

JESSE LOPEZ)
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 Claimant-Respondent)
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 v.)
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 MAERSK PACIFIC, LIMITED) DATE ISSUED: 11/30/2005
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 and)
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 COMMERCIAL INSURANCE SERVICES,)
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 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Preliminary Order Determining Extent of Counsel’s Success in Prosecuting Claim and Attorney Fee Order of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

James P. Aleccia (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Preliminary Order Determining Extent of Counsel’s Success in Prosecuting Claim and Attorney Fee Order (01-LHC-0277, 01-LHC-1696) of Administrative Law Judge Anne Beytin Torkington 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 sustained work-related injuries on April 11, 2000, to his head, neck, left shoulder and thoracolumbar spine, for which employer voluntarily paid disability and

medical benefits from April 12, 2000, to July 24, 2000. Claimant thereafter filed a claim seeking additional benefits for a low back injury with radiating left leg pain, and employer controverted the work-relatedness of this condition. In a decision dated August 13, 2003, Administrative Law Judge Donald B. Jarvis awarded claimant temporary total disability benefits from April 11, 2000, through September 28, 2000, temporary partial disability benefits from September 29, 2000, through December 15, 2000, and medical benefits. Upon reconsideration,¹ Administrative Law Judge Anne Beytin Torkington (the administrative law judge) modified Judge Jarvis's decision to reflect that claimant is entitled to temporary total disability benefits from April 11, 2000, through July 23, 2000, which represents the amount of benefits already voluntarily paid by employer in this case.

On February 20, 2004, claimant's counsel filed a petition for an attorney's fee requesting an award in the total amount of \$22,387.50, which was followed, on March 19, 2004, by employer's submission of its objections to the fee petition. In a Preliminary Order Determining Extent of Counsel's Success in Prosecuting Claim dated August 17, 2004, the administrative law judge found that the requested attorney's fees were excessive as "the relief ultimately granted was confined in comparison to the scope of the litigation as a whole." Order dated August 17, 2004, at 5. She thus ordered claimant's counsel "to prepare a Revised Petition for Fees and Costs," and in turn, directed employer to "file a Statement of Final Objections," noting that "[a]ny failure to object will be deemed a waiver and acquiescence." *Id.* at 5-6.

On September 7, 2004, claimant's counsel submitted a revised petition for an attorney's fee seeking a total of \$13,612.50, representing 60.50 hours at \$225 per hour. In particular, claimant's counsel reduced the original number of hours requested by one-half and added to that figure 10.75 hours of attorney work performed between February 20, 2004, and September 7, 2004, to prepare and defend the fee application. Employer did not file any "final" objections to the revised fee petition. In her Attorney Fee Order dated November 5, 2004, the administrative law judge awarded claimant's counsel an attorney's fee totaling \$13,342.50.

On appeal, employer asserts that claimant's counsel has not established a successful prosecution of claimant's claim as required by Section 28(a) of the Act, 33 U.S.C. §928(a), since it voluntarily paid all disability benefits ultimately awarded by the administrative law judge in this case, *i.e.*, it paid temporary total disability benefits up to

¹ Following the submission of employer's petition for reconsideration, the case was reassigned to Administrative Law Judge Anne Beytin Torkington.

July 24, 2000. Employer also argues that the requested hourly rate of \$225 awarded by the administrative law judge in this case is excessive.²

Under the plain language of Section 28(a), an employer is liable for a fee if it declines to pay any benefits within 30 days after receiving written notice of the claim from the district director, and the claimant's attorney's services thereafter result in a successful prosecution of the claim. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Employer's voluntary payment of benefits prior to the date of filing of claimant's claim does not preclude employer's liability under Section 28(a). *Richardson*, 336 F.3d 1103, 37 BRBS 80(CRT); *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT).

In her Preliminary Order, the administrative law judge found that while claimant did not successfully prosecute his claim for additional disability benefits, he nonetheless successfully established that his back injury was work-related and that he is entitled to future medical benefits as well as to reimbursement of past medical expenses, all of which had been contested by employer in this case. In particular, Judge Jarvis concluded in his decision that claimant is "entitled to reimbursement for necessary treatment subsequently procured on his own," as well as for "all reasonable medical costs necessitated in the future as a result of the April 11, 2000, work-related injury." Decision and Order at 16. Consequently, as claimant established entitlement to medical benefits for treatment of his back condition which employer controverted, claimant's counsel is entitled to an attorney's fee, payable by employer, pursuant to Section 28(a). 33 U.S.C. §928(a); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Moreover, the administrative law judge rationally found that an hourly rate of \$225 is reasonable given "counsel's thirty-two years of experience, her expertise in Longshore workers' compensation litigation," and "her competence in litigating this particular claim," Order dated August 17, 2004, at 2. See *Newport News Shipbuilding & Dry Dock Co v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *McKnight v. Carolina Shipping Co.*, 32

² We shall not address employer's contention, on appeal, that the amount of the fee awarded by the administrative law judge in this case is not commensurate with the limited benefits actually obtained by claimant, as it was not previously raised before the administrative law judge and cannot be raised for the first time on appeal. *Moody v. Ingalls Shipbuilding, Inc.*, 29 BRBS 63 (1995), *denying recon. of* 27 BRBS 173 (1993) (Brown, J., dissenting); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (decision on recon.).

BRBS165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). As such, the administrative law judge's award of an hourly rate of \$225 is affirmed. 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Preliminary Order Determining Extent of Counsel's Success in Prosecuting Claim and Attorney Fee Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge