BRB No. 03-0817

JOSEPH FLOWERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL CARGO COMPANY	)	
	)	DATE ISSUED:Aug. 25, 2004
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, New Orleans, Louisiana, for claimant.

Joseph B. Guilbeau and Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Freiman), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2002-LHC-1629) of Administrative Law Judge C. Richard Avery 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his right hand and arm during the course of his employment for employer on July 5, 1996. In a decision issued on January 22, 2001, the administrative law judge found claimant entitled to compensation for temporary total disability, 33 U.S.C. §908(b), from July 5, 1996, to January 6, 1998, when the administrative law judge found that claimant's work injury reached maximum medical improvement. The administrative law judge awarded claimant compensation for permanent total disability, 33 U.S.C. §908(a), from January 7 to July 26, 1998, when the administrative law judge found that employer established the availability of suitable alternate employment. The administrative law judge also awarded claimant permanent partial disability compensation for his work-related wrist injury based his finding that claimant sustained a 30 percent impairment of the right arm. 33 U.S.C. §908(c)(1), (19). Finally, employer was ordered to reimburse claimant $248.13 for prescription medication and for the cost of driving 2,490 miles to obtain medical treatment and to attend a mediation conference.

On December 21, 2001, claimant's treating physician, Dr. Bourgeois, recommended that claimant obtain pain management treatment from Dr. Blotner, as well as treatment for depression, which he related to claimant's work injury. Claimant's attorney wrote to employer's attorney on February 7, 2002, demanding that employer provide such treatment, pursuant to the administrative law judge's initial decision awarding claimant medical benefits. Employer rejected claimant's demand, and an informal conference was held on March 19, 2002. The district director opined that employer was not in default of the administrative law judge's order awarding medical benefits, but that a change of condition may have occurred. The district director recommended that claimant be examined by employer's choice of physician, an examination employer had scheduled for March 30, 2002. Claimant rejected the district director's recommendation, and the claim was transferred to the Office of Administrative Law Judges on April 9, 2002.[1]

The parties subsequently agreed in July 2002 that claimant would undergo an examination for employer by Dr. Faust; thereafter, employer would authorize initial evaluations by Dr. Blotner and by Dr. Andrews, a psychologist. In his Decision and Order Granting in Part Employer/Carrier's Motion for Summary Decision and Order Postponing Hearing issued on October 1, 2002, the administrative law judge summarized claimant's demand for enforcement of the administrative law judge's prior decision

[1] Claimant also appealed the district director's memorandum to the Board. In an Order issued on May 15, 2002, the Board dismissed claimant's appeal. The Board held that a direct appeal of the district director's refusal to issue a default order is not appropriate as the issue requires findings of fact by an administrative law judge. *Flowers v. Coastal Cargo Co.*, BRB No. 02-0481 (May 15, 2002).

awarding medical benefits and, alternatively, a determination that claimant has a right to the additional medical treatment recommended by Dr. Bourgeois. The administrative law judge found that his prior decision did not order employer to provide claimant treatment for pain management and psychological counseling for depression, and that employer has the right to challenge the reasonableness and necessity of such treatment. The administrative law judge further determined, based on the agreement of the parties, to postpone for 60 days the hearing scheduled for October 10, 2002. During this time, employer was directed to review the evaluations of Drs. Blotner and Andrews and to decide whether it wished to have claimant further evaluated to assess the reasonableness of treatment for pain management and depression. The administrative law judge stated he would thereafter determine whether to set for hearing the issue of the reasonableness of the recommended medical treatment or to remand the claim to the district director for an independent medical exam. *See* 33 U.S.C. §907(e).

By letter dated January 31, 2003, employer informed claimant's attorney that medical evaluations had been scheduled for claimant on February 11, 2003, with Dr. Waring, and on March 18, 2003, with Dr. Bianchini. After these evaluations were performed, employer agreed to authorize claimant's treatment with Drs. Blotner and Andrews, and the parties submitted joint stipulations to this effect to the administrative law judge on April 23, 2003. On May 13, 2003, the administrative law judge issued an Order of Remand to the district director to implement the parties' stipulations.

Claimant's counsel filed a fee petition for work performed before the administrative law judge in which he requested a fee of $4,515, representing 30.1 hours of attorney time at $150 per hour. In his supplemental decision, the administrative law judge addressed employer's objections, but awarded claimant's counsel the requested fee. On appeal, employer challenges the attorney's fee award. Claimant responds, urging affirmance.

Employer first argues that claimant is not entitled to an attorney's fee, as claimant initiated needless litigation due to his refusal to submit to a medical examination by a physician of employer's choosing to determine the appropriateness of Dr. Bourgeois's referring claimant for pain management treatment and psychological counseling. The administrative law judge found that claimant's attorney is entitled to a fee because he successfully obtained the medical treatment sought by claimant.

We reject employer's contention of error, and we affirm the administrative law judge's finding that claimant's attorney is entitled to a fee. In February 2002, claimant requested that employer authorize medical treatment for pain management and depression, which employer refused to authorize until April 2003. *See* 33 U.S.C. §928(a); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). Thus, claimant prevailed before the administrative law judge in establishing his entitlement to

medical treatment for pain management and to psychological counseling. *See Frawley v. Savannah Shipyard Co.,* 22 BRBS 328 (1989). Furthermore, claimant agreed by July 2002 to employer's request for an examination by a physician of its choosing, Dr. Faust, and Drs. Blotner and Andrews also provided evaluations of claimant. Notwithstanding these evaluations, and the administrative law judge's directing employer in his October 1, 2002, decision to determine within 60 days whether additional evaluations were necessary, employer did not schedule examinations by Drs. Waring and Bianchini until January and March 2003, and it did not stipulate to the necessity and reasonableness of the December 2001 recommendation for additional medical treatment until April 2003. Employer's dilatory response to claimant's request for medical treatment after claimant agreed in July 2002 to its request for an examination by Dr. Faust establishes, contrary to employer's assertion, that this was an actively litigated claim until employer agreed in April 2003 to authorize additional medical treatment. *See generally Rihner v. Boland Marine & Manufacturing Co.,* 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995). Accordingly, as claimant's counsel's services resulted in claimant's obtaining additional medical benefits, we hold that the administrative law judge properly held employer liable for claimant's attorney fee. 33 U.S.C.§928(a); *see Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Alternatively, employer argues that, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the fee award should be reduced by at least 50 percent as claimant unsuccessfully contended that, pursuant to the administrative law judge's initial decision awarding claimant future medical benefits, he was entitled to the medical treatment recommended by Dr. Bourgeois. In *Hensley*, the Supreme Court held that a fee award, under a fee-shifting scheme, should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks,* 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

We reject employer's contention that the administrative law judge erred by not reducing the fee for time expended in furtherance of claimant's unsuccessful contention that he is entitled to the medical treatment recommended by Dr. Bourgeois, pursuant to the administrative law judge's initial decision in which claimant was awarded medical benefits. The sole issue before the administrative law judge was claimant's entitlement to the medical treatment recommended by Dr. Bourgeois, on which issue claimant fully prevailed. Claimant's ultimate success on this issue before the administrative law judge renders employer liable for all necessary work performed leading to that success. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). The test for determining the necessity of work performed by counsel is whether, at the time it was performed, the attorney

reasonably believed it was necessary to establish entitlement. *See, e.g., O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

In this case, the administrative law judge summarized employer's contention that the award should be reduced by at least 50 percent. The administrative law judge stated in response to employer's objections that certain time claimed was excessive, unnecessary, or unreasonable, that he was unwilling to find that certain tasks were not reasonable and necessary to the preparation of the claim. As claimant was fully successful on the sole issue before the administrative law judge, the administrative law judge was not required to reduce the fee request pursuant to *Hensley*. Moreover, we affirm the administrative law judge's award of an attorney's fee for work the administrative law judge found reasonable and necessary to establish claimant's entitlement to the recommended medical treatment, notwithstanding that claimant did not prevail on his contention that he is entitled to the treatment based on the administrative law judge's initial decision. *See O'Kelley*, 34 BRBS at 44; *Maddon*, 23 BRBS at 61-62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Finally, in his response brief, claimant's counsel requests a fee of $675 for time expended before the Board, representing 4.5 hours for preparation of claimant's response brief at an hourly rate of $150. Employer has not responded to the attorney's fee request. Claimant is entitled to an attorney's fee payable by employer for successfully defending against employer's appeal. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); 20 C.F.R. §802.203(b). We find the hourly rate of $150 requested by counsel reasonable in this case. *See* 20 C.F.R. §802.203(d)(4); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). We also find the number of hours requested to be reasonably commensurate with necessary work performed and we grant the requested fee of $675, payable employer. 20 C.F.R. §802.203(e).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed. Claimant's counsel is awarded an attorney's fee of $675 for work performed the Board, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

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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BETTY JEAN HALL
Administrative Appeals Judge