

BRB No. 99-1149

RICHARD DOUGLAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROWN CONSTRUCTION COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
ALASKA NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees of Edward C. Burch,  
Administrative Law Judge, United States Department of Labor.

Michael F. Pozzi, Renton, Washington, for claimant.

Matthew D. Regan (Holmes Weddle & Barcott), Anchorage, Alaska, for  
employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative  
Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Order Awarding Attorney's Fees (97-LHC-1751) of  
Administrative Law Judge Edward C. Burch 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 may be set  
aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion,  
or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12  
BRBS 272 (1980).

On June 15, 1996, claimant, a diesel mechanic, injured his left leg, including his knee,

when he fell as he was stepping from a barge onto a boat. Claimant attempted to return to work the following week, but soon quit due to the pain. Claimant sought permanent total disability benefits under the Act for the period from February 18, 1997 to March 27, 1997, and permanent partial disability benefits thereafter for a 32 percent impairment of the left lower extremity.<sup>1</sup>

In his Decision and Order-Awarding Benefits, the administrative law judge found that claimant is entitled to temporary total disability benefits for the period of June 21, 1996, to October 15, 1996, and permanent total disability benefits for the period from October 16, 1996, to February 18, 1997. In addition, the administrative law judge found that claimant is entitled to permanent partial disability benefits under the schedule for a ten percent loss of use of his left leg. 33 U.S.C. §908(c)(2). The administrative law judge also awarded future medical costs necessitated as a result of the June 1996 injury.

Subsequently, claimant's counsel submitted an attorney's fee petition requesting \$11,789.40 in fees and costs. After considering employer's objections, the administrative law judge reduced a number of the requested entries and awarded claimant's counsel a fee in the amount of \$10,104, representing 51.7 hours of legal services at the rate of \$195 and .25 hours at the hourly rate of \$90, plus \$1,393.90 in costs.

On appeal, employer contends that the administrative law judge, in awarding an attorney's fee, erred in failing to take into account the amount of benefits awarded and the limited success achieved. Employer also appeals the awarded hourly rate. Claimant responds, urging affirmance of the administrative law judge's award of an attorney's fee.

The Board has consistently held that it will not consider objections to an attorney's fee which were not raised before the administrative law judge. *See Moody v. Ingalls Shipbuilding, Inc.*, 29 BRBS 63 (1995), *denying recon. of* 27 BRBS 173 (1994) (Brown, J., dissenting); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). In its objections to the fee petition filed with the administrative law judge, employer made the following statement: "Moreover the outcome obtained by claimant's counsel in this case did not exceed that of a settlement offer . . ." Obj. at 7. The administrative law judge stated that employer did not object to the fee request on the basis that it was not commensurate with claimant's degree of

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<sup>1</sup>Prior to the hearing, employer had paid claimant temporary total disability benefits from June 21, 1996 to February 18, 1997, and permanent partial disability benefits for a seven percent impairment of the left lower extremity.

success, and thus that he would not address this issue. Order Awarding Attorney's Fees at 4.

We affirm the administrative law judge's finding that this statement does not raise the issue of the relationship of the attorney's fee to the degree of success achieved. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992). Rather, the issue raised by employer's statement relates to employer's liability for an attorney's fee under Section 28(b) of the Act, 33 U.S.C. §928(b), which requires claimant to obtain greater benefits than those paid or tendered in order for employer to be liable for claimant's attorney's fee. *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9<sup>th</sup> Cir. 1998); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting). The administrative law judge found employer liable for the attorney's fee under Section 28(b), as employer's tender of December 31, 1997, did not include future medical treatment and as he awarded claimant these benefits.<sup>2</sup> Order Awarding Attorney's Fees at 3. Therefore, inasmuch as employer did not raise below an objection to the fee requested in relation to the degree of success in achieving the claims asserted, we will not address employer's contentions on appeal in this regard. *Moody*, 29 BRBS at 63.

Nevertheless, we agree with employer's contention that the case must be remanded to the administrative law judge for application of the regulatory criteria of 20 C.F.R. §702.132(a). This regulation 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 awarded . . ." 20 C.F.R. §702.132(a). The administrative law judge recited these criteria, but did not state he applied or considered all of them in his analysis of the fee petition.<sup>3</sup> *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10<sup>th</sup> Cir. 1997) (statement that all factors were considered is sufficient). Although the fee need not be limited to an amount equal to the benefits obtained, *see generally Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on other grounds on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting), the administrative law judge must consider this regulatory criterion, as well as the complexity of the legal issues, in awarding the fee. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). We, therefore, vacate the administrative law judge's fee award and remand the case for

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<sup>2</sup>Employer does not appeal the administrative law judge's determination that it is liable for claimant's attorney's fee under Section 28(b).

<sup>3</sup>Thus, employer is entitled to appeal this issue despite not having raised this objection below.

consideration of the fee award in light of the amount of benefits awarded, in conjunction with the other regulatory criteria.

Employer's contention that the administrative law judge erred in awarding counsel his requested hourly rate, \$195, is rejected. The administrative law judge found that based on counsel's experience and the services rendered, and the administrative law judge's knowledge of fee awards in the Anchorage area, the requested rate is warranted. Employer has not established an abuse of discretion in this regard. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). The administrative law judge, however, may, in his discretion, reduce the hourly rate if application of the regulatory criteria so warrants.

Accordingly, the administrative law judge's Order Awarding Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge