BRB No. 02-0827

KEVIN M. DAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATED ISSUED: Aug. 7, 2003
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fee of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts, Groton, Connecticut, for claimant.

Michael J. Feeney (McKenney, Jeffrey & Quigley), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fee (2001-LHC-1992, 2001-LHC-3379) of Administrative Law Judge David W. DiNardi 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 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).

Claimant, while working for employer on October 27, 1981, experienced back and neck pain. Claimant left work and was subsequently treated conservatively with medication, rest, and physical therapy. Upon his return to work, claimant was assigned to light-duty activities in the planning office of employer's pipe shop. On April 1, 1992, claimant experienced right hand pain, which he attributed to the repetitive use of a

keyboard, and additional neck pain. Claimant was subsequently laid-off in February 1994. Employer paid claimant weekly benefits and on November 20, 1995, claimant and employer entered into a lump-sum settlement of claimant's state claim. Thereafter, on August 17, 2000, claimant filed a claim under the Act seeking total disability benefits for the period of April 1, 1992, to April 5, 1994, permanent total or permanent partial disability benefits from April 6, 1994 and continuing, and a scheduled award for an impairment to his hand pursuant to Section 8(c)(3) of the Act, 33 U.S.C. §908(c)(3).

In his Decision and Order – Awarding Medical Benefits, the administrative law judge determined that at the latest claimant was aware of the full extent of his lumbar, cervical, and bilateral hand injuries by November 20, 1995, the day on which he settled his state claim, and that, accordingly, claimant's August 17, 2000 claim for disability benefits is barred by Section 13 of the Act, 33 U.S.C. §913. Decision and Order at 33. These findings are not appealed. Next, having previously concluded that claimant's lumbar, cervical, and bilateral hand/arm problems are causally related to his employment with employer, the administrative law judge awarded claimant medical benefits for these conditions in accordance with Section 7 of the Act, 33 U.S.C. §907. *Id.* at 43-45. Thus, claimant's successful prosecution of his claim was limited to one issue, his entitlement to medical benefits. *Id.* at 46.

Claimant's counsel thereafter filed a fee petition with the administrative law judge requesting a fee of $7,875.04, representing 36.42 hours of legal services performed at an hourly rate of $200, 2.75 hours of paralegal services performed at an hourly rate of $60, and costs of $426.04. Employer filed objections to counsel's requested fee, arguing that it was unreasonable in light of claimant's limited success before the administrative law judge. In a supplemental decision, the administrative law judge awarded the full fee and costs requested by claimant's counsel.

On appeal, employer challenges the fee award of the administrative law judge. Claimant responds, urging affirmance of that award in its entirety.

In challenging the fee awarded by the administrative law judge, employer argues, citing *Hensley v. Eckerhart*, 461 U.S. 421 (1983), and *General Dynamics Corp. v. Horrigan* , 848 F.2d 321, 21 BRBS 73(CRT)(1st Cir.), *cert. denied*, 488 U.S. 992 (1988), that since claimant was only partially successful before the administrative law judge, the fee awarded by the administrative law judge cannot be upheld. In support of this assertion, employer notes that claimant prevailed on only one issue before the administrative law judge, and that the amount of his success was thus minimal. We agree with employer that the fee awarded by the administrative law judge cannot be affirmed in light of the decision of the United States Supreme Court in *Hensley*.

In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *see also Horrigan*, 848 F.2d at 321, 21 BRBS at 73(CRT); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT)(D.C. Cir. 1983). Where claims involve a common core of facts or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. 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. As the Supreme Court stated in *Hensley*, the most critical factor is the degree of success obtained. *Hensley*, 461 U.S. at 437.

In the present case, employer raised the applicability of *Hensley* before the administrative law judge. In addressing this objection, the administrative law judge set forth the holding of the Court in *Hensley*, stated that "there is no requirement that the attorney be successful on all of the issues presented in the litigation," and concluded that the issues presented in the instant case are too interrelated to permit allocation of the requested fee between successful and unsuccessful issues. Supplemental Decision and Order at 3-4. This rationale is inadequate. The conclusion that the issue of employer's liability for claimant's medical expenses, on which claimant prevailed, is related to the issue of whether the claim was timely filed, on which claimant did not prevail, cannot be sustained. There is no relation in law or fact between the issues of whether claimant timely filed a claim for compensation under the Act and claimant's entitlement to medical benefits. Thus, as these issues are clearly severable, we vacate the administrative law judge's finding of interrelatedness.

Next, the administrative law judge summarily found that "[i]n light the nature and extent of the excellent legal services rendered to Claimant by his attorney and the amount of compensation obtained for Claimant, [counsel's requested fee and costs are] fair and reasonable." Supplemental Decision and Order at 5. In its objections filed with the administrative law judge, employer properly raised claimant's limited success and the amount of benefits obtained, arguing that the fee sought by counsel must have some reasonable relationship to the compensation awarded.[1] *See* Employer's Counsel's letter

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[1]Contrary to the statement contained in claimant's response brief, the administrative law judge's decision did not result in the significant award to claimant of 90.28 weeks of permanent partial disability benefits for an 18.5 percent impairment to his

dated August 8, 2002. Under the Act, the second prong of the *Hensley* test requires consideration of the extent of claimant's success in relation to the fee requested. *See Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)*(en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995). Thus, as the administrative law judge did not adequately address the degree of claimant's success as required by *Hensley* when awarding counsel his requested fee, we vacate the administrative law judge's fee award and remand the case for reconsideration of the fee petition. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fee is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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hand. *See* Clt's brief at 2-3. Rather, as the administrative law judge found the claim to have been untimely filed, no disability compensation was awarded to claimant under the Act, although the administrative law judge did render alternate findings in the event his decision was appealed. *See* Decision and Order at 33, 46. Lastly, while the administrative did award claimant medical benefits, claimant does not dispute employer's assertion that these benefits presently consist of reimbursement for a single medical examination.