

WILLIAM O. SCHUKY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KINDER MORGAN COMPANY)	DATE ISSUED: <u>APR 15, 2005</u>
)	
and)	
)	
THE GRAY INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Awarding Reduced Attorney Fees and the Order Denying Claimant's Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock, Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Awarding Reduced Attorney Fees and the Order Denying Claimant's Motion for Reconsideration (2002-LHC-2388) of Administrative Law Judge Gerald M. Etchingham 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).

Claimant injured his low back in 2001; he returned to work one month later. A dispute arose over the amount of claimant's benefits, and the case was set for formal

hearing in February 2003. Just before the hearing was to occur, claimant's counsel notified the administrative law judge that the case had been settled. In the confirmation letter to employer, claimant's counsel included two chiropractic bills for payment, one of which was for an unrelated shoulder injury. Counsel requested that employer pay both bills, so he would not have to file an additional fee petition. He also asked for transportation costs incurred by claimant in obtaining medical treatment, and he informed employer that claimant would waive his right to additional compensation under Section 14(e) of the Act, 33 U.S.C. §914(e), if these costs were paid. Employer refused to pay these previously undisclosed costs. Ultimately, the parties resolved their differences, and they settled the claim in February 2004.

Claimant's counsel filed a petition for a fee for services rendered in this case through January 31, 2004. He sought 22 hours of attorney time at an hourly rate of \$250, six hours of legal assistant time at an hourly rate of \$100, and \$90.50 in expenses, for a total fee of \$6,190.50. Employer filed objections, arguing, *inter alia*, that the hourly rate and total hours were excessive and that claimant delayed the settlement, making all services rendered after February 2003 unreasonable and unnecessary. Claimant's counsel filed a reply to these arguments, and he filed a supplemental fee petition for time spent on the reply brief. Based on his determination that the case was "straightforward," and giving weight to claimant's counsel's experience, an attorney's affidavit, and his own experience, the administrative law judge awarded claimant's counsel a fee based on an attorney hourly rate of \$225, deeming that to be an appropriate rate for services performed in this case in the Portland, Oregon area. Next, the administrative law judge addressed the hours requested. He found that the case was neither novel nor complex and that it should have settled in February 2003. Because he found that claimant "unreasonably injected the unrelated" shoulder treatment bill into the case and tied payment of that bill to claimant's waiver of additional compensation under Section 14(e), the administrative law judge concluded that all work after February 17, 2003, except for two hours of wind-up services, was unreasonable and unnecessary. Accordingly, he awarded a total fee in the amount of \$3,165.50. Order at 3-5; Order Denying M/Recon. Claimant appeals, arguing that the administrative law judge abused his discretion in disallowing a fee for all services after February 17, 2003, and in failing to award a fee for defending his hourly rate, as the administrative law judge awarded a rate higher than that proposed by employer.

We reject claimant's contentions that the administrative law judge abused his discretion in reducing this fee award in any way. 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[, taking] into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. . . ." 20 C.F.R. §702.132(a); *see generally National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). In

this case, the administrative law judge considered claimant's counsel's assertion that the delay in settling the case was not due to his actions, but the administrative law judge disagreed. Rather, the administrative law judge determined that the work following the reported settlement in February 2003 was unnecessary and unreasonable, as, despite counsel's experience, that work was due directly to the inappropriate insertion of a claim for treatment for an unrelated shoulder injury into this case for a compensable back injury.¹ Order at 4. As the administrative law judge specifically considered counsel's arguments but found them "disingenuous," *id.*, claimant has not established that the administrative law judge abused his discretion in finding the services performed after February 2003 excessive, and we affirm the administrative law judge's reduction of the hours requested. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

Similarly, we reject claimant's contention that the administrative law judge abused his discretion in not awarding a fee for defending the hourly rate. Counsel was not successful in obtaining the hourly rate requested, although he obtained a greater rate than that suggested by employer. The administrative law judge is not bound by the hourly rate requested by counsel, suggested by employer or awarded in other cases. Rather, the administrative law judge is in the unique position of evaluating the effectiveness of counsel, the nature of the activities performed, the usual billing rate in the particular geographic area, and the complexity of the issues in setting an appropriate hourly rate. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); 20 C.F.R. §702.132. In this case, the administrative law judge determined that the work performed by counsel warranted an hourly rate of \$225, and counsel's brief, written in 2004, did not persuade him otherwise.

¹The administrative law judge also noted that the bill for treatment of the unrelated shoulder injury is "likely unrecoverable" under the Act. Order at 4 n.3; 20 C.F.R. §702.404 (limitation on recovery of costs for chiropractic treatment).

Accordingly, the administrative law judge's attorney's fee award is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge