BRB Nos. 01-0897
and 01-0897A

VICTOR TORRES	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HOPEMAN BROTHERS	)	DATE ISSUED: August 19, 2002
MARINE INTERIORS	)	
	)	
and	)	
	)	
LIBERTY MUTUAL	)	
INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Supplemental Order Awarding Attorney's Fee of Jeffrey Tureck, Administrative Law Judge, and the Compensation Order Award of Attorney Fees of Eric L. Richardson, District Director, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Roy D. Axelrod (Law Office of Roy D. Axelrod), Solana Beach, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Order Awarding Attorney's Fee (00-LHC-0703) of Administrative Law Judge Jeffrey Tureck and claimant appeals the Compensation Order Award of Attorney Fees (Case No. 18-68290) of District Director Eric L. Richardson 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 January 15, 1998, claimant injured his right arm during the course of his employment as a joiner/insulator. Claimant did not report the injury and he continued working until March 1998, when he complained of elbow pain. Dr. Han diagnosed a right elbow strain and tendinitis. He restricted claimant to light work. Claimant's condition did not improve and he also developed shoulder pain. Claimant stopped working on April 27, 1998. In the fall of 1998, claimant returned to non-longshore employment and he began vocational rehabilitation programs in automotive technology and computer literacy. On June 3, 1999, claimant obtained non-longshore employment with Sea Water Visions as a carpenter.

Claimant developed increasing pain in his right shoulder, elbow and wrist. He sought treatment from Dr. Kane in September 1999. Claimant underwent right shoulder and elbow surgery on January 21, 2000. He returned to work for Sea Water Visions until March 3, 2000, when he was terminated due to a lack of work within his shoulder restrictions. On May 22, 2000, Dr. Kane opined that claimant's shoulder condition had reached maximum medical improvement, and he imposed permanent work restrictions of no heavy lifting at shoulder level or above, and no repetitive gripping and grasping of heavy objects. Claimant has been self-employed selling ceramics since March 3, 2000. Employer voluntarily paid compensation for various periods of temporary total and partial disability, 33 U.S.C. §908(b), (e), for permanent total disability, 33 U.S.C. §908(a), for a ten percent permanent impairment of the right arm, 33 U.S.C. §908(c)(1), and for permanent partial disability, based on a loss of wage-earning capacity, 33 U.S.C. §908(c)(21). Moreover, at the date of the formal hearing on December 14, 2000, employer was voluntarily paying claimant $65 per week for wage loss due to his shoulder injury. The parties disputed the extent of claimant's temporary disability, the onset date of compensation for permanent partial disability based on a loss of wage-earning capacity, and the extent of claimant's ongoing loss of wage-earning capacity. Employer also sought Section 8(f) relief. 33 U.S.C. §908(f).

In his decision, the administrative law judge awarded claimant compensation for temporary total disability from April 27, 1998, to February 21, 1999, and from January 21 to February 9, 2000, based upon an average weekly wage of $446.22. Claimant was awarded compensation for temporary partial disability from February 22, 1999, to January 20, 2000, and from February 10 to May 21, 2000, and continuing compensation for permanent partial disability from May 22, 2000, based on wage-earning capacity of $358.40 and a loss of $87.82 per week. Claimant also was awarded medical benefits, 33 U.S.C. §907, and employer was found entitled to a credit of approximately $11,000 for its overpayments of

compensation, 33 U.S.C. §914(j). Employer was denied Section 8(f) relief.

Claimant's counsel subsequently sought an attorney's fee of $11,312.50, representing 43.75 hours of attorney services at $250 per hour, plus expenses of $375, for work performed before the administrative law judge. The administrative law judge reduced the hourly rate to $190, deducted 1.75 hours for reviewing medical reports, denied the requested costs, and awarded claimant's counsel a fee of $8,550, representing 45 hours at an hourly rate of $190. Claimant's counsel also filed a fee petition for work performed before the district director in which he requested an attorney's fee of $6,375, representing 25.5 hours of attorney services at $250 per hour. The district director reduced the hourly rate to $175 and one hour of the time requested, and awarded claimant's counsel a fee of $4,287.50, representing 24.5 hours of attorney time at $175 per hour.

On appeal, employer challenges the fee awarded by the administrative law judge. Claimant responds, urging affirmance. BRB No. 01-0897. Claimant appeals the attorney's fee awarded by the district director. Employer responds, urging affirmance. BRB No. 01-0897A.

We initially address employer's appeal of the administrative law judge's award of an attorney's fee. Employer first contends that it is not liable for an attorney's fee, pursuant to Section 28(b), 33 U.S.C. §928(b), because claimant did not obtain benefits greater that those employer voluntarily paid or tendered. We decline to address this liability contention as employer did not raise this argument before the administrative law judge, and employer may not raise it for the first time on appeal. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, No. 93- 4367 (5th Cir. Dec. 9. 1993).

In challenging the fee awarded by the administrative law judge, employer also argues, citing *Hensley v. Eckerhart*, 461 U.S. 421 (1983), that the fee awarded by the administrative law judge did not appropriately account for claimant's degree of success. In support of this assertion, employer notes that the amount of compensation claimant was awarded for periods of total disability was less than he had requested, he was awarded compensation for a lower loss of wage-earning capacity than he had asserted, also lower than had been voluntarily paid by employer, and that medical benefits for claimant's shoulder condition were not at issue before the administrative law judge.

In *Hensley*, the Supreme Court stated that if a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in

relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The Court stated that the most critical factor is the degree of success obtained. *Hensley*, 461 U.S. at 437; *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. 1988), *cert. denied*, 488 U.S. 997 (1988).

In the present case, employer raised the applicability of *Hensley* before the administrative law judge. The administrative law judge considered claimant's limited success in reducing counsel's hourly rate from $250 to $190. The administrative law judge observed that claimant had asserted a residual wage-earning capacity of $284 per week, while employer argued that claimant had a weekly wage-earning capacity from February 1999 to May 21, 2000, of $358.40, and of $400 from May 22, 2000, forward. In his decision, the administrative law judge credited employer's vocational consultant and found that claimant had a weekly wage-earning capacity of $358.40 during the periods of temporary and permanent partial disability commencing February 22, 1999. Addressing the extent of claimant's success, the administrative law judge found that, assuming a normal life expectancy, claimant will receive benefits totaling over $100,000 for his loss of wage-earning capacity, notwithstanding employer's $11,000 credit from its overpayment of compensation. Additionally, the administrative law judge noted claimant's success in obtaining continuing medical benefits for his shoulder and elbow injuries.

Contrary to employer's contention, the administrative law judge appropriately discussed the amount of claimant's overall recovery in reducing the hourly rate to $190. *See Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Nevertheless, we agree with employer that the administrative law judge's attorney's fee award must be vacated and the case remanded for reconsideration, pursuant to *Hensley*. In quantifying the level of claimant's overall success, the administrative law judge also must consider the amount claimant sought in comparison to the benefits that employer offered to pay voluntarily. *See Brooks*, 963 F.2d at 1535-1537, 25 BRBS at 164-169(CRT). In this regard, claimant ultimately obtained lower weekly compensation for permanent partial disability than the $65 per week employer was voluntarily paying at the date of the formal hearing, although the award was greater than employer argued it should be.[1] EX 27 at 225. Additionally, at the

[1]It appears that employer continued these payments until at least the date claimant submitted his Post-Trial Brief on February 6, 2001. *See* Claimant's Post-Trial Brief at 3. Pursuant to the administrative law judge's decision, claimant has a weekly wage-earning capacity of $358.40 and a weekly loss of earning capacity of $87.92, resulting in a compensation rate of $58.55 per week. 33 U.S.C. §908(c)(21), (e), (h). Employer argued that claimant's wage-earning capacity was $400 per week and claimant argued it was $284.

parties' November 19, 1999, informal conference, employer offered to pay continuing compensation for permanent partial disability based on a residual wage-earning capacity of either $340 or $335 per week, which also would have resulted in claimant's obtaining greater compensation than that awarded by the administrative law judge. EX 22 at 217.

The administrative law judge further relied upon his award of medical benefits as support for the fee award; however, employer did not contest claimant's entitlement to past and future care at the formal hearing. Tr. at 7. An award of benefits that is voluntarily being paid cannot support a fee award under Section 28(b). *See Barker v. U.S. Dept. of Labor,* 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998). In his response brief, claimant asserts that employer conceded the work-relatedness of the shoulder condition and began providing medical benefits only after the case was transferred to the administrative law judge. The record shows that employer contested the compensability of the shoulder condition in its July 2, 1998, notice of controversion. CX 3. The case was transferred to the Office of Administrative Law Judges (OALJ) on December 17, 1999. Claimant's pre-hearing statement lists at issue "Medical Care/Costs." However, in requesting a continuance on June 27, 2000, employer states that it had authorized treatment for claimant's shoulder condition on January 21, 2000. Accordingly, on remand the administrative law judge must determine whether medical benefits were contested after the case was transferred to OALJ, and, if so, the date the issue was resolved prior to the formal hearing. Claimant's attorney is entitled to a fee for time reasonably expended at the administrative law judge level on issues that were resolved prior to the formal hearing. *Rihner v. Boland Marine & Mfg. Co.*, 24 BRBS 84 (1990), *aff'd,* 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Accordingly, we vacate the administrative law judge's fee award, and we remand for consideration of the amount of an attorney's fee pursuant to *Hensley*.

In his appeal, claimant challenges the attorney's fee awarded by the district director. Claimant argues that the district director erred by awarding a fee based on an hourly rate of $175, contending that the appropriate hourly rate for San Diego is $250. The district director addressed employer's objection to the requested hourly rate of $250, and he found the rate excessive considering the nature of the claim, the benefits gained, and the complexity of the case. On this basis, the administrative law judge found a rate of $175 reasonable. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995)*; Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). We affirm the hourly rate of $175 awarded as the district director considered claimant's degree of success, the necessity of the work performed, and the complexity of the issues involved. Claimant has

not shown that the district director abused his discretion in reducing the hourly rated based on the regulatory criteria.[2] *See Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *see also McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Maddon*, 23 BRBS 55.

Accordingly, the administrative law judge's Supplemental Order Awarding Attorney's Fee is vacated, and the case is remanded for further proceedings consistent with this opinion. The district director's Compensation Order Award of Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[2]Claimant submitted, attached to a reply brief, a decision from a Los Angeles Superior Court that referred to a prior suit in which a fee was awarded by a trial court based on an hourly rate of $250. The amount of a fee awarded in another case is not binding precedent in this case. *See Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994).