

BRB No. 01-0567

WAYNE PREYER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HALTER MARINE GROUP)	DATE ISSUED: <u>April 5, 2002</u>
)	
and)	
)	
RELIANCE NATIONAL)	
INDEMNITY COMPANY)	
)	
Employer/Carrier-)	
Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision Awarding Attorney’s Fees of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant’s former attorney, John W. Merting.

Karl R. Steinberger (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant’s counsel appeals the Supplemental Decision Awarding Attorney’s Fee (99-LHC-0624) of Administrative Law Judge Larry W. Price 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 the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).*

Claimant injured his back, neck, chin, and left arm when he fell from a walkway during the course of his employment on February 10, 1998. He returned to light duty work on April 3, 1998, but after approximately one week ceased working due to pain; claimant has not worked since that

time. On April 20, 1998, claimant's employment was terminated.

On November 7, 2000, an Order of Remand was issued in this claim reflecting the parties' stipulation to most issues. Claimant's former attorney, Mr. John W. Merting, who had withdrawn from this case on October 27, 2000, subsequently submitted a fee petition to the administrative law judge seeking \$20,267.00 for legal services rendered and \$420.56 in costs.¹ Specifically, claimant's former attorney requested a fee representing 62 hours of legal services at a rate of \$325 per hour, 1.8 hours of paralegal services at a rate of \$65 per hour, and costs of \$420.56. Employer filed objections not only to the hourly rate requested but also to sixty-five specific entries in the fee petition.² In his award, the administrative law judge eliminated 9.7 hours of attorney services and \$16.10 in costs for work performed prior to the claim's transfer to the Office of Administrative Law Judges. *See Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*). He also eliminated all costs not related to obtaining medical records, finding such costs to be office overhead. In addressing the legal services performed, he found the objected to items to be reasonable and necessary to the successful prosecution of this case, but he reduced the hourly rate requested from \$325 per hour to \$175 per hour. Accordingly, the administrative law judge awarded counsel a fee of \$10,374, plus costs of \$98.54.

Claimant's former attorney now appeals, contending that the administrative law judge's decision to reduce his requested hourly rate and disallow many of his documented expenses is

¹Mr. Merting represented claimant while this case was pending before the Office of Administrative Law Judges. Following the issuance of the administrative law judge's fee order, Mr. Merting retained the services of Attorney John Houser to represent him before the Board.

²Employer also argued before the administrative law judge that there had been no "successful prosecution" in this case to warrant a fee award. Based upon counsel's reply to this objection, the administrative law judge found that additional benefits were obtained and paid as a result of counsel's efforts and, therefore, there had been a successful prosecution entitling claimant to a fee award payable by employer, 33 U.S.C. §928(b). Supplemental Decision at 2. This finding has not been appealed.

irrational and unreasonable. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

It is well-established, and counsel concedes on appeal, that the administrative law judge has broad discretion in his award of an attorney's fee and the party challenging the reasonableness of an attorney's fee award bears the burden of showing that the award was contrary to law or was arbitrary and capricious, or an abuse of discretion. *See generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). It is the administrative law judge's responsibility to review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001).

In the present case, the administrative law judge initially agreed with employer that the hourly rate of \$325 requested by counsel was excessive. Thereafter, the administrative law judge specifically found a rate of \$175 per hour "to be a fair and reasonable fee in this instance." *See* Supplemental Decision at 2. In support of his contention that this awarded hourly rate is unreasonable, claimant's counsel has presented on appeal a detailed history of the legal representation of longshoremen which, while interesting from a historical standpoint, is irrelevant to the issue of whether the administrative law judge's hourly rate finding in the case at bar should be overturned. Similarly, counsel's reliance on *The 2000 Small Law Firm Economic Survey* is misplaced, as the amount of an attorney's fee for work performed under the Act is within the discretion of the body awarding the fee. *See Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); 20 C.F.R. §702.132. Lastly, counsel's mere assertion that the awarded hourly rate does not conform to reasonable and customary charges does not satisfy his burden of proving that the awarded hourly rate is insufficient.³ *See generally Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986). Accordingly, inasmuch as the hourly rate allowed is within the discretion of the body awarding the fee and claimant has not met his burden of showing that the \$175 hourly rate awarded for work performed before the administrative law judge is unreasonable, the hourly rate awarded to counsel by the administrative law judge is affirmed.⁴ *See Parks v. Newport News Shipbuilding &*

³Also irrelevant to this issue is counsel's allegation that his services were obtained through the non-profit *pro bono* referral service of the Escambia/Santa Rosa Bar Association to which he must give ten per cent of any award received, thereby further reducing his net fee in this instance. Brief at 4. This contention is contradicted by claimant's statement in response to the fee petition to the administrative law judge that he obtained counsel through the Yellow Pages of the telephone book. *See* Notarized Letter, dated January 22, 2001.

⁴Although counsel refers in his brief to the administrative law judge's decision to disallow \$322.02 in photocopying, telephone, fax and postage charges as expenses which are a part of counsel's office overhead, Supplemental Decision at 3, counsel does not raise specific error in this regard. Moreover, in his reply brief, counsel clarifies that only the hourly rate is at issue and costs were mentioned only because the "cost of doing business" is relevant to the rate. We will therefore not separately address the issue of compensable costs.

Dry Dock Co., 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

Accordingly, the administrative law judge's Supplemental Decision Awarding Attorney's Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

But see Picinich v. Lockheed Shipbuilding Co., 23 BRBS 128 (1989) (Order) (within administrative law judge's discretion to award expenses such as photocopying).