BRB No. 02-0387

EDWARD SIMINSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: Feb. 24, 2003
	)	
Self-Insured Employer-Petitioner	)	
	)	
I.T.O. CORPORATION OF BALTIMORE	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding A Representative's Fee and Order Denying Employer's Motion for Reconsideration of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for Ceres Marine Terminals.

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

PER CURIAM:

Ceres Marine Terminals (employer) appeals the Supplemental Decision and Order Awarding A Representative's Fee and Order Denying Employer's Motion for Reconsideration (1997-LHC-01717) of Administrative Law Judge Mollie W. Neal 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).

Claimant was injured at work on November 15, 1996, and employer voluntarily paid him temporary total disability and medical benefits from November 16, 1996, through March 11, 1997. Subsequently, claimant was released to return to work with I.T.O. on March 12, 1997. On that date, claimant's knee buckled and he was unable to continue working. Claimant returned to work on October 6, 1997. Employer disputed claimant's claim for additional benefits arguing that claimant suffered an intervening injury while working for I.T.O. on March 12, 1997, for which it was not responsible.

The administrative law judge awarded claimant temporary total disability benefits from November 16, 1996, through October 6, 1997, payable by employer, finding that the knee buckling on March 12, 1997, was a natural progression or unavoidable result of the 1996 injury and not a new injury or aggravation. In calculating claimant's average weekly wage, the administrative law judge included a one-time sum of $4,000, which claimant received prior to the injury as a contractual buyout of the Guaranteed Annual Income (GAI) program. Upon employer's appeal, the Board affirmed the administrative law judge's findings with respect to the intervening injury issue but modified claimant's average weekly wage to exclude the GAI buyout. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

Subsequently, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $28,687.50, representing 82.5 hours of attorney services at $200 per hour and 48.75 hours of attorney services at $250 per hour, plus $1,975.92 in expenses. Employer objected to the fee petition. The administrative law judge considered employer's objections, disallowed 20 hours, and awarded claimant's counsel a fee of $22,350, representing 111.75 hours of attorney services at $200 per hour, and $1,975.92 in expenses. The administrative law judge summarily denied employer's motion for reconsideration of the fee award.

On appeal, employer challenges the administrative law judge's finding that it is liable for a fee for services performed after September 25, 1997. Employer further contends that the administrative law judge erred in failing to reduce the fee in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Employer also challenges the administrative law judge's allowance of all of the requested hours for the drafting of claimant's post-hearing brief and review of checks on October 6, 1997, and her allowance of billing in minimum increments of one-quarter hour. Claimant responds in support of the administrative law judge's fee award to which employer replies.

Employer initially contends that it is not liable for any attorney's fee after September 25, 1997, because it agreed to be bound by an independent medical examination under Section 7(e) of the Act, 33 U.S.C. §907(e), and thus should escape fee liability under Section 28(b), 33 U.S.C. §928(b). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. *See Barker v. U. S. Dep't of Labor*, 138 F.3d 431, 32 BRBS 171(CRT) (1st Cir. 1998). Section 28(b) allows an employer to escape fee liability if the controversy between the parties relates to the degree or length of claimant's disability and employer offers to tender an amount of compensation based upon the degree or length of disability found by an independent medical examiner as authorized by Section 7(e), 33 U.S.C. §907(e). This provision applies if the employer offers, in writing and in advance, to submit the case to the Secretary's independent medical examiner and to tender compensation based on the disability rate determined by the medical examiner. *See Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3d Cir. 1978); *Barranca v. Universal Maritime Service Corp.*, 6 BRBS 781 (1977); *Baird v. W.J. Jones & Son, Inc.*, 6 BRBS 727 (1977).

In a letter dated September 25, 1997, employer requested that the administrative law judge

> immediately direct the District Director to appoint an OWCP IME pursuant to section 7(e) of the Act. 33 U.S.C. §907(e); 20 C.F.R. §702.408-702.410. In this manner, your Honor can get an independent expert's view as to whether the Claimant is really disabled. Moreover, pursuant to section 28(b) of the Act, the Employer agrees to be bound by the result of the section 7(e) examination. Thus, no further attorney fees can be assessed against the Employer.

Emp. Ex. 53. In her fee award, the administrative law judge did not address whether this offer was sufficient to absolve employer of fee liability after September 25, 1997, but only discussed the reasons for her denial of employer's request for the independent medical examination under Section 7(e), stating that the request, made on the eve of the end of the period for discovery, was purely for delay tactics and to avoid fee liability.

We must remand this case for further consideration of this issue. On its face, employer agreed, in its letter of September 25, 1997, in advance, to be bound by the

findings of an independent medical examiner. While the administrative law judge may have acted within her discretion in denying the request to remand the case for such an examination, she did not address whether employer nonetheless may be absolved of attorney fee liability after the date it agreed to be bound by the results of an independent medical examination. On remand, the administrative law judge should address whether the exculpatory provision applies if the independent examination does not take place. Moreover, a key issue to be resolved in this regard is whether the controversy between the parties involved "the degree or length of claimant's disability." 33 U.S.C. §928(b). The primary issue between employer, ITO, and claimant involved whether the March 12, 1997, incident was an intervening injury and the identification of the responsible employer. The parties also disputed the calculation of claimant's average weekly wage. *See* Emp. Post-hearing Br. at 38-46; November 5, 1997, Tr. at 16-27. These issues do not involve the "degree or length" of claimant's disability. On remand, therefore, the administrative law judge must reconsider employer's liability for claimant's attorney's fee after September 25, 1997.[1]

Employer also contends that the administrative law judge erred in failing to reduce the fee in light of *Hensley*, 461 U.S. 424. In *Hensley*, the Supreme Court generally held that a fee award under a fee-shifting statute such as Section 28(a), (b), should be for an amount that is reasonable given the results obtained. *Hensley*, 461 U.S. at 434-437; *see also 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.), *cert. denied*, 488 U.S. 992 (1988). In the instant case, the administrative law judge considered *Hensley,* and she found that claimant prevailed on all issues except his average weekly wage. Next, she found that claimant's success was such that the hours reasonably expended are a satisfactory basis for the award. Supp. Decision and Order at 8-9. The administrative law judge also found that claimant's success was substantial given the claims asserted and the amount of benefits voluntarily paid by employer. *Id.* Applying the *Hensley* criteria, the administrative law judge stated she would not reduce the fee simply because claimant did not prevail on his contention regarding the method of calculating his average weekly wage. *Id.* As the administrative law judge fully considered *Hensley* and acted within her discretion in determining the amount of the fee award, we reject employer's contention that the fee award should

[1]We note that Section 28(b) otherwise applies in this case, as claimant obtained a greater award than employer paid or tendered. Employer paid benefits through March 11, 1997, and then controverted claimant's claim. The administrative law judge awarded claimant compensation through October 6, 1997, payable by employer. *See generally Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

be reduced further due to claimant's lack of success on the average weekly wage issue. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3d Cir. 2001).

We also reject employer's argument that the fee should be reduced for time spent on the responsible employer issue. Assuming, *arguendo*, claimant has no interest in the responsible employer issue on the facts of this case, employer has not demonstrated error in the administrative law judge's failure to address this contention.[2] Employer has not demonstrated how the fee should be reduced given that claimant's counsel spent only one page in his brief to the administrative law judge on this issue.

Employer further contends that the administrative law judge erred in allowing all 1.5 hours claimed for claimant's counsel to review four canceled checks on October 6, 1997. We reject employer's contention as it shows no abuse of discretion in the administrative law judge's allowance of all time for this task, as she rationally stated that she would not substitute her judgment for that of claimant's counsel on the time necessary to perform this task. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); Supplemental Decision and Order at 14.

Employer lastly contends that the administrative law judge erred in allowing claimant's counsel to bill in minimum increments of one-quarter hour. Employer's contention lacks merit as it has shown no abuse of discretion by the administrative law judge in allowing this billing practice. The Board has held that billing in increments of one-quarter hour is not inconsistent with the regulations governing fee awards. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); 20 C.F.R. §§702.132; 802.203(d)(3); *contra Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (Fifth Circuit has held that one-quarter hour minimum is too high for certain routine tasks).

[2]Employer raised this issue for the first time in its motion for reconsideration.

Accordingly, we vacate the administrative law judge's finding that employer is not absolved of fee liability after September 27, 1997, and we remand this case for further consideration consistent with this decision. The administrative law judge's Supplemental Decision and Order Awarding A Representative's Fee is affirmed in all other respects.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge