

BRB Nos. 93-1038
and 95-1534A

DAVID P. THOMSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
FRASER SHIPYARDS,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
AETNA CASUALTY & SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeals of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor, and the Supplemental Decision and Order Awarding Attorney's Fees of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

A. Blake MacDonald (MacDonald, Munger, Downs & Munger), Duluth, Minnesota, for claimant.

Larry J. Peterson (Larry J. Peterson & Associates), St. Paul, Minnesota, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (91-LHC-1728) of Administrative Law Judge Charles W. Campbell and the Decision and Order denying claimant's petition for modification (94-LHC-1203) of Administrative Law Judge Robert G. Mahony 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). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). 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 and*

Dry Dock Co., 12 BRBS 272 (1980).

Claimant allegedly sustained injuries to his neck and upper back as a result of a work-related accident on October 24, 1990. A Decision and Order - Awarding Benefits was issued on November 24, 1992, by Administrative Law Judge Charles W. Campbell. Judge Campbell determined that claimant sustained work-related injuries which rendered him temporarily totally disabled for the period of October 25, 1990 through December 19, 1991, and ordered employer to pay compensation at the rate of \$288.99 per week, plus any interest owed. Additionally, Judge Campbell awarded claimant certain expenses for medical treatment arising from his work-related injuries.

Thereafter, claimant's counsel in this matter sought an attorney's fee of \$10,935, representing 81 hours of services at \$135 per hour, plus \$2,130.61 in expenses, for work performed before the district director and Judge Campbell in connection with claimant's compensation claim. In his Supplemental Decision and Order Awarding Attorney's Fees, Judge Campbell, after consideration of employer's objections, awarded a fee of \$8,640 representing 64 hours at \$135 per hour, plus the requested expenses.¹ Employer filed a timely appeal challenging Judge Campbell's award of attorney's fees and the appeal was assigned BRB No. 93-1038. Claimant responds, urging affirmance of the fee award.

Subsequently, claimant filed a petition for modification of Judge Campbell's Decision and Order - Awarding Benefits, seeking additional temporary total disability benefits from December 19, 1991. In his Decision and Order filed April 24, 1995, Administrative Law Judge Robert G. Mahony concluded that claimant has not shown a mistake of fact or a change in condition and thus, denied his request for modification. Claimant, with new counsel, appealed and employer cross-appealed Judge Mahony's Decision and Order denying modification and those appeals were assigned BRB Nos. 95-1534 and 95-1534A. At claimant's request, the Board consolidated BRB Nos. 95-1534/A and 93-1038 for decision purposes only. *See Thomson v. Fraser Shipyards, Inc.*, BRB Nos. 95-1534/A and 93-1038 (July 10, 1995)(unpub. Order). Claimant then requested that his appeal, BRB No. 95-1534, be withdrawn and accordingly, his appeal was dismissed by the Board.² *See Thomson v. Fraser Shipyards, Inc.*, BRB Nos. 95-1534/A (Sept. 21, 1995)(unpub. Order).

As an initial matter we address employer's appeal of Judge Mahony's Decision and Order denying modification. On appeal, employer raises contentions regarding the timeliness of claimant's petition for modification. The dismissal of claimant's appeal of Judge Mahony's Decision and Order denying claimant's request for modification, however, renders employer's contentions moot. Consequently, since employer is not adversely affected or aggrieved by Judge Mahony's denial of

¹In his decision, Judge Campbell noted that he only had jurisdiction to award fees for the 64 hours of services performed at the hearing level of the proceedings on and after April 15, 1991 and instructed claimant's counsel that he may apply to the district director for an award of fees for services performed before that date. Claimant's counsel subsequently petitioned and received an attorney's fee from the district director.

²In its Order, the Board noted that employer's appeal, BRB No. 95-1534A, remained pending before the Board.

claimant's request for modification, its appeal, BRB No. 95-1534A, is hereby dismissed. 20 C.F.R. §802.201; *see generally Sharpe v. George Washington University*, 18 BRBS 102 (1986). We now consider employer's challenge to Judge Campbell's (hereafter, the administrative law judge's) Supplemental Decision and Order Awarding Attorney's Fees.

Employer first contends that the fee petition fails to comply with the appropriate regulatory guidelines. We note that contrary to employer's contention, the fee petition sufficiently identifies the requested hours. 20 C.F.R. §702.132(a). Additionally, the administrative law judge specifically found counsel's fee application to be "sufficiently itemized." We therefore reject employer's contention that the awarded fee must be reduced on this basis.

Employer next contends that counsel's fee petition does not meet the specificity requirements of the regulations because it does not identify who performed the enumerated services. *See* 20 C.F.R. §702.132(a). Employer did not raise this objection before the administrative law judge and cannot raise it now for the first time on appeal. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge. In considering counsel's fee petition, the administrative law judge noted employer's objections in determining that the time spent in performing services at the hearing level was reasonable in view of the number of issues which were involved in the case.³ Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard; thus we decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

We further reject employer's assertion that the awarded hourly rate is excessive. The administrative law judge determined that the hourly rate of \$135 sought by claimant's counsel is reasonable based on the general current level of rates for Longshore Act work by claimants' attorneys in the geographical area involved. As employer's mere assertion that the awarded rates do not conform to the reasonable and customary charges in the area where this claim arose is insufficient to meet its burden of proving that the rate is excessive, we affirm the rates awarded by the administrative law judge. *See Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *Maddon*, 23 BRBS at 55; *see generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

³We note that employer did not voluntarily pay benefits and contested virtually every aspect of this case, including whether claimant sustained an injury, whether claimant actually filed a claim and if so, whether said claim was timely filed.

Lastly, employer objects to the administrative law judge's award of expenses for travel, miscellaneous long distance telephone calls and a binder for the placement of medical records. With regard to the travel time, the administrative law judge awarded a fee for eight hours for round trip travel and attendance at the medical deposition in question, plus \$220 in airfare. Employer contends this period of eight hours should encompass a round trip by automobile (from Duluth to Minneapolis) as counsel claimed the deposition itself took only two and one-half hours. Employer asserts it should be liable only for mileage and should not be liable for airfare in addition to this time. Alternatively, employer argues that if it is liable for counsel's airfare, then the eight hours awarded by the administrative law judge for that day should be reduced to reflect the decrease in travel time. The Board has held that attorney travel time is compensable under Section 28 of the Act, 33 U.S.C. §928, where the travel is reasonable, necessary, and in excess of that normally considered to be a part of overhead. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). The same test applies to travel expenses or costs. *Id.*; *see also Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995). In the instant case, counsel's travel to Minneapolis to attend the deposition of employer's medical expert is compensable, as it is reasonable and necessary. *Swain*, 14 BRBS at 657. However, we agree with employer that the administrative law judge's award of the eight hours in travel time as well as the airfare is a duplication of fees. Moreover, we note that the administrative law judge did not explicitly consider the relevant criteria set out in *Swain* prior to awarding counsel's travel time and expenses. Consequently, we vacate his award of these costs and remand for reconsideration of the evidence on this issue.⁴ We, however, affirm the administrative law judge's award of the costs for miscellaneous long distance telephone calls and for the binder for medical reports as he determined that these costs were reasonable. *See generally Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989)(Order).

Accordingly, employer's appeal of Judge Mahony's Decision and Order denying claimant's request for modification is dismissed. BRB No. 95-1534A. Judge Campbell's award of travel expenses is vacated and the case is remanded for further consideration consistent with this opinion. In all other regards, Judge Campbell's Supplemental Decision and Order Awarding Attorney Fees is affirmed. BRB No. 93-1038.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

⁴Contrary to employer's request, a formal hearing is not required where, as in the instant case, the fee request is considered by the administrative officer before whom the work was performed. *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86, 95 n. 2 (1989). Consequently, we decline to instruct the administrative law judge to hold a formal hearing upon remand.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge