

JOSEPH LOMBARDO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AMERICAN STEVEDORING, LIMITED)	DATE ISSUED: <u>Nov. 8, 2000</u>
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Upon Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

James R. Campbell, Middle Island, New York, for claimant.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher, LLP), Jersey City, New Jersey, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Upon Remand (98-LHC-0954) of Administrative Law Judge Ainsworth H. Brown 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 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). This is the second time this case is before the Board.

Claimant suffered a work-related injury to his right ankle and left knee. On June 22, 1998, the parties informed the administrative law judge that all issues between them had been resolved, and requested that the case be remanded for processing. Subsequently, claimant's counsel sought a

fee of \$6,412.50, representing 25.65 hours of legal services rendered at the hourly rate of \$250.

In his Order of Remand and Award of Attorney Fees, the administrative law judge granted the parties' request to remand the case to the district director "for processing," and awarded claimant's counsel a fee of \$1,880. The administrative law judge summarily denied claimant's motion for reconsideration. Claimant appealed this fee award to this Board, contending that it is so inadequate as to be arbitrary, capricious and an abuse of discretion.

While agreeing that the administrative law judge correctly found that claimant's counsel is not entitled to a fee for work performed regarding employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f), the Board found that the administrative law judge neglected to state which other specific hours were being disallowed and failed to specifically discuss the application of the regulatory criteria of 20 C.F.R §702.132. As a result of these deficiencies, the Board vacated the administrative law judge's fee award and remanded the case for reconsideration pursuant to the regulatory criteria. *Lombardo v. American Stevedoring, Ltd.*, BRB No. 98-1546 (July 28, 1999)(unpublished).

On remand, the administrative law judge specifically addressed sixteen requested items and either reduced them as excessive or eliminated them for varying reasons. He then reinstated his previous attorney's fee award of \$1,880.

Claimant again appeals, arguing that the reduced fee is inadequate. Employer responds, urging affirmance.

Claimant asserts on appeal that the fee awarded by the administrative law judge is so inadequate as to be arbitrary, capricious, an abuse of discretion, and not in accordance with law. Specifically, in support of his appeal, claimant avers that the administrative law judge erred in awarding an attorney's fee without considering counsel's experience, the actual time spent on services rendered to claimant, and the results obtained as a result of the performance of those services. We agree.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, which provides that an awarded attorney's fee must be reasonable, and the applicable regulation, 20 C.F.R. §702.132, which provides that an awarded attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Moreover, a fee award should be for an amount that is reasonable in relation to the results obtained. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *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); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. *See, e.g., Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Before the administrative law judge, employer raised numerous objections to counsel's fee petition, asserting that many of the entries contained therein were excessive or duplicative. In his decision on remand, the administrative law judge discussed sixteen specific entries requested by claimant's counsel. Regarding those entries, the administrative law judge found eight were excessive and thus reduced the time requested. The hours claimed in the remaining 8 entries were disallowed either on the basis that the time was duplicative of work previously performed, that it was unnecessary or that the entry was vague. Thereafter, the administrative law judge found that counsel's success in this case was achieved by the receipt of one medical report from claimant and that, therefore, a fee of \$1,880 was reasonable for the services rendered by counsel on behalf of claimant.¹

¹In awarding counsel this fee, the administrative law judge did not approve a definitive hourly rate, stating only that \$250 was "toward the high end" for New York City attorneys. The effective rate awarded after the total fee is divided by the number of approved hours was \$164.92.

Having reviewed claimant's contentions on appeal, we conclude that the administrative law judge's fee award must be vacated and the case remanded for further consideration under the applicable legal standard. Claimant avers that the administrative law judge erred in reducing his requested fee after finding that the instant case was resolved pursuant to the receipt of one medical report and without a formal hearing being held. Specifically, claimant's counsel asserts that, as employer failed to inform him of its intention to settle this case pre-hearing, he was ethically obligated to fully prepare claimant's case for presentation before the administrative law judge. We agree with counsel that the administrative law judge erred in reducing various entries set forth in his fee petition based upon a determination that, because employer agreed to pay benefits on the day of the formal hearing, the services rendered were unnecessary. In this regard, the administrative law judge engaged in a retrospective analysis of a claimant's attorney's fee petition. Such an analysis is not in accordance with law, as the proper test to determine the compensability of an attorney's work is whether, at the time the attorney performed the work in question, he could reasonably regard the work as necessary to establish entitlement.² *See Maddon*, 23 BRBS at

²Thus, for example, the administrative law judge erred in denying time for trial preparation on June 19, 1998, and reducing the 5 hours claimed on June 22, 1998, to one-half hour based on his conclusion that this time was all that was needed for counsel to notify the judge of the outcome. The administrative law judge must review this time in terms of whether counsel's efforts were reasonable based on what he knew at the time the work was performed. Moreover, the administrative law judge rejected 2.7 hours on May 4, 1998, as duplicative of those on April 2, a conclusion belied by the face of the fee petition. On April 2, claimant reviewed and copied employer's files. On May 4, he reviewed the complete file in trial preparation, copied the exhibits for trial and had claimant examined by Dr. Post. These entries provide examples of errors in the administrative law judge's review but are not exclusive; thus, the administrative law judge must reconsider the entire fee petition on remand.

55. Moreover, where a case is resolved shortly prior to a scheduled hearing, counsel is entitled to be compensated for his necessary work up to that time and any services performed thereafter which are required to “wind up” the case. *See Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff’d on recon. en banc*, 33 BRBS 38 (1999); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984). Therefore, the case must be remanded for reconsideration of the compensable hours under the correct legal standard.

In addition, the administrative law judge must reconsider the hourly rate. As noted, the administrative law judge did not specifically determine an appropriate rate, indicating only that the requested rate of \$250 was too high. To the extent the rate was reduced because the matter was not highly contested and was resolved after receipt of one report, the administrative law judge must reconsider his conclusion as it is based on the retrospective analysis discussed above. The administrative law judge must also consider the relevant factors of 20 C.F.R. §702.132. In this regard, the amount of benefits is a factor, and the administrative law judge erred by failing to consider the excellent results obtained by claimant’s counsel. Counsel asserts that his services resulted in the reinstatement of claimant’s benefits, the payment of approximately \$43,000 in back benefits due to claimant, and employer’s authorization of surgery. On remand, the administrative law judge must consider this success, as well as the other regulatory factors, in determining an appropriate hourly rate. We therefore vacate the administrative law judge’s fee award and remand the case for the administrative law judge to reconsider the time requested and services rendered by claimant’s counsel on this case. The administrative law judge must explain his conclusions and award a fee based on the necessity and reasonableness of the work involved as well as the ultimate success obtained as a result of the services rendered by counsel on behalf of claimant. 20 C.F.R. §702.132.

Accordingly, the administrative law judge’s Supplemental Decision and Order Upon Remand awarding attorney fees is vacated, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge