

BRB Nos. 09-0639 and
09-0718

JAMES M. PHILLIPS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MASSE CONTRACTING, INCORPORATED)	DATE ISSUED: 04/16/2010
)	
and)	
)	
GRAY INSURANCE COMPANY)	
)	
Employer/Carrier- Petitioners)	DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order-Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Isaac H. Soileau, Jr. (Couture & Soileau, LLC), New Orleans, Louisiana, for claimant.

Frank R. Whiteley (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee (2008-LHC-00237) of Administrative Law Judge Lee J. Romero, Jr., and the Compensation Order-Award of Attorney's Fees (Case No. 07-166461) of District Director David A. Duhon 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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).

Claimant suffered a work-related injury on February 3, 2003, while pushing scaffolding with other workers. He felt severe chest pain and burning in his neck and was taken by ambulance to the emergency room. He was diagnosed with an inner chest cavity strain and was cleared to return to work after two days. As he continued to suffer neck and arm pain, claimant was referred to Dr. Graham, who performed shoulder surgery on October 4, 2004. Claimant testified that the pain in his arm did not improve. Claimant began treating with Dr. Brent, who performed an anterior cervical discectomy and fusion at C3-4 on November 11, 2005. Claimant's symptoms improved "somewhat" after the surgery, as he has less pain but also less movement in his neck. He continues to suffer from chronic pain, numbness and burning in his arms, and burning in his shoulders. Claimant has not returned to work and sought disability benefits under the Act. Employer voluntarily paid claimant temporary total disability benefits from February 14, 2003.

In his decision, the administrative law judge found that claimant suffered a work-related injury to his shoulder, neck and arm on February 3, 2003, while pushing scaffolding at employer's worksite. The administrative law judge also found that claimant is a credible witness, that he consistently described his symptoms to each physician and that none of the physicians have expressed doubt as to his subjective complaints. Thus, the administrative law judge credited claimant's testimony that he suffers from ongoing persistent pain and numbness and decreased grip strength in his left hand. The administrative law judge also noted the effects of claimant's medications and the limitations imposed thereby. The administrative law judge addressed the physical demands of claimant's job as sandblaster/painter and concluded that claimant established a *prima facie* case of total disability. As employer did not present any evidence of suitable alternate employment, the administrative law judge found that claimant is entitled to total disability benefits.

Subsequently, claimant's counsel filed a fee petition for work performed before the administrative law judge. He requested \$34,417.21, representing 80.40 hours of legal work by attorney Soileau at the hourly rate of \$225, 2.7 hours of legal work by attorney Green at the hourly rate of \$160, 165.80 hours of paralegal work at the hourly rate of \$80, and \$2,631.21 in costs. In his Supplemental Decision and Order Awarding Attorney's

Fee, the administrative law judge found that an hourly rate of \$200 hourly rate for attorney Soileau is reasonably commensurate with counsel's experience, the necessary work performed and the benefits obtained on claimant's behalf, and awarded attorney Green's requested rate of \$160. The administrative law judge agreed that the requested 165.80 hours of paralegal time are excessive for a three hour hearing on the merits and the filing of a post-trial brief, and after reducing a number of the entries, awarded 94.5 hours of paralegal work. Thus, the administrative law judge awarded a fee in the amount of \$26,629.19, representing 80.40 hours of legal services by attorney Soileau at the hourly rate of \$200 (\$16,080), 2.70 hours of legal services by attorney Green at the hourly rate of \$160 (\$432), and 94.5 hours of paralegal work at the hourly rate of \$80 (\$7,560), plus \$2,557.19 in costs.

Claimant's counsel also filed a fee petition for work performed before the district director. He requested \$49,227.32, representing 135.40 hours of legal work by attorney Soileau at the hourly rate of \$225, 36.10 hours of legal work by attorney Green at the hourly rate of \$160, 133.5 hours of paralegal work at the hourly rate of \$80, and \$2,178.32 in costs. The district director found that employer is liable for claimant's counsel's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). He also found that the requested hourly rates of \$225 for attorney Soileau, \$150 for attorney Green and \$75 for the paralegal were reasonable and customary for that geographic region. With regard to the specific entries, the district director disallowed the work performed on the Louisiana compensation claim, and awarded counsel a fee in the amount of \$42,533.57, representing 111.9 hours of legal services at the hourly rate of \$225, 36.9 hours of legal services at the hourly rate of \$150, and 133.5 hours of paralegal services at the hourly rate of \$75, plus \$1,808.57 in costs.

On appeal, employer contends that the administrative law judge erred in finding that claimant is entitled to permanent total disability benefits as the treating physicians have released claimant to return to work in his former position. Moreover, employer contends that the administrative law judge erred in awarding claimant's counsel a fee based on its assertion that claimant is not entitled to the benefits awarded, or in the alternative that the fee award is excessive and the hourly rate should be reduced further. BRB No. 09-0639. In addition, employer appeals the district director's award of an attorney's fee for work performed before the Office of Workers' Compensation Programs, contending it cannot be held liable under Section 28(a) of the Act, 33 U.S.C. §928(a). Moreover, employer contends that the district director did not recommend that employer pay additional benefits, and thus employer cannot be held liable pursuant to Section 28(b), 33 U.S.C. §928(b). Employer also contends that the hourly rate awarded by the district director is excessive. BRB No. 09-0718. Claimant responds, urging affirmance of the administrative law judge's decisions awarding benefits and an attorney's fee, and of the district director's award of an attorney's fee.

Extent of Disability

With regard to the decision on the merits, employer contends that the administrative law judge erred in awarding total disability benefits inasmuch as claimant's treating physicians released him to return to his former work. Employer thus contends that claimant does not have any medical evidence to support his claim of total disability. In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual work due to the work injury. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). A claimant's credible complaints of pain may, alone, be sufficient to establish his inability to return to his usual work. *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

The administrative law judge noted that Drs. Graham and Brent opined that claimant had no work restrictions following his recovery from the shoulder and cervical surgeries. Cl. Exs. 1 at 25-26; 2 at 40-41. However, the administrative law judge found that Dr. Brent stated that he did not assess whether a patient would continue to suffer pain in performing his work duties, but rather only whether he would further injure himself if he returned to his former work. Cl. Ex. 2 at 31. After considering claimant's job description and the physical demands of a sandblaster/painter, *see* Tr. at 51-53, the administrative law judge found that claimant cannot return to his work due to the injury. The administrative law judge rationally credited claimant's complaints of ongoing persistent pain, decreased grip strength, and the effects and limitations resulting from his medications. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order at 15, 20; Tr. at 32, 34-35, 50. In addition, the administrative law judge noted that Dr. Brent diagnosed claimant with chronic pain and continues to treat his symptoms. We affirm the finding that claimant cannot return to his usual job as it is rational, supported by substantial evidence, and in accordance with law. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). As claimant established his *prima facie* case and employer did not present any evidence of suitable alternate employment, we affirm the administrative law judge's ongoing award of permanent total disability benefits as of October 22, 2008, the date claimant's condition became permanent.¹ *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

¹ Employer contends that the administrative law judge erred in relying on claimant's unsuccessful attempt to find employment to award total disability benefits. As employer did not present any evidence of suitable alternate employment in this case, the administrative law judge was not required to review the evidence regarding claimant's attempt to secure a post-injury position. *See Roger's Terminal & Shipping Corp. v.*

Attorney's Fee - Administrative Law Judge

As we have affirmed the administrative law judge's award of total disability benefits, we reject employer's initial contention, as claimant is entitled to a fee for this successful prosecution. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Employer contends that the amount of the fee award is unreasonable as the number of hours billed by counsel's paralegal is excessive and the hourly rate awarded to counsel should have been further reduced to \$175.

The administrative law judge agreed with employer's contention that the number of hours billed by the paralegal was excessive, and he reduced the hours spent drafting and preparing a witness and exhibit list from 14 hours to two hours. In addition, the administrative law judge reduced the 69 hours of paralegal time billed for assisting with the post-trial brief to 30 hours. The administrative law judge also awarded 39.5 hours of paralegal services which were not contested, 11 hours of work on mileage logs, medical billings and prescription documentation, and 12 hours for review of medical documentation and telephone conferences scheduling depositions, for a total of 94.5 hours of paralegal services. The administrative law judge fully addressed employer's specific objections and made some reductions in the hours requested for paralegal services. In addition, he reviewed all other paralegal entries and made additional reductions. We decline to further reduce the fee request as employer has not established an abuse of discretion in this regard. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Roach v. New York Protective Covering*, 16 BRBS 114 (1984).

The administrative law judge also addressed employer's objection to the hourly rate of \$225 requested by claimant's counsel, and reduced the rate to \$200 per hour, based on counsel's experience, the necessary work performed, and the benefits obtained on claimant's behalf. Supplemental Decision and Order Awarding Attorney's Fee at 3. On appeal, employer merely states that the hourly rate should have been further reduced to \$175. As the administrative law judge addressed and fully explained his reasons for awarding the attorney's fee herein, and as employer has not shown that the administrative law judge abused his discretion, we affirm the fee award. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001).

Director, OWCP, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Attorney's Fee – District Director

Employer contends that the district director erred in awarding claimant's counsel an attorney fee for work performed before the district director, as employer was making voluntary payments. Section 28(a) provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of a claim from the district director's office, it declines to pay any compensation. 33 U.S.C. §928(a); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). In this case, employer was paying temporary total disability benefits at the time claimant filed his claim on June 27, 2003, and continued to pay claimant these benefits until December 2, 2008. Cl. Ex. 8. Thus, as employer correctly contends, claimant's counsel is not entitled to an attorney's fee under Section 28(a). *Andrepoint v. Murphy Exploration & Production Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009). However, the district director did not apply Section 28(a) in holding employer liable for claimant's fee.

Section 28(b) applies where an employer pays or tenders payment of compensation without an award, and thereafter a controversy arises over additional compensation. In order for employer to be held liable pursuant to Section 28(b), that section requires all of the following: (1) an informal conference, (2) a written recommendation from the district director, (3) the employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of an attorney to achieve a greater award than that which the employer paid or tendered after the written recommendation. *See id.*; *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

Following the accident on February 3, 2003, employer began paying claimant temporary total disability compensation benefits at the rate of \$249.14 per week. Claimant filed a claim under the Act on June 27, 2003. On December 3, 2003, employer adjusted claimant's compensation rate to \$416 per week, which it alleged was the appropriate rate under the Louisiana compensation statute. Employer claimed that claimant's injury did not occur in employment covered under the Longshore Act. An informal conference was held on August 7, 2007, and the district director made a written recommendation for employer to pay claimant compensation benefits at the rate applicable under the Act as claimant was injured in covered employment. As employer did not adjust claimant's compensation rate, claimant requested a hearing before the Office of Administrative Law Judges.

Before the administrative law judge, the parties stipulated to claimant's average weekly wage and compensation rate. The administrative law judge awarded claimant temporary total disability benefits from February 3, 2003 to October 21, 2008, at the rate of \$531 per week and permanent total disability benefits from October 22, 2008, and

continuing, at the rate of \$531 per week, in addition to annual adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f). Decision and Order at 26; 33 U.S.C. §908(a), (b). Thus, contrary to employer's contention, a controversy arose over the amount of compensation benefits due under the Act after employer had begun voluntarily paying claimant at a rate calculated pursuant to the Louisiana statute, an informal conference was held after which the district director made a written recommendation for employer to adjust the compensation benefits to the appropriate rate under the Longshore Act, the case was referred to the Office of Administrative Law Judges after employer declined to make the adjustment, and claimant was fully successful before the administrative law judge. As all the prerequisites for fee liability under Section 28(b) are satisfied, we affirm the district director's finding that claimant is entitled to an attorney's fee for work performed before the district director payable by employer, as it is in accordance with law. *See Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT), *modifying on reh'g* 237 F.3d 404, 34 BRBS 44(CRT) (5th Cir. 2000). In addition, we reject employer's contention that the district director erred in awarding claimant's counsel an hourly rate of \$225, as employer has failed to establish that the district director abused his discretion in this regard. Thus, we affirm the district director's fee award.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney's Fee, and the district director's Compensation Order-Award of Attorney's Fees, are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge