BRB No. 99-0508

EDWARD J. CYR Claimant-Respondent v. LOGISTEC OF CONNECTICUT, INCORPORATED and SIGNAL MUTUAL INDEMNITY ASSOCIATION Employer/Carrier-Petitioners	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May), Glastonbury, Connecticut, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar, L.L.P.), Stamford, Connecticut, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fee of Administrative Law Judge David W. Di Nardi (97-LHC-2234, 98-LHC-1685) 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 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 filed claims against New Haven Terminal (NHT) and Logistec (LGC or employer) for his work-related hearing loss, and both employers controverted the claim.[1] Audiograms performed at LGC on July 26, 1996, by Dr. Lehmann on April 15, 1997, and by Dr. Astrachan on May 13, 1998, suggested the possibility of hearing loss but demonstrated a zero percent impairment loss under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). A fourth audiogram administered at the Yale University Occupational Health Clinic (Yale) on January 8, 1997, exhibited an 8.1 percent binaural loss, and a fifth audiogram, administered by Dr. Hirokawa on May 27, 1998, revealed a 2.2 percent bilateral hearing impairment. Employer objected to the introduction of Dr. Hirokawa's examination into the record on the ground that claimant failed to furnish this evidence to employer within the time-frame outlined by the administrative law judge's Pre-Hearing Order dated April 24, 1998.

In his Decision and Order, the administrative law judge, after admitting the report of Dr. Hirokawa into evidence, found employer responsible for an award of benefits for a 0.733 percent work-related binaural hearing loss based on the averaged results of the audiograms administered by Drs. Lehmann, Astrachan and Hirokawa. The administrative law judge further found employer responsible for the payment of the medical bills for claimant's visits to the Yale Clinic and Dr. Hirokawa, reimbursement for travel expenses associated with the examinations by Drs. Lehmann and Astrachan, and any reasonable and necessary future medical benefits for claimant's hearing impairment pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's admission of Dr. Hirokawa's medical report, and award of medical benefits. Employer also appeals the administrative law judge's award of an attorney's fee of $6,332.04 to claimant's counsel. Claimant responds, urging affirmance.

Admission of Evidence

Employer initially asserts that the administrative law judge's admission of Dr. Hirokawa's report is reversible error as claimant's service of the report to employer

[1]Logistec purchased New Haven Terminal on July 12, 1996. The claim against NHT was subsequently dismissed.

was in violation of the administrative law judge's pre-trial Order, its late submission unfairly prejudiced employer's case, and it, in essence, represents a change in claimant's treating physician without notification to employer in violation of Section 7(d)(2), 33 U.S.C. §907(d)(2). Specifically, employer argues that in his pre-trial Order dated April 24, 1998, the administrative law judge explicitly stated that all evidence was to be developed and exchanged within a 45-day period prior to the date of the hearing (*i.e.*, by August 6, 1998), and thus, employer's receipt of Dr. Hirokawa's report on September 3, 1998, was not timely. In addition, employer maintains that contrary to the administrative law judge's finding, it was prejudiced by the late submission of Dr. Hirokawa's report as it greatly altered the nature of its defense.

In his decision, the administrative law judge concluded that as both parties violated the pre-hearing order and as employer did not establish any prejudice, other than a general allegation thereof, employer's objections to the audiogram and report of Dr. Hirokawa were overruled, and the exhibit was admitted into evidence as it is relevant, material and not unduly cumulative to the unresolved issues of the case. In addition, the administrative law judge found employer was given a reasonable amount of time to rebut this exhibit[2] and the record remained open for almost three months after the hearing, but noted that employer offered no such response other than opposing the admission of the exhibit. As the administrative law judge has directly addressed employer's objections to the admission of Dr. Hirokawa's report and provided employer with an adequate opportunity to submit additional evidence in rebuttal to Dr. Hirokawa's report, employer has not been prejudiced and its right to procedural due process has not been denied.[3] *See generally Parks v. Newport News*

[2]The administrative law judge acted to safeguard employer's rights by noting that "it is up to [employer's counsel] as to whether he would like to cross-examine Dr. Hirokawa." Hearing Transcript (HT) at 93.

[3]Employer's contention that Dr. Hirokawa's report should be excluded from the record because it is in violation of Section 7(d)(2) is without merit as the issues presented by these provisions go to employer's liability for the resulting medical expenses and do not necessarily pertain to the admissibility of said evidence.

Shipbuilding & Dry Dock Co., 32 BRBS 90 (1998), *aff'd mem.,* No. 98-1881, 1999 WL 1203777 (4th Cir. Dec. 16, 1999). Accordingly, we affirm the administrative law judge's admission of Dr. Hirokawa's report into the record in this case.

Medical Benefits

Employer next argues that contrary to the administrative law judge's finding, it should not be held liable for travel costs associated with the examination of Dr. Lehmann as that appointment was set up by NHT and not by employer. Additionally, employer asserts that in seeing Dr. Lehmann, claimant was not traveling for the purpose of "treatment" as defined by Section 7, but rather for the purpose of obtaining an independent medical evaluation for another employer, NHT.

In the instant case, the administrative law judge determined that claimant is entitled to reimbursement of travel expenses associated with the examinations of Drs. Lehmann and Astrachan. The administrative law judge explicitly addressed and rejected employer's contention regarding its liability for Dr. Lehmann's examination, since employer, as the responsible employer under the rule set out *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), is solely responsible for the entire award. Travel expenses incurred for purposes of a medical examination are recoverable as litigation costs where they are reasonable and necessary. *See* 33 U.S.C. §928(d). The administrative law judge found said expenses in the instant case to be reasonable and necessary, and as employer, in presenting its case, urged the administrative law judge to consider Dr. Lehmann's test results and, thus, benefitted from that opinion, we affirm the administrative law judge's conclusion that, pursuant to *Cardillo*, employer is liable for Dr. Lehmann's examination.[4]

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Employer further argues that it was improper for the administrative law judge to award medical benefits pursuant to Section 7 for the Yale examination and/or for Dr. Hirokawa's examination, since the former was completely discredited by the

[4]In its brief, employer cites *Castro v. Maher Terminals, Inc.*, 710 F.Supp. 573 (D.N.J. 1989), for the proposition that medical examinations by physicians chosen by the employer, and any associated travel costs, cannot be considered medical care, and thus, are not reimburseable, under Section 7. In *Castro,* the court held that medical examinations by employer-chosen physicians cannot be classified as either compensation paid to claimants or medical care necessary for treatment or the process of recovery, such that they may not be included as part of an employer's lien on funds recovered by claimant in an action against the third party responsible for his injury. Consequently, *Castro* is inapplicable to the instant case.

administrative law judge, and claimant saw Dr. Hirokawa without first requesting authorization. Additionally, employer argues that it cannot be liable for the expenses related to Dr. Hirokawa's examination as it did not receive a copy of his report within the 10-day time frame set out in 33 U.S.C. §907(d)(2) and 20 C.F.R. §702.422(a).

Section 28(d) of the Act, 33 U.S.C. §928(d), the only statutory provision authorizing the administrative law judge to assess litigation costs, provides that where an attorney's fee is awarded against an employer or carrier there may be a further assessment against such employer or carrier as costs, fees, and mileage for necessary witnesses attending the hearing at the instance of claimant. Section 28(d) requires only an analysis of the reasonableness and necessity of the costs incurred by counsel in litigating the case, and no additional analysis is required. Consequently, we reject employer's contention that the administrative law judge erred by not applying the two-pronged test set out in *Hensley v. Eckhardt*, 461 U.S. 424 (1983), in determining whether reimbursement of the expenses associated with claimant's visit to the Yale Clinic are compensable. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

After a hearing test conducted for employer on July 26, 1996, claimant was advised that his results revealed a significant loss of sensitivity at the higher pitches prompting claimant to undergo further audiometric testing at the Yale Clinic as recommended by his attorney. As claimant's decision to seek additional audiometric testing was initiated by the testing conducted by employer, we reject its contention that the administrative law judge erred in finding the Yale Clinic hearing evaluation to be a reasonable and necessary cost associated with the litigation of this claim pursuant to Section 28(d).[5] *See generally Ezell,* 33 BRBS at 19; *Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103 (1986). Moreover, the record establishes that the hearing test administered by Dr. Hirokawa was for the purpose of litigating the instant claim. Thus, these expenses are recoverable under Section 28(d) so long as they are reasonable and necessary. *Id.* As the administrative law judge found that the costs associated with Dr. Hirokawa's report were reasonable and necessary, we hold that the administrative law judge acted within his discretion in awarding these costs and decline to disturb this award.[6] *Ezell*, 33 BRBS at 19.

[5]Moreover, we note that the administrative law judge acted within his discretion in finding that his decision to accord no weight to the Yale Clinic report was an insufficient reason to deny reimbursement as the costs were reasonable and necessary when incurred.

[6]We therefore need not address employer's contentions under Section 7 regarding Section 7(d)(2) and claimant's seeing Dr. Hirokawa without first requesting authorization.

Attorney's Fee

Employer initially asserts that the awarded hourly rates of $185 for lead counsel and $140 for co-counsel are excessive, suggesting that hourly rates of $100 and $75 would be more appropriate. The administrative law judge rejected employer's suggested rates, noting that they have not been in effect for the past five years, and concluded that the rates proposed by claimant's counsel are fair and reasonable. We therefore hold that employer's assertions are insufficient to meet its burden of establishing that the hourly rates awarded by the administrative law judge are unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer next asserts that the administrative law judge failed to apply the decision of the United States Supreme Court in *Hensley v. Eckhardt*, 461 U.S. 424 (1983), and the decision of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993), to his consideration of the fee petition in this case, particularly given that claimant received limited compensation benefits. Employer maintains that in light of *Hensley*, the administrative law judge's award of an attorney's fee of over $6,300 is exorbitant and unreasonable since claimant was awarded very little compensation.

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 George Hyman Const. 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). 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. Under the Act, the second prong of the *Hensley* test requires the administrative law judge to award a reasonable fee after consideration of employer's objections and the regulatory criteria, 20 C.F.R. §702.132. *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).

Contrary to employer's contention, the administrative law judge, in addressing the fee petition in the instant case, explicitly applied the two-pronged test set out in *Hensley*. With regard to the first prong, the administrative law judge concluded that the legal and factual issues presented in this claim were greatly intertwined. He noted that claimant was found to have a .733 percent binaural hearing loss and was awarded future medical benefits, including hearing aids, to treat his impairment and that therefore, the time and effort expended by claimant's counsel in regard to the disability claim were material, useful, necessary, and interrelated to obtaining the award for future medical expenses, even if the total amount of benefits initially sought was not awarded.

Addressing the second prong and the surrounding circumstances of the case, the administrative law judge rejected employer's assertions that the fee is unreasonable in light of the lack of complexity of the issues involved, that the fee should be reduced due to the quality of representation, and that the fee should be reduced in light of the minimal benefits awarded. First, the administrative law judge found that the complexity of the issues involved in the instant case was commensurate with the fee requested, noting that "the parties have treated these so-called Logistec hearing loss claims as if they were complex anti-trust cases." Supplemental Decision and Order Granting Attorney Fee at 5. The administrative law judge next found that claimant, throughout the proceedings, received the highest quality of counsel. Lastly, after consideration of *Hensley*, the administrative law judge found that the reduction of the attorney's fee was inappropriate in this situation. Specifically, the administrative law judge found that in addition to the present and past benefits actually awarded claimant, he is entitled to all reasonable and necessary future benefits related to his hearing impairment, including hearing aids, and the administrative law judge thus concluded that as such, claimant's award is more than "minimal," in that significant expenses may be incurred by claimant's future need for medical treatment and the award of such treatment is a significant success in the prosecution of this claim. Inasmuch as the administrative

law judge considered and resolved the pertinent issues pertaining to the fee petition in light of the two-pronged test in *Hensley* and as employer has not shown that the his award of an attorney's fee in the instant case is arbitrary, capricious, an abuse of discretion or not in accordance with law, it is affirmed.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge