BRB No. 86-406

RALPH BYNES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
MIDLAND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees and Costs of Nahum Litt, Chief Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein, Miami, Florida, for claimant.

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

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fees and Costs (82-LHC-2933) of Chief Administrative Law Judge Nahum Litt 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. *Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant injured his back on January 17, 1981 when he was removing tires from a pallet while working for employer. Decision and Order at 3. He filed a claim for benefits, and the administrative law judge awarded him temporary total disability benefits from January 17, 1981 to May 25, 1983, and permanent total disability benefits from May 25, 1983 and continuing. 33 U.S.C. §908(a), (b). The administrative law judge also awarded medical expenses and an attorney's fee upon approval of a fee petition, and he determined that employer is entitled to Section 8(f), 33 U.S.C. §908(f), relief. Decision and Order at 9-10.

On November 20, 1985, claimant filed an application for an attorney's fee and a motion for

costs. He requested $10,000 for 42.35 hours of services, and $605.55 for a witness fee and transcript costs. Employer responded, accepting the time requested but suggesting an hourly rate of $125. Thus, employer argued that $5,300 would be a more appropriate fee. Employer also asserted that a $500 witness fee was excessive. The administrative law judge awarded the requested costs of $605.55, but he reduced the hourly rate to $120 and allowed 32 hours of services, thus awarding a fee of $3,840.[1] Order at 2. Claimant appeals the Order. Employer has not responded to the appeal.

In determining that counsel is entitled to a fee of $3,840 instead of the requested $10,000, or even the recommended $5,300, the administrative law judge rejected 1.25 hours of services he deemed duplicative of other services. Order at 1. He denied all post-hearing time, except 15 minutes on January 15, 1985 for reviewing a doctor's transcript and 30 minutes on November 12, 1985 for reviewing the Decision and Order, because he determined the post-hearing services did not "augment the record or otherwise bear upon the proceeding before this Office. . . ." Order at 2. Additionally, the administrative law judge rejected time denoted as "slippage" because it did not meet the specificity requirements of the regulations.[2] *Id.* Finally, he determined that an hourly rate of $120 is appropriate given the geographic area, the lack of complexity of the case, and the fact that much of counsel's services entailed the preparation and review of routine correspondence. *Id.*

Claimant makes numerous contentions concerning the propriety of the administrative law judge's fee award. Primarily, he contends the administrative law judge arbitrarily reduced the fee request without considering the factors in the regulation, 20 C.F.R. §702.132, particularly the amount of benefits awarded.[3] Claimant also contends the administrative law judge did not fully explain his reasons for the fee reduction, and did not consider the necessity of the services he deemed duplicative.

Section 702.132 of the regulations provides that any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. *See, e.g., Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n,* 22

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[1]Claimant notes the administrative law judge's failure to indicate the number of hours he allowed in calculating counsel's fee. Although the administrative law judge did not specifically state the total hours awarded, his omission is harmless as it can be readily ascertained that he allowed 32 hours of services by subtracting the hours he rejected from the requested hours.

[2]Labelled as "slippage," counsel sought time for various non-recorded services. The amount of "slippage" time was approximated as 10 percent of the total time requested. *See* Petition at 10.

[3]Counsel argues that, given claimant's life expectancy, he will collect over $145,000 in benefits as a result of this claim, and such an award would generate a fee greater than $58,000 in a contingent accident case. Therefore, he argues, to award a fee less than even that recommended by employer is not reasonable. Moreover, he argues he is not rewarded for his success in obtaining over $145,000 for claimant, as he would have received the same fee for obtaining a lesser award.

BRBS 434 (1989); 20 C.F.R. §702.132(a). In this case, the administrative law judge clearly considered the complexity of the case and the quality of the representation. He also considered the geographic area and the type of services rendered. After considering these factors, the administrative law judge reduced the hourly rate from the requested $235 per hour to $120 per hour. We conclude that he did not abuse his discretion in awarding a fee based on an hourly rate of $120, as that is a reasonable rate for services performed in the early 1980's. *See generally Muscella*, 12 BRBS at 272.

Next, we consider claimant's contention that the fee award is arbitrary because the administrative law judge failed to fully explain his reasons for reducing the hours requested and failed to consider the necessity of the services. With respect to the disallowance of duplicative services, we conclude that claimant has not shown that the administrative law judge abused his discretion or acted arbitrarily in denying time for these services. *See generally Muscella*, 12 BRBS at 272. Further, the regulation at 20 C.F.R. §702.132(a) requires that a fee petition contain a complete statement of the extent and character of the necessary work done. Consequently, the administrative law judge properly rejected the item labelled "slippage" as it does not conform to the regulation.

We agree, however, that the administrative law judge erred in disallowing 5.25 hours for post-hearing services, as services performed prior to the filing of the Decision and Order are compensable at the administrative law judge level. *See generally Picinich v. Todd Shipyards Corp.*, 23 BRBS 128 (1989). The services need not specifically augment the record. In this case, 11 months elapsed between the formal hearing and the issuance of the Decision and Order. During this time, counsel had brief conversations with claimant, and he monitored claimant's medical condition. As this work clearly is compensable under Section 702.132, we modify the administrative law judge's Order to allow an additional 5.25 hours at a rate of $120 per hour.

Accordingly, the administrative law judge's Order awarding an attorney's fee is modified to include the 5.25 hours of post-hearing services previously disallowed by the administrative law judge, at $120 per hour. In all other respects, the Order is affirmed. Consequently, employer is liable for costs of $605.55 and an attorney's fee in the amount of $4,470, representing 37.25 hours of work performed before the administrative law judge, at a rate of $120 per hour, payable directly to claimant's counsel.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge