BRB No. 92-2331

JAMES E. GRIFFIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Theodor P. von Brand, Administrative Law Judge, United States Department of Labor.

Charles S. Montagna (Rutter & Montagna), Norfolk, Virginia, for the claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (88-LHC-1741) of Administrative Law Judge Theodor P. von Brand 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 will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. Pursuant to stipulations and agreements between the claimant, employer and the Special Fund immediately prior, and subsequent to, the hearing before the administrative law judge, claimant received an award of permanent total disability and medical benefits, and employer was awarded Section 8(f), 33 U.S.C. §908(f), relief. The only issues pending for adjudication were those pertaining to claimant's counsel's attorney's fee award. Thereafter, claimant's attorney filed a fee petition for work performed before the administrative law judge, in which he requested $4,343.75, representing 5.75 hours of services at $125 per hour, and 25 hours of services at $145 per hour. Employer filed objections to the fee petition.

In a Supplemental Decision and Order Awarding Attorneys Fees dated December 4, 1991, the administrative law judge, addressing employer's objections to the fee request, disallowed 19.25 of the 30.75 hours claimed and reduced the $145 hourly rate requested to $125. Accordingly, he

awarded claimant's counsel the sum of $1,437.50. representing 11.5 hours at $125 per hour. Claimant appealed the administrative law judge's Supplemental Decision and Order, specifically contesting his disallowance of 18.5 hours requested for services performed after October 18, 1988, including 3 hours requested for travel time from counsel's Norfolk, Virginia office to the hearing in Hampton, Virginia. Employer responded, urging affirmance.

In its Decision and Order, *Griffin v. Virginia International Terminals Inc.*, BRB No. 90-160 (January 28, 1992) (unpublished), the Board held that the administrative law judge erred in denying counsel an attorney's fee for the services performed after October 18, 1988. In so concluding, the Board noted that although the parties had entered into stipulations on October 18, 1988, the stipulations had not been submitted to the administrative law judge until the October 24, 1988, hearing and that at that time, the administrative law judge asked that additional work be performed, *i.e.*, the proposed findings of fact and joint order which the parties submitted on November 3, 1988. The Board also determined that, contrary to employer's assertions, the services in question had resulted in claimant's obtaining additional benefits because the parties' joint proposed findings of fact included a provision for medical benefits which had not been in the parties' original stipulations. The Board accordingly determined that the services in question were necessary to establish entitlement at the time they were performed, vacated the administrative law judge's denial of attorney's fees subsequent to October 18, 1988, and remanded the case for him to reconsider counsel's entitlement to attorney's fees during this period.

In so doing, the Board specifically instructed the administrative law judge to reconsider his denial of the 3 hours requested for travel time between Norfolk and Hampton on the date of the hearing on the rationale that this time was part of counsel's overhead, noting that under *Swain v. Bath Iron Works Corp.,* 14 BRBS 657 (1982), travel time which is reasonable, necessary, and in excess of that normally considered to be part of overhead is compensable under the Act. As to whether the time from Norfolk to Hampton should be compensable, the Board directed the administrative law judge to consider its decisions in *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592 (1981) (Board awards 1 and 1/2 hours of travel time between Norfolk and Newport News, holding time is too lengthy to be considered an incidental overhead expense), and *Neeley v. Newport News Shipbuilding & Dry Dock Co.,* 19 BRBS 138 (1986)(Board holds travel time from counsel's Norfolk office to a "nearby" Hampton courthouse was not separately compensable). Accordingly, the Board vacated the administrative law judge's denial of the travel time claimed, and instructed the administrative law judge on remand to review the distances traveled in this case, and to reconsider the issue of reasonable travel expenses on the date of the hearing.

In his Decision and Order On Remand, the administrative law judge awarded claimant's counsel an additional 15.75 hours for services performed after October 18, 1988, but again denied the travel time claimed, finding it to be a part of office overhead. Citing the *Rand McNally Road Atlas* (1988 ed.), the administrative law judge determined that the distances between Norfolk and Hampton and Norfolk and Newport News were 20 and 22 miles, respectively, and inferred from this

that notwithstanding unforeseen traffic congestion, the round trip between Norfolk and Hampton should last no more than an hour and a half. He then determined that inasmuch as the 20 mile distance between counsel's office to the courtroom is not on its face out of the ordinary and the trip in question was routine, and not unique to this case, having been made by counsel's law firm on innumerable occasions over the past ten years, the travel involved was a normal cost of doing business to be attributed to counsel's overhead. The administrative law judge accordingly denied the 3 hours of travel expenses claimed and awarded counsel a total fee of $3,406.25, representing the 11.5 hours previously awarded plus the additional 15 and 3/4 hours awarded for the services rendered subsequent to October 18, 1988, based on the hourly rate of $125.

On appeal, claimant challenges the administrative law judge's denial of the travel expenses claimed. Claimant maintains that the administrative law judge erred in ignoring the Board's "unequivocal" instruction that claimant's counsel be awarded reasonable travel expenses on the date of the hearing and by so doing unfairly deprived counsel of compensation for approximately 25 percent of his work day. Employer has not responded to claimant's appeal.

Initially, we reject claimant's contention that, in denying the travel expenses requested, the administrative law judge ignored the Board's instructions to award reasonable travel expenses.[1] Contrary to claimant's contention, the Board did not unequivocally mandate that travel expenses be awarded on remand; it remanded the case for the administrative law judge to reconsider this issue in light of the prevailing, seemingly divergent, legal case precedent. On remand, the administrative law judge, consistent with the Board's remand instructions, ascertained the travel distances in question. Acting within his discretion, the administrative law judge then concluded that counsel's travel to and from the hearing was local in nature and not in excess of that considered to be a part of normal office overhead. Inasmuch as claimant has failed to establish that the administrative law judge's finding in this regard is unreasonable, the administrative law judge's denial of travel expenses in this case is affirmed. *See Ferguson v. Southern States Cooperative*, 27 BRBS 16, 23 (1993).

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[1]In making this argument, claimant focuses on a statement in the Board's summary of its mandate that "counsel is entitled to reasonable travel expenses on the date of the hearing," while ignoring the substance of the discussion of the travel expense issue. A reading of the Decision and Order as a whole certainly leaves open the possibility that the administrative law judge would find no travel time "reasonable."

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge