

CARLOS LOPEZ)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BAY DECKING COMPANY)	DATE ISSUED: <u>Oct. 19, 2004</u>
)	
and)	
)	
SIGNAL MUTUAL, FRANK GATES)	
ACCLAIM, INCORPORATED)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fee of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Roy D. Axelrod (Law Offices of Roy D. Axelrod), Solana Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fee (2001-LHC-3348) of Administrative Law Judge Richard K. Malamphy 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, a truck driver/crane operator, injured his back at work on March 1, 1998, and was totally disabled from the date of injury until August 15, 1999. Claimant reached maximum medical improvement on August 16, 1999, underwent vocational rehabilitation in customer service from November 15, 1999, through May 1, 2000, and returned to work as a car salesman in July 2000.¹ Claimant sought additional disability benefits commencing May 2, 2000.

In his Decision and Order, the administrative law judge analyzed the evidence regarding suitable alternate employment and awarded claimant permanent partial disability benefits from August 16 through November 14, 1999, and from May 2, 2000, and continuing. Employer appealed this decision to the Board, contending that the administrative law judge erred by rejecting some of the identified jobs in the labor market surveys and in determining claimant's post-injury wage-earning capacity.

On appeal, the Board affirmed the administrative law judge's conclusions that the proffered positions of painter and pest control technician are not suitable for claimant, but held that his rejection of the customer service representative positions following claimant's completion of his vocational rehabilitation in customer service may have been in error. *Lopez v. Bay Decking Co.*, BRB No. 03-0194 (Nov. 17, 2003) (unpublished). Accordingly, the case was remanded to the administrative law judge for reconsideration of the suitability of the customer service positions following claimant's vocational training and claimant's post-injury wage earning capacity based upon these additional positions, if necessary.

Subsequent to the administrative law judge's first decision and while this case was on appeal before the Board, claimant's attorney filed a fee petition for work performed before the administrative law judge, seeking a fee of \$9,194.11, representing 35.5 hours of legal services at \$250 per hour, plus \$319.11 in costs. Employer filed objections to this request, disputing the hourly rate and specific time entries. In his Supplemental Decision and Order, the administrative law judge addressed employer's objections and awarded a fee of \$8,585.61, representing 36.74 hours of legal services at \$225 per hour plus \$319.11 in costs.

Employer appeals the award of an attorney fee, arguing that because the award was based on the success of claimant's attorney in the underlying proceedings, and that determination has been remanded for further consideration, the fee award should be vacated and remanded for further consideration consistent with the administrative law

¹ Claimant suffered an unrelated injury to his back on August 4, 2001, while working as a car salesman.

judge's finding on remand. In response, claimant has submitted a copy of his Supplemental Brief Following Remand.

An administrative law judge need not wait until there is a final decision on a claim before entering an attorney's fee award but may award a fee during the pendency of an appeal. However, the fee award is not enforceable until the compensation order becomes final. *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT)(7th Cir. 1982); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

Although employer raises no arguments on appeal concerning the hourly rate or specific entries, *per se*, employer's argument that the fee award may be excessive when the amount of benefits is considered has merit. In making the fee award, the administrative law judge specifically addressed claimant's degree of success in obtaining additional benefits from employer and the amount of benefits awarded. *See* 20 C.F.R. §702.132; Supp. Decision and Order at 8. In light of our decision to vacate the award of benefits and to remand the case for further consideration, we agree with employer that the administrative law judge should reconsider the amount of the attorney's fee in light of the benefits awarded on remand. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *see Hensley v. Eckerhart*, 461 U.S. 424 (1983). If the administrative law judge reinstates his original compensation award, the fee award is affirmed.

Accordingly, the case is remanded for consideration of the fee award in light of the administrative law judge's decision on remand.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge