

FRANK NEBLOSKY)	
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Claimant-Petitioner)	
)	
v.)	
)	
SERVICE EMPLOYEES)	DATE ISSUED: 02/26/2010
INTERNATIONAL)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Award of Attorney's Fee of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, claimant's prior attorney.

Michael D. Murphy (Henslee Schwartz LLP), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Award of Attorney's Fee (2007-LHC-00340) of Administrative Law Judge Daniel F. Solomon 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act for injuries sustained during the course of his employment with employer. Claimant was represented by David Barnett. Approximately two weeks prior to a scheduled hearing, the parties agreed to settle the claim for \$100,000, closed medical benefits, and a \$25,000 attorney's fee for Mr. Barnett, payable by employer. Claimant withdrew his assent to the settlement agreement prior its submission to an administrative law judge for approval. *See* 33 U.S.C. §908(i). Claimant retained new counsel, Dennis Nalick, who subsequently settled the claim for \$150,000, closed medical benefits, and a \$14,750 attorney's fee for Mr. Nalick, payable by employer. Thereafter, Mr. Barnett sought an attorney's fee payable by employer for services rendered to claimant prior to his retaining Mr. Nalick. Employer and Mr. Barnett did not agree on the amount of an attorney's fee.

Mr. Barnett then submitted to the administrative law judge a petition for a fee of \$30,520, representing 76.3 hours at an hourly rate of \$400 for time expended before the administrative law judge, and a fee of \$20,160, representing 50.4 hours at an hourly rate of \$400 for time expended before the district director, plus costs of \$1,943.60. Employer filed objections to the fee request. Employer contended that Mr. Barnett's prior willingness to accept a fee of \$25,000 to resolve the claim shows that \$25,000 is a reasonable fee. Alternatively, employer suggested that a fee of \$20,000 for fees and costs is reasonable based on the quality of counsel's representation, a reduction in the hourly rate to \$250, and a reduction in the amount of costs requested for photocopying, facsimiles, and postage.

In his supplemental decision, the administrative law judge found that Mr. Barnett is entitled to a fee based on an hourly rate of \$400. The administrative law judge agreed with employer, however, that Mr. Barnett's fee should be limited to \$25,000; *i.e.*, the amount of a fee he was willing to accept by the terms of the abandoned settlement prior to claimant's retaining new counsel. Subsequently, employer submitted a letter and Mr. Barnett submitted a motion requesting that the administrative law judge clarify whether his fee award applied to work performed only at the administrative law judge level or also included a fee for work performed at the district director level. Mr. Barnett appealed the administrative law judge's fee award prior to his responding to their requests.

On appeal, claimant challenges the fee award. Employer responds that the Board should remand the case for the administrative law judge to clarify whether his fee award applies also to work performed at the district director level.

We agree with employer that the fee award must be vacated and the case remanded for the administrative law judge to address whether the fee award was for work performed solely while the case was pending before him. As the fee request at issue was no longer part of a proposed Section 8(i) settlement, the administrative law judge's authority was limited to awarding a fee for work performed only after the claim was transferred by the district director to the Office of Administrative Law Judges (OALJ). *Jenkins v. Puerto Rico Marine*, 36 BRBS 1 (2002); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). In this case, claimant's counsel's fee petition to the administrative law judge requests a fee for time expended before both the administrative law judge and district director. The administrative law judge's decision does not clearly limit its scope to Mr. Barnett's fee request of \$30,520 for services at the OALJ level. The administrative law judge agreed with employer's contention concerning Mr. Barnett's prior willingness to accept \$25,000 for services rendered before the administrative law judge and district director, pursuant to the parties' unapproved Section 8(i) settlement. In his decision, the administrative law judge stated that Mr. Barnett is awarded \$25,000 "for attorney's fee and costs for services rendered on behalf of the claimant." Supplemental Decision & Order at 3. As we are unable to determine whether the fee award is solely for services rendered while the case was before the administrative law judge, we must remand this case for the administrative law judge to clarify the award and to award a fee only for such services.¹ *See generally Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

Claimant contends that the administrative law judge erred by limiting his fee to the amount agreed to in the settlement agreement that was never submitted for approval. The administrative law judge found that a fee of \$25,000 is reasonable since Mr. Barnett and employer had "reached a bargain as of withdrawal." Supplemental Decision and Order at 3. We disagree. Claimant rescinded his willingness to accept the proposed settlement prior to its submission for approval pursuant to Section 8(i). Any fee agreed to pursuant to Section 8(i) is subject to approval by an administrative law judge in order to be effective. *See generally Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168(CRT) (7th Cir. 1993). Therefore, as the settlement agreement in this case that included an attorney's fee for Mr. Barnett was not approved under Section 8(i), this unexecuted

¹ The administrative law judge's supplemental decision was filed in the district director's office on May 20, 2009. Employer's letter to clarify whether the fee award included a fee for work performed before the district director was mailed on May 28, 2009. Claimant's similar Motion for Clarification was mailed on May 29, 2009. The administrative law judge could rationally have construed these letters as timely motions for reconsideration. *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001); *see also* 20 C.F.R. §802.206(a).

agreement is not a basis for the administrative law judge to award Mr. Barnett a fee of \$25,000. *See generally* *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988); *Rogers v. Hawaii Stevedores, Inc.*, 37 BRBS 33 (2003). On remand, the administrative law judge should evaluate Mr. Barnett's fee petition in accordance with 20 C.F.R. §702.132 and applicable case precedent. *See generally* *Ayers S. S. Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge