BRB No. 99-0460

JAMES BARBERA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL TERMINAL AND CONTAINER SERVICE, INCORPORATED	)	DATE ISSUED: 1/28/00
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Motion for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

William M. Broderick and Richard P. Stanton, Jr., New York, New York, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Motion for Reconsideration (94-LHC-2154) of Administrative Law Judge Linda S. Chapman 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).

On April 16, 1991, claimant, a maintenance manager for employer, injured his back

after falling three feet while he was climbing a container stacked on top of another container. In her Decision and Order, Administrative Law Judge Barnett initially found that claimant met the status and situs tests for coverage under Sections 2(3) and 3(a) of the Act, 33 U.S.C. §§902(3), 903(a). Judge Barnett then denied claimant compensation after finding that claimant's present salary fairly and reasonably reflected his wage-earning capacity under Section 8(h) of the Act, 33 U.S.C. §908(h), and that claimant suffered no loss in wage-earning capacity by virtue of his injury. She further denied claimant a *de minimis* award. Consequently, Judge Barnett ordered employer to pay claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, and found claimant entitled to temporary total disability under Section 8(b) of the Act, 33 U.S.C. §908(b), from April 29, 1991, through August 31, 1991. No compensation was awarded, however, as claimant had received his full salary from employer during this period.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney's fee of $69,247.50, representing services at $300 per hour for Mr. Broderick and $250 per hour for his associate, Mr. Stanton, and $3,750.39 in expenses. Employer filed objections to the fee petition to which claimant's counsel replied.

In her Supplemental Decision and Order, Judge Barnett denied claimant's request for reconsideration of her denial of a *de minimis* award. She also rejected most of employer's objections to the attorney's fee request with the exception of two entries for travel to obtain medical films and records on February 10, 1995, and February 17, 1995. With respect to these two travel entries, the administrative law judge ordered claimant's counsel to file an amended fee petition adequately explaining the necessity of this travel or deleting the time attributable to it, noting that these services are generally considered to be clerical duties properly included in overhead.

Claimant's counsel subsequently submitted an amended fee petition which deleted the claim for 3.5 hours for both travel entries on February 10, 1995, and February 17, 1995. In her Second Supplemental Decision and Order, Judge Barnett ordered employer to pay claimant's counsel the sum of $71,247.89 in fees and costs for the successful representation of claimant and an additional $1,060 in fees and costs for defending the fee application.

Claimant appealed Judge Barnett’s denial of compensation benefits to the Board. Employer cross-appealed and filed a supplemental appeal of the award of an attorney's fee, contending that the administrative law judge erred in not applying the holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The Board affirmed the administrative law judge's finding that claimant sustained no loss in wage-earning capacity and her denial of a *de minimis* award. *Barbera v. Global Terminal & Container Service, Inc.,* BRB Nos. 96-0877/A (Feb. 26, 1997) (unpublished), *appeal dismissed,* 135 F.3d 763 (3d Cir. 1997)(table). The Board agreed with employer's contention in its cross-appeal that the administrative law judge erred in not applying the holding set forth in *Hensley*, 461 U.S. at 424. The Board stated that although the administrative law judge cited *Hensley* in her Supplemental Decision and Order, she did not apply its holding in awarding an attorney's fee in excess of $71,000.[1] The Board therefore vacated the administrative law judge's award of an attorney's fee and remanded the case to the administrative law judge, instructing her to adjust the attorney's fee awarded after taking into account the limited results obtained in this case, noting that only medical benefits were awarded. Claimant appealed the Board's decision to the United States Court of Appeals for the Third Circuit. The appeal was dismissed on the ground that it was not taken from a final order. *Barbera v. Director, OWCP,* 135 F.3d 763 (1997)(table).

As Administrative Law Judge Barnett died in the interim, the decision on remand was assigned to Administrative Law Judge Chapman (the administrative law judge). In her Decision and Order, after discussing the holdings in *Hensley*, 461 U.S. at 424, *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566 (1992), and *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992), the administrative law judge found that the award of future medical benefits constituted a "successful prosecution," so that claimant obtained at least some relief on the merits, and was thus a "prevailing party"entitled to a fee award. Decision and Order at 4. The administrative law judge concluded that the number of hours requested was reasonable, but that the hourly rates requested were excessive. She therefore reduced the hourly rate requested from $300 to $200 per hour for Mr. Broderick, and from $250 to $170 per hour for Attorney Stanton. Consequently, the administrative law judge obtained a "lodestar" figure of $46,242.50 (94.15 hours at $200 per hour, or $18,830, for Mr. Broderick, and 161.25 hours at $170 per hour, or $27,412.50, for Mr. Stanton), plus $3,750.39 in costs, for a total of $49,992.89. Having then determined that this figure must be adjusted downward in accordance with *Hensley* in light of claimant's limited success, the administrative law judge concluded that

[1]The administrative law judge merely stated with regard to *Hensley* that "[t]his case is an example of why the Supreme Court has admonished counsel not to turn motions for fee awards under fee shifting statutes into a 'second major litigation.'" [Citations omitted]. Supplemental Decision and Order at 2.

the amount of relief claimant obtained represents no more than a third of that requested, and accordingly reduced the lodestar amount of $46,242.50 to $15,414.16, plus $3,750.39 in costs, awarding a total of $19,164.55. In a Decision and Order on Motion for Reconsideration, she affirmed the reduction of the hourly rate and total amount. Claimant appeals the administrative law judge's Decision and Order and Decision and Order on Motion for Reconsideration. Employer responds, urging affirmance. Claimant replies, reiterating his arguments.

Claimant first argues that the administrative law judge erred in reducing Mr. Broderick's hourly rate to $200, and Mr. Stanton's rate to $170, as the rates requested were prevailing rates in the region and both other judges and the Board had approved such rates in other cases. Specifically, claimant argues that Judge Barnett, who presided over the case, was in the best position to observe firsthand many factors that go into an analysis of a fee award and was familiar with prevailing hourly rates in the region. Claimant asserts that Judge Chapman, with less experience, substituted her judgment for that of the trier-of-fact. Claimant alleges that Judge Chapman distorted Judge Barnett's decision in discussing claimant's counsel's experience.

We reject claimant's arguments. As the Board remanded the case for analysis in accordance with *Hensley*, the administrative law judge could reconsider the issue of an appropriate hourly rate in accordance with the standards set out in that case. In considering the hourly rate to be awarded counsel in the instant case, the administrative law judge first determined that claimant had introduced no evidence that the requested rates are the prevailing rates in their area for similar work, and it was counsel's burden to do so. Given the lack of substantiation, she reduced the rates by one-third. On reconsideration, she also noted the attorneys involved could not have been "experts" in the field in view of the great number of hours (a total of 251.4 hours) they spent preparing the case. This finding is not irrational on the facts presented. Also, contrary to claimant's argument, a determination of an appropriate hourly rate does not depend on personal observation; the administrative law judge here appropriately referred to Judge Barnett's findings. It was also within the administrative law judge's discretion to rely on the rates in published decisions and the Survey of Law Firm Economics in determining a reasonable hourly rate. *See, e.g., Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111, 120 (1999). Accordingly, claimant has not satisfied his burden of showing that the administrative law judge abused her discretion in setting the hourly rates. *See* 20 C.F.R. §702.132; *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134 (CRT) (10th Cir. 1997); *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). As the administrative law judge's determination of the lodestar amount, based on the number of hours reasonably expended by counsel times a reasonable hourly rate, is rational, it is affirmed.

We next reject claimant's allegation that the administrative law judge's finding that

he was only one-third successful is arbitrary. If claimant achieves only partial or limited success, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. *Hensley*, 461 U.S. at 435-436. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Id.* In vacating Judge Barnett's award, the Board agreed with employer that, while she cited *Hensley*, she did not apply its holding that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case, in rendering her fee determination. The administrative law judge's reduction in this case rationally reflects claimant's limited success, as claimant's primary claim for compensation was denied and he obtained only medical benefits. The fee award is therefore affirmed.

The Board in its decision affirmed the administrative law judge's finding that claimant was not entitled to a *de minimis* award. A worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997). Inasmuch as the Board considered and rejected claimant's argument on this issue in the prior appeal in this case, we need not address it again here. Our prior determination that claimant is not entitled to a *de minimis* award is the law of the case. *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).[2]

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

[2]Even though the Board did not rely on the Supreme Court's *Rambo* decision, which had not yet been issued, the Board used the "significant possibility of future economic harm" standard of the United States Court of Appeals for the Ninth Circuit in *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27 (CRT)(9th Cir. 1996), *vacated in part and remanded*, *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997), which is consistent with the standard used by the Supreme Court in its decision. While Judge Barnett's denial of a *de minimis* award may have been based on a determination that the United States Court of Appeals for the Third Circuit did not speak on the issue and the Board did not favor such awards, the Board, in affirming, relied on correct law.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge