

BRB No. 02-0561

JAMES DONAHUE)
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 Claimant-Petitioner)
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 v.)
)
 NOVOLOG BUCKS COUNTY,) DATE ISSUED: APR 22, 2003
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Daniel J. Boyce, Philadelphia, Pennsylvania, for claimant.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (01-LHC-2396) of Administrative Law Judge Ralph A. Romano 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

In this case, the sole issue before the administrative law judge was claimant=s average weekly wage. Claimant asserted his average weekly wage should be \$777.90, calculated pursuant to Section 10(a), 33 U.S.C. ' 910(a), whereas employer posited that claimant=s average weekly wage should be \$661.25, pursuant to Section 10(c), 33 U.S.C. ' 910(c). In his decision, the administrative law judge determined that claimant=s work record is sufficient evidence to find that claimant is a *A*five-day worker@ for purposes of applying Section 10(a), and he

therefore found that claimant=s average weekly wage is \$777.90. Claimant=s counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of \$4,900, representing 24.5 hours of attorney time at \$200 per hour, plus costs of \$292.30. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded claimant=s counsel a fee of \$3,100, representing 20.67 hours of attorney time at \$150 per hour, plus costs of \$292.30.

On appeal, claimant argues that the administrative law judge failed to provide a sufficient explanation for the fee award, as he wholly adopted employer=s objections. Claimant also challenges the administrative law judge=s reduction of the requested hourly rate, asserting that *Hensley v. Eckerhart*, 461 U.S. 424 (1983) does not support the administrative law judge=s action. Moreover, claimant contends that the administrative law judge erred by not crediting the affidavit counsel attached to his fee petition, wherein counsel stated that the petition accurately reflects his time and expenses, and that \$200 is his normal hourly billing rate in cases arising under the Act. Employer has not responded to claimant=s appeal.

In his one-page Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge reduced the number of hours requested from 24.5 hours to 20.67 hours. The administrative law judge summarily stated that A[A]ll of Employer=s objections are sustained.@ Supplemental Decision at 1. A review of employer=s objections reveals that the administrative law judge deducted 3.83 hours of the 13.58 hours requested by counsel for consulting and corresponding with claimant, preparing for and taking claimant=s deposition, correspondence with employer=s counsel and the administrative law judge, and preparation of claimant=s witness list, exhibit list, and proposed stipulations. Employer argued that a total of 1.5 hours requested on June 6, 18, and 26, 2001, for interviewing and communicating with claimant was excessive for a single-issue claim, as were 4.42 hours requested on November 7, 2001, when claimant was deposed. Employer also objected to counsel=s request for 7.67 hours for time expended on multiple tasks performed on June 29, November, 1, 7, 8, and 9, 2001, because counsel failed to provide the specific amount of time expended per day on each particular task.

Under the facts of this case, we hold that the administrative law judge's summary reliance on employer=s objections to support reducing the number of

¹Employer=s cross-appeal of the administrative law judge=s fee award, BRB No. 02-0561A, was dismissed at employer=s request by Board Order issued on September 9, 2002.

hours requested cannot be affirmed. See generally *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); cf. *Pozos v. St. Mary=s Hospital & Medical Center*, 31 BRBS 173, 178 (1997) (administrative law judge may rely on reasoning contained in parties= pleadings in appropriate cases). Initially, we are unable to discern the administrative law judge=s rationale for reducing twice counsel=s request for 4.42 hours related to taking claimant=s deposition on November 7, 2001. Specifically, pursuant to employer=s objections, the administrative law judge reduced from a total of 7.67 hours requested to allow 5 hours for the combined entries dated June 29, November 1, 7, 8, and 9, 2001, and the administrative law judge also reduced from 4.42 hours to 3 hours the November 7, 2001, entry. Moreover, we also are unable to discern any basis for the administrative law judge=s granting employer=s objection to a charge for 25 minutes of work on June 29, 2001, to review discovery, telephone claimant, and write a letter to employer=s counsel, and to a charge for 20 minutes work on November 1, 2001, to write letters to both the administrative law judge and employer=s counsel, as the cumulative time requested for these tasks is reasonable on its face for the services performed. Accordingly, we must vacate the administrative law judge=s fee award and remand this case for further consideration.

On remand, the administrative law judge is instructed to reconsider and fully discuss the attorney=s fee petition and employer=s objections thereto, and he must provide a discussion and adequate rationale for any reduction in the number of hours requested by claimant=s counsel. *Steevens*, 35 BRBS at 135-136. The administrative law judge also must take into account the regulation at 20 C.F.R. '702.132(a), which states that Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits award.

The administrative law judge also reduced the requested hourly rate from \$200 to \$150, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Supreme Court held that a fee award, under a fee-shifting scheme, should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434; see also *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), cert. denied, 488 U.S. 992 (1988). In this case, claimant was completely successful on the sole issue before the administrative law judge. Claimant obtained an average weekly wage approximately \$116, or 17 percent, greater than the average weekly wage argued by employer. Moreover, in its objections, employer cited *Hensley* for the proposition that claimant must provide documentation to support his requested

hourly rate. Employer=s Objections at 2-3. The administrative law judge=s citation to *Hensley* does not indicate that he considered either claimant=s full success or counsel=s affidavit which attested that counsel=s billing rate in cases arising under the Act is \$200 per hour. Contrary to employer=s objection, counsel=s affidavit is to be given considerable weight² in determining the appropriate hourly rate. *Cuevas v. Ingalls Shipbuilding Corp.*, 5 BRBS 739, 741 (1977); 20 C.F.R. ' 702.132. Accordingly, we vacate the administrative law judge=s fee award based on an hourly rate of \$150. On remand, the administrative law judge must address counsel=s affidavit and determine an appropriate hourly rate given claimant=s full degree of success, taking into account any reduction in the number of hours requested. See *Hensley*, 461 U.S. at 434; *Steevens*, 35 BRBS at 135-136.

Accordingly, the administrative law judge=s Supplemental Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

²In his brief to the Board, claimant=s counsel cites to three prior cases wherein the administrative law judge awarded him a fee based on an hourly rate of \$200. Claimant=s Brief in Support of Petition for Review at 4.