

BRB No. 07-0532

A.W.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED:
DRY DOCK COMPANY)	11/21/2007 <u>2007</u>
)	
Self-Insured)	
Employer-Respondent)	
		DECISION and ORDER

Appeal of the Order on Petition for Attorney's Fee of Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for
claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport
News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order on Petition for Attorney's Fee (1998-LHC-0388) of
Administrative Law Judge Daniel A. Sarno, 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious,
an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding &
Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right hand on November 17, 1994, in the course of his
employment as a shipbuilder. The case was referred to the Office of Administrative Law
Judges on November 20, 1997. However, employer accepted the claim and the case was
remanded to the district director by order dated September 14, 1998. The district director

entered a compensation order dated January 21, 2000. Claimant's counsel filed a fee petition on January 23, 2007 and employer filed objections thereto on January 31, 2007.

In his Order, the administrative law judge found that claimant provided no explanation for the delay in filing an attorney's fee petition, that the administrative law judge who presided over the claim on the merits had specified that the attorney's fee petition be filed within thirty days of the date of the decision and that it was not filed within this period. The administrative law judge also stated that a nine-year delay is an excessive amount of time and, thus, concluded that the fee petition cannot be approved.

Claimant appeals the denial of an attorney's fee, contending that the Act does not provide a time limitation for filing an attorney's fee petition and that the administrative law judge erred in stating that a filing deadline was imposed. Employer responds, urging affirmance of the denial of an attorney's fee.

As claimant contends, the Act and its regulations do not specify a time period for filing a fee petition. 33 U.S.C. §928; 20 C.F.R. §702.132; *see Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). The regulation at 20 C.F.R. §702.132(a) states that the fee application "shall be filed . . . within the time limits specified by . . . [the] administrative law judge...." The loss of an attorney's fee is a harsh result and should not be imposed on counsel as a penalty except in the most extreme cases. *Paynter v. Director, OWCP*, 9 BLR 1-190 (1986) (Ramsey, C. J., dissenting).

In the present case, the administrative law judge incorrectly stated that the "[p]residing [j]udge specified that the fee petition be filed within thirty days of the date of the decision and Employer's objections were to be filed within ten days of the petition." Order on Petition for Attorney's Fee at 2. The previous order did not set any deadline for the filing of a fee petition. The Order of Remand states in its entirety:

In a letter dated September 9, 1998, counsel for Claimant requested the above referenced case be remanded to the District Director as the parties have resolved their differences.

Accordingly, the case is remanded to the District Director for the appropriate action.

Order on Remand (Sept. 14, 1998). We cannot affirm the administrative law judge's denial of an attorney's fee in this case as it is based on the erroneous finding that a deadline had been set for submission of an attorney's fee petition. In view of the lack of specified time period for filing in a prior order, we vacate the administrative law judge's

denial of an attorney's fee and remand the case for further consideration of counsel's entitlement to an attorney's fee.¹

Accordingly, the Order on Petition for Attorney's Fee of the administrative law judge is vacated, and the case is remanded for further consideration.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹ If on remand the administrative law judge considers counsel's fee petition on the merits, we agree with employer's objection to counsel's requesting his current hourly rate for work performed in 1998. As the delay was not due to protracted litigation, but rather was due to counsel's lack of diligence, the appropriate hourly rate is the rate at the time the services were performed. *See generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996).