *see also Buchanan v. International Transportation Services*, 33 BRBS 32 (1999); *Pozos*, 31 BRBS 173.

Employer next challenges the administrative law judge's award of $225 per hour as claimant's counsel did not demonstrate any particular expertise in the longshore practice area. Alternatively, employer asserts that if the $225 per hour rate is appropriate for claimant's counsel in this case, then the fee petition contains an extraordinary number of hours for an experienced longshore attorney. Employer further contends that the administrative law judge did not properly consider the entirety of claimant's counsel's fee in light of the standard set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The administrative law judge initially found that the issues in this case were not novel or complex enough, nor was there any extreme delay, to warrant the requested enhanced hourly rate of $440.26. After consideration of the regulations, the administrative law judge found counsel should be compensated at a rate of $225 per hour. Noting that this rate is one awarded to experienced Longshore counsel, the administrative law judge considered "the relative inexperience of Claimant's counsel in Longshore matters and his normal billing rate of $200 per hour" and decided to augment this rate to $225 per hour based on the result obtained and "the considerable personal effort involved in coordinating and handling this matter for a family deeply affected by this serious industrial accident." Decision and Order at 4. As the administrative law judge considered both the hourly rate that was reasonable and appropriate in the geographic area, as well as the factors contained in Section 702.132, 20 C.F.R. §702.132, of the regulations, we affirm the $225 hourly rate awarded to counsel in this case. *See generally Lopez v. Stevedoring Services of America*, BRBS , BRB No. 05-0160 (Oct. 26, 2005) (affirming, as reasonable, an administrative law judge's award of an hourly rate of $225 for work conducted within the Ninth Circuit); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); *see also Powell v. Nacirema*

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propriety of such a move, and as such falls short of employer's interpretation that *Hunt* mandates the use of separate counsel by claimant and the GFP in this case.

Operating Co., Inc., 19 BRBS 124 (1986) (administrative law judge may take judicial notice of hourly rates within region in similarly complex cases, and may award higher rate based on certain circumstances).

Additionally, as employer did not raise the applicability of *Hensley* in its objections before the administrative law judge, *see* Employer's Objections dated April 15, 2004, it cannot raise them now for the first time on appeal. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Nevertheless, the administrative law judge's decision reflects a consideration of the test enunciated by the Court in that case.[8] In this regard, the administrative law judge found that claimant "prevailed on most of the issues presented at the hearing," as evidenced by his Decision and Order dated March 29, 2004.[9] Moreover, he acknowledged, pursuant to Section 702.132(a), that he is "allowed to consider numerous factors in determining a fee award," including consideration of "the amount of benefits awarded." Decision and Order at 4. Thus, the fee request is not disproportionate to claimant's success in pursuit of his claim in this case. *Hensley*, 461 U.S. 424.

The administrative law judge further considered employer's objections regarding alleged excessiveness in the number of hours billed by claimant's counsel in this case. In this regard, he found that the hours spent on work prior to counsel's filing of his notice of appearance, as well as on pretrial and brief preparation, were reasonable and necessary under the circumstances of this case since they contributed to claimant's success on most of the issues. As employer has shown no abuse of discretion in the administrative law judge's finding that these services were not excessive, were reasonable, necessary, and contributed to the successful prosecution of the case, and as they are sufficiently detailed to describe the nature of the work performed, *see* 20 C.F.R. §702.132, the administrative law judge's award of fees for these services are affirmed. *See generally Ross*, 29 BRBS 42. Lastly, the administrative law judge acted within his discretion in finding that counsel's expenses for photocopying, office supplies and federal express were reasonable and necessary. *See generally Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989)

[8] In *Hensley*, 461 U.S. 424, the Supreme Court observed that if the plaintiff achieves only a partial or limited success, the product of the hours expended on litigation as a whole times a reasonable hourly rate may result in an excessive award. Therefore, the fact finder should award a fee only in an amount which is reasonable in relation to the results obtained. *Id.*, at 436, 440.

[9] In fact, the administrative law judge awarded $55,115 annually to the GFP, plus interest, for six years, which amounts to a sum of $332,354.36 plus approximately $13,252.04 in interest, as well as past and future medical benefits for treatment of claimant significant medical conditions.

(within an administrative law judge's discretion to determine whether photocopying expenses are part of attorney's overhead).

Accordingly, the administrative law judge's Decision and Order Concerning Attorney's Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge