

BRB No. 05-0450

MYRON BAUMLER )  
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 Claimant-Petitioner )  
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 v. )  
 )  
 MARINETTE MARINE CORPORATION ) DATE ISSUED: 01/24/2006  
 )  
 and )  
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 SIGNAL MUTUAL INDEMNITY )  
 ASSOCIATION/FRANK GATES )  
 ACCLAIM )  
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 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Attorney Fee Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Gregory P. Sujack (Garofalo, Schreiber, Hart & Storm, Chartered), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Attorney Fee Order (2001-LHC-3240, 3241) of Administrative Law Judge Robert L. Hillyard 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).

Claimant, who sustained a work-related injury on May 22, 2001, was awarded temporary total disability benefits in a Decision and Order Awarding Benefits issued on January 28, 2003. On February 24, 2004, the Board affirmed the administrative law judge's award of benefits to claimant and his determination of the responsible carrier for the payment of those benefits. *Baumler v. Marinette Marine Corp.*, BRB No. 03-0380 (Feb. 24, 2004)(unpub.).<sup>1</sup> The Board's decision was affirmed by the United States Court of Appeals for the Seventh Circuit. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032 (7<sup>th</sup> Cir. 2005). The present appeal deals solely with the administrative law judge's award of attorney's fees.

On February 21, 2003, claimant's attorney filed a petition for an attorney's fee for work performed before the administrative law judge in the amount of \$26,761.25, representing 133.75 hours at hourly rates of \$195 for work performed in 2001, \$200 for work performed from January to September 2002, and \$215 for work performed after September 2002; counsel additionally sought \$2,852.74 in expenses. Employer filed objections to the fee petition. In an Attorney Fee Order issued on January 7, 2005, the administrative law judge, after addressing employer's specific objections, reduced the requested hourly rate for work performed after September 2002 from \$215 to \$200, reduced the amount of time itemized for various services, and disallowed various services and expenses, including the time itemized for preparation of the fee petition as well as claimant's attorney's travel time and travel-related expenses. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$19,587.64, including expenses.

On appeal, claimant contends that the administrative law judge erred in reducing his requested hourly rate from \$215 to \$200 for services performed after September 2002, in disallowing the time itemized for the preparation of his fee petition, and in disallowing his travel time and expenses. In response, employer concedes that claimant's attorney is entitled to a fee for his travel charges between Chicago, Illinois, and Madison, Wisconsin, but otherwise urges affirmance of the alj's fee award.

Claimant asserts that the administrative law judge erred in reducing the hourly rate sought by claimant's counsel for work performed after September 2002 to \$200, as the awarded rate is inconsistent with counsel's usual hourly rate of \$215 for work performed

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<sup>1</sup> By Order dated June 23, 2004, the Board awarded claimant's attorney a fee of \$2,795.00 for services performed before the Board, representing 13 hours at the requested hourly rate of \$215.

during that time period.<sup>2</sup> In objecting that the \$215 hourly rate sought by counsel is excessive, employer asserted that claimant's attorney provided no reason for the increase in his hourly rate from \$200 to \$215 effective September 2002, which followed an increase in his hourly rate from \$195 to \$200 effective January 2002. *See* Employer's Response to Application for Attorney Fees at 4-5. After considering employer's contentions in this regard as well as the customary rates awarded for similarly complex cases in the same geographical area consistent with the factors contained in the regulation at 20 C.F.R. §702.132, the administrative law judge found a rate of \$200 to be reasonable for services performed after September 2002. Attorney Fee Order at 4. As claimant has not shown that the administrative law judge abused his discretion in reducing the hourly rate for work performed after September 2002, we affirm the hourly rate awarded by the administrative law judge. *See Moyer v. Director, OWCP*, 124 F.3d 1378, 34 BRBS 134(CRT) (10<sup>th</sup> Cir. 1997); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000).

Claimant next avers that the administrative law judge erred in disallowing the 2.25 hours requested for preparation of counsel's fee petition. As claimant correctly argues on appeal, the cases relied upon by the administrative law judge in finding that time spent in the preparation of the fee petition is not compensable no longer represent controlling precedent. Rather, in addressing this precise issue, the Board has followed the decision of the United States Court of Appeals for the Ninth Circuit in *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996), wherein that court held that attorneys are entitled to a reasonable fee for time spent preparing fee applications under the Act, as under other federal fee-shifting statutes, because uncompensated time spent in preparing a fee request diminishes the value of the attorney fee eventually received. *See Hill v. Avondale Industries, Inc.* 32 BRBS 186, 192 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5<sup>th</sup> Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91, 95 (1996). Furthermore, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has employed the same reasoning when holding that attorneys are entitled to a fee for their work defending their fee petitions under the Act. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 903 (7<sup>th</sup> Cir. 2003). Accordingly, we modify the administrative law judge's attorney fee award to provide that claimant's attorney is entitled to an additional fee of \$450, representing 2.25 hours at an hourly rate of \$200 for time spent in preparing his fee petition.

Claimant further contends that the administrative law judge erred in disallowing all of the time and expenses itemized for travel between his counsel's office in Chicago,

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<sup>2</sup> Claimant specifically states in this regard that he is not seeking a fee enhancement to compensate for delay in payment of a fee to counsel but rather that, in light of the administrative law judge's 22-month delay in awarding a fee, it was unreasonable for the administrative law judge to reduce counsel's requested hourly rate. *See* Cl. Brief in Support of Counsel for Claimant's Attorney Fee Appeal at 3-4.

Illinois, and various locations in Wisconsin. Fees for attorney travel time and expenses are compensable where the travel is reasonable, necessary, and in excess of that normally considered to be part of overhead. See *Brinkley v. Department of the Army/NAF*, 35 BRBS 60, 64 (2001); *O'Kelley*, 34 BRBS at 43; *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). The Board has held in this regard that an attorney's travel may be found to be unreasonable where the claimant retains counsel from outside the area in which he resides despite the availability of competent counsel experienced with the Act within the claimant's locality. See *Swain*, 14 BRBS at 666-67; *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979).

In the instant case, claimant resides in a rural area in the Upper Peninsula of Michigan and worked in Marinette, Wisconsin, which is located north of Green Bay, Wisconsin.<sup>3</sup> Claimant retained an attorney located in Chicago, and that attorney sought a fee for his travel time and related lodging and meal expenses for five trips to locations in Wisconsin.<sup>4</sup> Employer, also represented by counsel located in Chicago, did not object to claimant's attorney's travel time and expenses in its response to claimant's attorney's fee petition. In his Attorney Fee Order, the administrative law judge raised *sua sponte* the issue of the compensability of claimant's attorney's travel charges. Attorney Fee Order at 4. After citing the above holding in *Swain* that expenses of counsel from another geographic area may be found unreasonable where counsel experienced in the Act was available to claimant in the local area in which claimant resides, the administrative law judge summarily concluded that counsel's travel from Chicago to claimant's home was

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<sup>3</sup> Claimant's workplace in Marinette is located approximately 54 miles north of Green Bay, and claimant's residence is 33 miles north of Marinette.

<sup>4</sup> Specifically, claimant's counsel requested reimbursement for his travel time and lodging expenses incurred on February 4-5, 2002, for round-trip travel between Chicago and Green Bay, Wisconsin, for claimant's deposition. Next, claimant's attorney sought reimbursement for a second round-trip between Chicago and Green Bay for the deposition of claimant's treating physician taken on February 25, 2002. On March 20, 2002, claimant's attorney traveled from Chicago to Oconto, Wisconsin, located approximately 32 miles north of Green Bay, to meet with claimant and a witness; he then traveled from Oconto to Green Bay for the formal hearing which was held the following day, and then returned to Chicago after the hearing was concluded; counsel itemized travel time and lodging and meal expenses associated with this trip. The approximate distance between Chicago and Green Bay is 210 miles.

In addition, claimant's attorney traveled between Chicago and Madison, Wisconsin for the depositions of the carriers' physicians Drs. Yuska and Lemon. The approximate distance between Madison and Chicago is 150 miles, comparable to the 137-mile distance between Madison and Green Bay.

unreasonable. He consequently disallowed all of claimant's counsel's travel charges as excessive and unreasonable. *See* Attorney Fee Order at 4-5. For the reasons that follow, we hold that the administrative law judge's decision in this regard cannot be affirmed.

First, although it was within the administrative law judge's discretion to raise *sua sponte* the issue of the compensability of claimant's attorney's travel charges, it was incumbent upon him to provide the parties with reasonable notice and the opportunity to respond on this issue. *See, e.g., Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999). In the instant case, claimant was not afforded the opportunity to present evidence to the administrative law judge regarding the availability of competent counsel with experience representing longshore claimants within claimant's locality or other evidence relevant to the compensability of the travel charges.

Furthermore, the administrative law judge provided no factual support for his implicit conclusion that competent, experienced counsel was available in claimant's community. *See* Attorney Fee Order at 4-5. Because this issue was first raised in the administrative law judge's Attorney Fee Order, no evidence regarding the availability of local counsel was submitted into the record by the parties. Moreover, the administrative law judge did not take judicial notice of any information relevant to this issue. *See generally Story v. Navy Exch. Serv. Center*, 33 BRBS 111, 119-120 (1999) (administrative law judge could rely on Survey of Law Firm Economics regarding hourly rates). The administrative law judge did not make an explicit determination regarding the geographical area constituting claimant's locality nor did he cite any information regarding the number of attorneys within claimant's locality who represent longshore claimants, the extent of such attorneys' experience with the Act, or any other indicia of their competence to represent longshore claimants. *See generally Swain*, 14 BRBS 657; *Lopes*, 12 BRBS 170. Insofar as the administrative law judge implicitly found that competent local counsel experienced with the Act was available to claimant, such a finding is unsupported by any factual foundation and must be vacated. As there is no evidence that claimant could have retained local counsel, claimant's decision to retain counsel from Chicago is not unreasonable and claimant's counsel therefore is entitled to reimbursement for his reasonable travel time and expenses. *See Brinkley*, 35 BRBS at 64; *O'Kelley*, 34 BRBS 39; *Griffin*, 29 BRBS 135; *Swain*, 14 BRBS 657. With respect to claimant's attorney's travel between Chicago and Green Bay/Oconto, we cannot determine on the record before us whether each of the specific hours and expenses itemized by counsel is reasonable and necessary. We therefore remand the case to the administrative law judge for a determination as to the reasonableness and necessity of each of these specific charges.<sup>5</sup> *See generally Brinkley*, 35 BRBS at 64.

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<sup>5</sup> Claimant concedes that the .25 hour itemized on March 21, 2002, for counsel's travel time from his hotel in Green Bay to the site of the hearing in Green Bay is local travel normally considered to be a part of overhead and, thus, was properly disallowed.

Lastly, employer concedes on appeal that the charges itemized for claimant's counsel's travel between Chicago and Madison for the depositions of the carriers' physicians should have been allowed because even had claimant retained a local attorney, that attorney would have been required to travel between Green Bay and Madison, a distance comparable to that between Chicago and Madison. *See* Emp. Resp. Br. at 5. We therefore reverse the disallowance of the travel time and expenses for counsel's travel between Chicago and Madison, and modify the fee award to include all of the itemized charges for this travel.

Accordingly, the administrative law judge's Attorney Fee Order is affirmed in part, modified in part, and reversed in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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*See* Cl. Brief in Support of Counsel for Claimant's Attorney Fee Appeal at 5; *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995).