BRB No. 93-1074

FRANK O'HEHIR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL & CONTAINER SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits and the Decision and Order on Motion for Reconsideration of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Nicholas Scibilia, Scarsdale, New York, for claimant.

Keith L. Flicker and Francis M. Womack (Flicker & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits and the Decision and Order on Motion for Reconsideration (91-LHC-2507) of Administrative Law Judge Joel R. Williams 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 & Dry Dock Co.*, 12 BRBS 272 (1980).

On August 28, 1990, claimant injured his left knee, lower back, and right shoulder, while working as a warehouse checker for employer. Employer voluntarily paid temporary total disability compensation from August 29, 1990 through May 16, 1991, at the rate of $445.21 per week. Claimant sought permanent total disability compensation under the Act. A hearing was held on

January 16, 1992 to determine the nature and extent of claimant's disability and whether employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief. Following the hearing, claimant's counsel submitted a fee petition for work performed before the administrative law judge, requesting $26,042.50, representing 104.17 hours of services at $250 per hour, plus $3,303.32 in expenses. Employer filed objections to the fee request, and claimant responded.

In his Decision and Order issued on November 9, 1992, the administrative law judge determined that claimant reached maximum medical improvement on January 8, 1992, that claimant could no longer perform his usual work, and that employer failed to establish the availability of suitable alternate employment. Accordingly, he awarded claimant temporary total disability compensation from May 17, 1990 to January 7, 1992, and permanent total disability compensation thereafter, as well as interest, medical benefits, and an attorney's fee of $19,917.50, representing 79.67 hours of services at an hourly rate of $250, plus expenses of $3,288.32. Moreover, the administrative law judge determined that employer was entitled to Section 8(f) relief. In a Decision and Order on Motion for Reconsideration, the administrative law judge, over employer's objections, reaffirmed his finding regarding the date claimant's condition reached permanency.

Employer appeals, challenging the administrative law judge's finding that claimant reached maximum medical improvement on January 8, 1992, and the $250 hourly rate he approved in making the award of attorney's fees. Claimant responds, urging affirmance.

Employer initially contends that the totality of medical evidence establishes that claimant reached maximum medical improvement no later than December 6, 1990. Employer argues that the reports of claimant's treating physician, Dr. Jerro, reflect that claimant's condition did not change after that date, and that the diagnoses and physical findings of Dr. Koval, who found claimant totally disabled on January 14, 1991, parallel those listed in Dr. Jerro's report of December 6, 1990. Employer also asserts that Dr. Jerro's finding on January 8, 1992, that claimant was "permanent totally disabled," CX 5, was in a legal rather than a medical context.

An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 61 (1985). A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1992).

After review of the administrative law judge's Decision and Order and Decision and Order on Motion for Reconsideration in light of the evidence of record, we affirm his finding that claimant's condition reached permanency as of January 8, 1992, because it is rational, in accordance with law, and is supported by substantial evidence. *O'Keeffe*, 380 U.S. at 359. After considering the relevant medical opinions of Drs. Nehmer, Koval and Gallick, the administrative law judge acted

within his discretion in according determinative weight to the opinion of claimant's treating physician, Dr. Jerro, who rated claimant as being permanently totally disabled as of that date. CX 5. Inasmuch as employer has failed to raise any reversible error, the administrative law judge's finding that claimant's condition reached permanency on January 8, 1992 is affirmed. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., concurring and dissenting); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Turning to employer's arguments regarding the administrative law judge's award of attorney's fees, employer initially contends that the $250 hourly rate awarded by the administrative law judge is arbitrary because he put undue emphasis on counsel's geographic location and failed to properly consider the lack of complex legal issues in this case. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Inasmuch as the administrative law judge considered all of the regulatory criteria, including the complexity of the case, in determining that an hourly rate of $250 was reasonable and appropriate, employer's assertion that the complexity of the case did not warrant the fee awarded is rejected. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

Employer's argument that the administrative law judge erred in considering counsel's location inasmuch as the place where counsel practices law is not listed as a factor to be considered under 20 C.F.R. §702.132, must fail as it is well-established that geographic locality is a relevant factor to be considered in determining the applicable hourly rate, as employer itself recognized in its objecting to the fee request. *See Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995). Employer also contends that in approving the requested hourly rate of $250, the administrative law judge erred in considering counsel's 35 years of experience and his legal expertise in general, rather than the quality of counsel's representation of claimant in this particular case, and in taking judicial notice of Altman & Weil's "1990 Survey of Law Firm Economics." Moreover, employer asserts that an hourly rate of $125 is appropriate and that the awarded $250 hourly rate is arbitrary and inappropriate when compared to rates approved by the Board for New York attorneys in other cases, or with rates established under other United States statutes providing for payment of attorney's fees.

We need not address these arguments which employer has raised for the first time on appeal. *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). We note, however, that in determining the applicable hourly rate, the administrative law

judge explicitly found that the rate requested by counsel was in keeping with "the vigorousness and thoroughness of his representation in this particular case," Decision and Order at 13, and that counsel's "adequate preparation was a significant factor in his skillful direct and cross examination of the deponents and has led to his successfully establishing his client's permanent total disability," Decision and Order at 14. We further note that assuming, *arguendo*, that the Altman and Weil survey does not satisfy the criteria for judicial notice at 29 C.F.R. §18.201(b) of the regulations, which governs the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, any error the administrative law judge may have made is harmless on the facts presented because the survey was not the sole basis for the administrative law judge's hourly rate determination. *See generally Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986). Finally, we note that fees for legal services under the Longshore Act are done on a case-by-case basis and are within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132; *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994).

Inasmuch as employer has not shown that the administrative law judge abused his discretion in finding that the requested $250 hourly rate was reasonable and appropriate, his award of an attorney's fee based on this hourly rate is affirmed. *See generally Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Madden v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits and his Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge