BRB No. 04-0546

DAVID A. DOYLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROWAN COMPANIES, INCORPORATED	)	DATE ISSUED:Mar 18, 2005
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Second Supplemental Decision and Order Rescinding Prior Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

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

Steven L. Roberts (Fulbright & Jaworski, L.L.P.), Houston, Texas, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Second Supplemental Decision and Order Rescinding Prior Order (2000-LHC-2878) of Administrative Law Judge Lee J. Romero, Jr., 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).

This case is before the Board for a third time. On December 28, 1999, claimant experienced neck and back pain while working for employer as a yardman. Claimant was treated at a local hospital where he was given pain medication, muscle relaxers, and released for light-duty work. Thereafter, claimant continued to complain of pain while performing light-duty work assignments for employer. Subsequently, on January 20, 2000, claimant was sent home by employer. On January 26, 2000, an MRI performed on claimant's back revealed a bulging disc at C5-6, focal herniation at C6-7, and early changes of discogenic disease. On February 24, 2000, claimant was admitted to an emergency room with complaints of shoulder and neck pain; claimant was treated with injections of Demoral and Phenergan, given a prescription for Vicodin, and released. Employer voluntarily paid claimant compensation under the Act from January 21, 2000, through March 16, 2000, at which time claimant was terminated by employer. Claimant, who subsequently sought temporary total and temporary partial disability benefits under the Act for various periods, commenced non-longshore employment on July 25, 2000.

In the initial Decision and Order, the administrative law judge concluded that claimant has been temporarily disabled from the date of his work-related injury. The administrative law judge determined that claimant had not reached maximum medical improvement, and that although employer presented no evidence of suitable alternate employment, the record indicates that claimant worked post-injury. Accordingly, after calculating claimant's average weekly wage and post-injury wage-earning capacity, the administrative law judge awarded claimant temporary total disability compensation from January 21, 2000, through July 24, 2000, and from December 3, 2000, through January 3, 2001, and temporary partial disability compensation from July 25, 2000, through December 3, 2000, and from January 4, 2001, and continuing, as well as medical benefits and interest.[1] In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge awarded claimant's counsel, Ed Barton, an attorney's fee of $4,583.38, and counsel Quentin T. Price a fee of $20,328.

On employer's appeal, the Board affirmed the administrative law judge's finding that claimant is incapable of resuming his usual employment duties with employer, as well as his determination of claimant's average weekly wage. The Board vacated, however, the administrative law judge's calculation of claimant's post-injury wage-earning capacity subsequent to January 4, 2001, and remanded the case for the administrative law judge to consider all of the relevant evidence in determining whether claimant's post-injury earnings reasonably represent his wage-earning capacity. *Doyle v. Rowan Companies, Inc.*, BRB No. 02-0158 (Nov. 6, 2002)(unpub.).

[1] Specifically, the administrative law judge found that claimant had a post-injury wage-earning capacity of $386.92 per week from July 25, 2000 to December 13, 2000, and $280 per week from January 4, 2001, and continuing.

In his Decision and Order on Remand, the administrative law judge found that claimant had not reached maximum medical improvement, that the record did not support a finding that it was only through extraordinary effort claimant had worked post-January 4, 2001, and that claimant's actual post-January 4, 2001, wages fairly and reasonably represent his post-injury wage-earning capacity. Accordingly, after adjusting claimant's post-injury wages for inflation, the administrative law judge awarded claimant temporary partial disability benefits.[2] Claimant sought reconsideration of the administrative law judge's decision on remand, averring that he worked post-injury only through extraordinary effort and therefore his post-injury wage-earning capacity should be zero. The administrative law judge addressed and rejected claimant's contentions and accordingly denied claimant's motion for reconsideration.

On claimant's appeal, the Board affirmed the administrative law judge's determination that claimant's actual wages subsequent to January 4, 2001, accurately establish his wage-earning capacity and the computation of claimant's loss in wage-earning capacity. *Doyle v. Rowan Companies, Inc.,* BRB No. 03-0752 (July 28, 2004)(unpub.)(*Doyle II*).

Subsequently, claimant's counsel submitted to the administrative law judge a fee petition for work performed on remand. Counsel requested a fee of $4,432.50, representing 19.70 hours of legal services at an hourly rate of $225, and expenses of $179. The administrative law judge noted that employer did not object to this petition, but he reduced the fee requested by 2.2 hours. Therefore, the administrative law judge awarded claimant's counsel a fee of $3,937.50, representing 17.50 hours of legal services at the hourly rate of $225, plus $179 for expenses. Supplemental Decision and Order Awarding Attorney's Fees. Employer filed a Motion to Reconsider Award of Attorney's Fee, contending that a fee award was inappropriate because claimant had not been successful before the administrative law judge on remand. The administrative law judge agreed with employer's motion and held that as claimant was found to be entitled to less compensation as a result of the proceedings on remand than he had originally been awarded, claimant was not successful. Therefore, the administrative law judge denied claimant an attorney's fee for work performed on remand.

[2] Specifically, the administrative law judge found that claimant had a loss in wage-earning capacity from January 4, 2001 to September 30, 2001 of $94.36 per week ($696.06-$601.70), from October 1, 2001 to December 31, 2001, of $114.46 per week ($696.06-$581.60), from January 1, 2002, through September 30, 2002, of $114.77 per week ($696.06-$581.29), from October 1, 2001, to December 31, 2002, of $132.54 per week ($696.06-$563.52), and from January 1, 2003, and continuing of $81.41 per week ($696.06-$614.65).

On appeal, claimant contends that the administrative law judge erred in finding that he was unsuccessful on remand and therefore in denying an attorney's fee. Employer responds, urging affirmance of the administrative law judge's decision to rescind the attorney's fee award.

We cannot affirm the administrative law judge's finding that claimant was wholly unsuccessful on remand. The administrative law judge was instructed by the Board to consider all of the relevant evidence regarding claimant's actual post-injury wages in determining claimant's residual post-injury wage-earning capacity. On remand, claimant contended that he was totally disabled, or alternatively, that if the administrative law judge found claimant's actual wages fairly represent his wage-earning capacity, the wages should be adjusted to reflect the effects of inflation. Employer argued on remand that claimant's average weekly earnings in 2001 were $623.42, his average weekly earnings for 2002 were $623.75, and his projected average weekly earnings for 2003 would be $646.15. Employer's proposed wage-earning capacity did not take inflation into account. *See, e.g., White v. Bath Iron Works Corp.*, 793 F.2d 319, 18 BRBS 101(CRT) (1st Cir.), *cert. denied*, 479 U.S. 1094 (1986). After reviewing the evidence, the administrative law judge found that claimant's post-January 4, 2001, wages accurately reflected his post-injury wage-earning capacity. However, the administrative law judge agreed with claimant's contention that claimant's post-injury wages must be adjusted to those paid at the time of the claimant's injury in order to compensate for inflationary effects. Thus, the administrative law judge adjusted claimant's post-injury wages downward by the percentage increase in the national average weekly wage. *See Richardson v. General Dynamics Corp.,* 23 BRBS 327 (1990). As a result, claimant has a greater loss in wage-earning capacity.[3] This finding was not challenged on appeal by either party, and thus was affirmed by the Board. *See Doyle II*, slip op. at 4.

Although claimant on remand was not successful in establishing that he is totally disabled, the administrative law judge rejected employer's position that claimant's actual wages reflected claimant's post-injury wage-earning capacity without an adjustment for inflation. Thus, claimant achieved a degree of success in that he defended his award against employer's attempt to reduce it even further; claimant's success, however, is limited in that his benefits were reduced from those originally awarded. *See* n.1, 2, *supra*. Employer is liable for a reasonable attorney's fee when claimant defends his award on appeal, on remand, or on modification. *See generally Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *Atlantic & Gulf Stevedores, Inc. v. Director, OWCP*, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); *McKnight*

[3] *See* n.2, *supra.* Employer's proposed calculation of claimant's wage-earning capacity would have resulted in a loss of wage-earning capacity of $72.58 for 2001, $72.31 for 2002, and $49.91 beginning in January 2003.

v. Carolina Shipping Co., 32 BRBS 251 (1998), *aff'g on recon. en banc* 32 BRBS 165 (1998). Therefore, we vacate the administrative law judge's finding that claimant's counsel is not entitled to any attorney's fee for work performed on remand.

We remand the case to the administrative law judge to reconsider the amount of the fee award to which claimant's counsel is entitled, in accordance with principles enunciated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). 33 U.S.C. §928; *see Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988); 20 C.F.R. §702.132. In this regard, we note, contrary to claimant's contentions, that *Hensley's* applicability does not rest on whether a fee is awardable under Section 28(a) or Section 28(b). Once liability for an attorney's fee has shifted to employer due to claimant's success, it is liable only for a "reasonable" fee. 33 U.S.C. §928(a), (b). 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.), *cert. denied*, 516 U.S. 682 (1995), citing *Baker*, 991 F.2d 163, 27 BRBS 14(CRT) and *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT). 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); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). 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.[4]

Accordingly, the Second Supplemental Decision and Order Rescinding Prior Order of the administrative law judge denying claimant's counsel an attorney's fee for work performed before the administrative law judge on remand is vacated, and the case is remanded for further consideration consistent with this opinion.

[4] We also reject claimant's contention that his success on remand should be measured against employer's initial contention that claimant was not entitled to any benefits. This comparison was appropriate for determining the amount of the fee to which claimant's counsel was entitled for work performed in the initial proceedings before the administrative law judge. Counsel was awarded a fee of $24,000 for that work. For the work performed on remand, it is appropriate to measure claimant's success in terms of the comparison between the administrative law judge's original award and claimant's maintaining an award that was higher than employer proposed on remand.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determination that the Supreme Court's teaching in *Hensley v. Eckerhart,* 461 U.S. 424 (1983) is applicable to the case at bar and that the administrative law judge's decision denying an attorney's fee should be vacated. I disagree with my colleagues, however, in holding that the attorney's fee award should be based on claimant's degree of success in obtaining additional compensation on the sole issue before the administrative law judge on remand. I believe that an attorney's fee award must be based upon claimant's degree of success in obtaining compensation beyond employer's voluntary payments, measured at the conclusion of the litigation.

First, as the majority indicated, the law has long been clear that *Hensley* applies to all attorney's fee awards under the Longshore Act. *See General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993). Furthermore claimant's contention that *Hensley* does not apply to attorney's fee awards under Section 28(a) of the Longshore Act is without merit. The instant case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit which has expressly held to the contrary. *See, e.g., Baker,* 991 F.2d at 166, 27 BRBS at 16(CRT).

Second, the majority misapprehends the teaching of *Hensley* when it holds that claimant is entitled to an attorney's fee award for work on remand, considered apart from the litigation as a whole. In *Hensley*, the Supreme Court directed that when a judge considers an attorney's fee petition under a fee-shifting statute, he "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation." 461 U.S. at 436. Because neither the "overall relief

obtained" nor the "hours reasonably expended on litigation" can be determined until the litigation is concluded, the majority misapplies *Hensley* when it holds that the administrative law judge should rule on an attorney's fee application at the conclusion of each proceeding before him.[5]

Under a proper application of *Hensley* to the instant case, claimant is entitled to an attorney's fee because he is a prevailing party: he obtained compensation in addition to that voluntarily paid by employer. 33 U.S.C. §928(a). The administrative law judge can now undertake the analysis required by *Hensley:*

> 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?

461 U.S. at 435. The level of success, however, is measured not only by the specific issues on which claimant prevailed and the amount of money awarded, but also by the amount sought in the lawsuit. The High Court was quite explicit:

> We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

461 U.S. at 440-41. When the administrative law judge has concluded that analysis and has determined an appropriate attorney's fee for work on this case, he should subtract from that figure $24,000, the amount of the attorney's fee he previously awarded for work in this case. The balance, if any, is the amount lawfully due. 33 U.S.C. §928(a); *Hensley*, 461 U.S. at 436.

In sum, I agree with the majority that the administrative law judge's decision denying an attorney's fee must be vacated and that on remand the administrative law

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[5] Employer argues that claimant is not entitled to an attorney's fee for work on remand because he did not receive more benefits on remand than had been ordered in the original decision, citing *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101-102 (1997). Employer's reliance on *Duhagon* is misplaced because the administrative law judge in *Duhagon* awarded claimant no compensation in addition to that voluntarily paid by employer and that decision was affirmed by the Board. In the instant case, the administrative law judge awarded additional compensation, and the Board affirmed that decision in part and vacated that decision in part.

judge should apply *Hensley* to his determination of the attorney's fee award. I disagree with my colleagues, however, in holding that *Hensley* can be applied piecemeal to stages of litigation. Because a *Hensley* analysis entails the consideration of several factors, including: the severability of unsuccessful claims, the level of success achieved, a comparison of the success achieved with the scope of the litigation, the hours reasonably expended, and those factors cannot be determined until the litigation on compensation ends, it necessarily follows that *Hensley* precludes calculation of an attorney's fee before the conclusion of the litigation. Hence, I would direct the administrative law judge on remand to apply *Hensley* properly to the instant case and reduce any attorney's fee award by the $24,000 previously awarded.

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REGINA C. McGRANERY
Administrative Appeals Judge