

BRB No. 92-1659

DONALD STREET)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CHRISTENSEN MOTOR YACHT)	DATE ISSUED:
)	
and)	
)	
EAGLE PACIFIC INSURANCE)	
COMPANY)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Order Approving Settlement of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Kevin Keaney (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Patricia G. Brown (Littler, Mendleson, Fastiff & Tichy), Portland, Oregon, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Approving Settlement (91-LHC- 2448) of Administrative Law Judge Thomas Schneider rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Worker's 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 only be set aside if show by the challenging party to be arbitrary, capricious, an abuse of discretion of not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On May 5, 1990, claimant sustained a left knee injury while working as a marine carpenter for employer when he slipped while climbing a ladder. Claimant did not seek medical treatment and continued to work until September 9, 1990, when he went to an emergency room with complaints of increasing knee pain. An MRI performed on September 14, 1990, revealed injury to the left medial

meniscus. On September 18, 1990, claimant provided employer with notice of his injury. On September 21, 1990, employer filed a notice of controversion, denying liability for compensation and medical benefits on the ground that claimant had sustained an intervening injury which severed the relationship between his condition and the subject work injury. On October 5, 1990, claimant underwent arthroscopic surgery after which he remained off work. On March 7, 1990, claimant's treating physician declared his knee condition medically stationary and rated his permanent impairment at ten percent. Claimant returned to work for employer on November 16, 1990, and continued to work until March 1991, when he left employer's employ for reasons unrelated to his work injury. No voluntary payments were made by employer, and on June 20, 1991, claimant requested that the claim be scheduled for a formal hearing.

Before the formal hearing occurred, however, the parties entered into a proposed settlement under Section 8(i) of the Act, 33 U.S.C. §908(i). Pursuant to the terms of the parties' agreement, employer agreed to pay claimant \$11,916.07 in temporary total and scheduled permanent partial disability compensation as well as all medical expenses arising from the work injury. In addition, claimant waived his entitlement to interest on past due compensation, and employer agreed that it would be responsible for a reasonable attorney's fee to be determined by the administrative law judge.

On March 12, 1992, an executed copy of the parties' settlement application was forwarded to the administrative law judge, along with claimant's application for an attorney's fee. In the fee petition, claimant's counsel requested \$5,228.15, representing 29 and 7/8 hours of services at \$175 per hour plus \$123.81 in expenses. Employer objected, arguing that the hourly rate and overall fee request were excessive in light of the non-complex nature of the claim and claimant's counsel's unreasonable objections to the initial drafts of the settlement agreement.¹ Employer offered to pay \$4,500 for fees and costs. Claimant declined employer's offer and replied to employer's objections, asserting that the fee requested was reasonable for the necessary work done in connection with this disputed claim. Claimant's counsel further asserted that he reasonably objected to the initial drafts of the settlement agreement because they did not contain any language which indicated that employer had accepted the claim and had withdrawn its controversion, and because they contained a number of inaccuracies. Moreover, claimant indicated that he was reasonably concerned that the initial drafts of the settlement left open the possibility that claimant could be held liable for reimbursement of medical costs paid by his private insurer and non-reimbursed medical costs beyond that paid by his private insurer.

In an Order dated April 15, 1992, the administrative law judge approved the parties' Section 8(i) settlement and awarded the full \$5,228.15 fee requested. Employer appeals the fee award, reiterating its argument below that the \$175 hourly rate is unreasonable in light of the lack of complexity of the claim. Employer further asserts that in determining the applicable hourly rate, the administrative law judge failed to adequately discuss the regulatory criteria of 20 C.F.R. §702.132 in violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(hereinafter APA). Moreover, employer maintains that the award of a fee based on a \$175 hourly rate is contrary to prior Board decisions recognizing hourly rates of \$125 and \$150 as reasonable, and is specifically contrary to

¹Three drafts were apparently exchanged prior to the final agreement.

prior fee awards made to claimant's counsel under the Act in other cases. Employer contends that the hourly rate awarded marks a substantial departure from the rates historically awarded in the Portland area, and that although claimant submitted evidence which established that the senior partner in his counsel's law firm has previously been awarded an hourly rate of \$175, this evidence is insufficient to establish that claimant's counsel, an associate, should receive a similar award.² Claimant responds, urging affirmance of the administrative law judge's fee award. Employer replies, reiterating its argument that the administrative law judge's discussion of the applicable hourly rate fails to comply with the requirements of the APA.

We reject employer's assertions. In making the fee award, the administrative law judge specifically considered and rejected employer's argument that the \$175 hourly rate sought was excessive. In so concluding, the administrative law judge noted that while an hourly rate of \$175 is on the "high side of remuneration for a simple case of ordinary difficulty," this rate was reasonable on the facts presented because claimant's counsel, whom he had previously described as competent, had used his time economically. The administrative law judge further noted that he was cognizant of the fact that lawyers' office expenses are always rising, apparently referring to the results of a national survey which indicated that legal overhead expenses have been rising disproportionately to increases in hourly billing rates submitted by claimant's counsel in support of his fee petition.³ Because the administrative law judge considered both the complexity of the case and the quality of the representation provided in determining that the \$175 hourly rate requested was reasonable, we reject employer's argument that the administrative law judge's explanation of the hourly rate determination was in violation of the APA. *See* 20 C.F.R. §702.132. Employer's unsupported assertion that the hourly rate awarded is excessive is insufficient to meet its burden of showing that the hourly rate awarded is unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55, 62 (1989). Accordingly, the administrative law judge's hourly rate determination is affirmed. Contrary to employer's assertions, the fact that claimant's counsel may have been awarded lesser hourly rates before other adjudicative bodies in other cases does not mandate a contrary result. Fee awards are made on a case-by case basis and are within the discretion of the body awarding the fee. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 236-237 (1993).

Accordingly, the administrative law judge's Order Approving Settlement is affirmed.

²Employer asserts that the award to claimant's counsel's senior partner by the administrative law judge based on an hourly rate of \$175 was premised on findings that he was not only very effective, able, and experienced in longshore law, but that he also habitually handles his cases in substantially fewer hours than most other claimants' attorney's in the western United States.

³Employer contends that the administrative law judge's personal knowledge that "lawyer's expenses are constantly rising" is insufficient to support the hourly rate awarded in this case. Although employer asserts that the record is devoid of evidence regarding rising costs in the Portland, Oregon area, and that the national survey regarding overhead expenses which claimant affixed to his fee petition is irrelevant to the prosecution of cases under the Longshore Act, the administrative law judge acted within his discretion in concluding otherwise. Because the administrative law judge gave alternative reasons for finding the \$175 hourly rate appropriate, any error made in this regard would, in any event, be harmless.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge