BRB No. 00-455

RICHARD E. SLAGLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: Jan. 16, 2001
	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Order for Fees and Costs and the Order Denying Motion for Reconsideration of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Order for Fees and Costs and the Order Denying Motion for Reconsideration (98-LHC-1203, 99-LHC-2807) of Administrative Law Judge Henry B. Lasky 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).

A hearing was conducted in the instant case on January 14, 1999. After the hearing,

claimant advised the administrative law judge that the matter had been settled pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), and that the application for approval of the settlement would be submitted to the administrative law judge shortly. The administrative law judge gave the parties 30 days to submit the application. As the parties did not submit the application for approval of the agreed settlement within the time required, the administrative law judge issued an Order of Remand on June 2, 1999, and the matter was remanded to the district director for submission, review and implementation of the proposed settlement agreement if warranted. When the district director did not approve the settlement, claimant requested that the district director return the file to the administrative law judge for a decision on the merits. Before the complete record could be forwarded to the administrative law judge, a new application for approval of settlement was sent to the administrative law judge on October 28, 1999. The administrative law judge approved the settlement in the amount of $225,000. The administrative law judge ordered claimant's counsel to file a petition for fees and costs within 15 days after the filing of the Decision and Order Approving Settlement. The administrative law judge stated employer could file objections within ten days of its receipt of the fee petition, but that "any item not objected to [on a line by line basis] shall be deemed acquiesced in by employer." Decision and Order Approving Settlement at 3.

On November 18, 1999, counsel for claimant filed an affidavit for attorney's fees and costs seeking $15,937.50, representing 66.25 hours of attorney services at the hourly rate of $225 and 13.75 hours of legal assistant services at the hourly rate of $75, and $3,530.60 in costs. Employer filed objections to the fee application on November 23, 1999. In his supplemental decision, the administrative law judge reduced the requested hourly rate for the attorney's services from $225 to $200, as this rate reflects counsel's "skill and diligence as an attorney." Supplemental Order at 2. In addition, the administrative law judge denied five hours spent resolving the settlement issues, as well as 3.5 hours spent in consultation with claimant, as the administrative law judge found that this excessive time was expended due to the parties' failure to timely submit the settlement application. The administrative law judge awarded claimant's counsel a fee in the amount of $12,831.25, representing 59 hours of attorney services at the hourly rate of $200 and 13.75 hours of legal assistant services at the hourly rate of $75, and costs in the amount of $3,530.60.

On appeal, claimant contends that the administrative law judge improperly disallowed more hours than were objected to by employer. In addition, claimant contends that the administrative law judge erred in disallowing hours spent completing the settlement when the delay was not due to any unreasonable conduct by claimant or claimant's counsel. Employer responds, urging affirmance of the administrative law judge's decision.

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[1]The administrative law judge summarily denied claimant's motion for reconsideration of the fee award.

Initially, we will address claimant's contention that the administrative law judge erred in reducing the number of hours requested by five due to the delay in reaching a settlement. The administrative law judge considered the fees for services performed from February 1, 1999, and disallowed five hours as unnecessary, based on his finding that the parties unnecessarily protracted the settlement proceedings. *See* Supplemental Order for Fees and Costs at 2. Contrary to claimant's contentions, the administrative law judge is not bound by employer's statement regarding the number of hours it believes is "reasonable" to process a case. Rather, it is the administrative law judge's responsibility to review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. §702.132; *see generally National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979). The administrative law judge considered claimant's assertion that the delay in finalizing the settlement was not due to claimant's actions, but found that the "amount of time Counsel for Claimant spent resolving the settlement was not due to the presence of difficult issues, but rather the parties (sic) failure to submit the application for approval of the agreed settlement within the time required." Supplemental Order at 3. As the administrative law judge specifically considered claimant's contentions, and claimant has not established that the administrative law judge abused his discretion in finding the services performed excessive, we affirm the administrative law judge's reduction of the hours requested by five. *See generally Ezell v. Direct Labor, Inc*., 33 BRBS 19 (1999); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997).

Claimant also contends that the administrative law judge erred in reducing the number of hours requested by an additional 3.5 hours beyond those to which employer objected. Relevant to this appeal, employer alleged that the total time claimed between February 1, 1999 and November 22, 1999, should be reduced by five hours because counsel spent too much time on the settlement issues and in consultation with his client during this period. In his decision, the administrative law judge characterized employer's objection as encompassing both an objection to the excess number of hours requested on the settlement issues, and to excess contact with claimant. Supplemental Order for Fees and Costs at 3. The administrative law judge agreed that the time spent on settlement was excessive and reduced the hours requested by five, *see* discussion, *supra*, and also reduced the fee request by an additional 3.5 hours to account for excessive contact with claimant due to the unnecessarily protracted settlement procedure. *Id.*

Initially, we reject claimant's contention that the "general rule" as stated in *Ross v. Ingalls Shipbuilding*, 29 BRBS 42, 43 (1995), is that the carrier waives any objections if it does not raise them before the administrative law judge, as this case stands for the proposition that employer may not raise objections before the Board that were not raised below, and not that the administrative law judge is restricted in his review of the fee petition to the objections raised by the employer. Similarly, claimant contends that the administrative law judge stated in his Decision and Order Approving Settlement that if employer did not

object to specific services, he would "automatically allow them." This statement mischaracterizes the administrative law judge's statement, as the administrative law judge noted that any services which were not objected to on a line by line basis and in timely manner would be deemed "acquiesced in" by employer. While employer's failure to object before the administrative law judge would preclude employer from raising those issues on appeal, the failure to object does not prevent the administrative law judge from determining the reasonableness of the fee requested.

Moreover, we reject claimant's contention that he was denied due process because the administrative law judge disallowed more hours than those objected to by employer as he was deprived of the right to justify the hours. The regulations require that an attorney's fee application must be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status of each person performing such work, with the normal billing rate for such person, and the hours devoted by each such person to each category of work. 20 C.F.R. §702.132. Thus, claimant was afforded sufficient due process as he was required to submit a fully justified application to the administrative law judge for consideration. *See Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134 (CRT)(10th Cir. 1997)(attorney has property interest only in a "reasonable fee," not in the amount requested).

However, it is apparent from a reading of the administrative law judge's order that he misconstrued employer's objection on which he based his conclusion. He stated that employer objected to both five hours during the settlement process and to 3.5 hours spent in conference and on the telephone with claimant. Supplemental Order at 3. In fact, employer objected to a total of five hours including both "excessive" client contacts and the protracted settlement process in that five hours. *See* Employer/Carrier's Objections to Attorney Fees at 3. Moreover, the administrative law judge specifically found that counsel was not merely "babysitting" his client, and that the rules of professional conduct require that counsel keep his client informed. Order at 3. Thus, as these services were necessary at the time they were performed, *see Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989), and as employer did not separately object to them, we vacate the administrative law judge's finding that the fee request must be reduced by an additional 3.5 hours, and we modify the fee award to allow these 3.5 hours.

Accordingly, the administrative law judge Supplemental Order for Fees and Costs is modified to reflect an increase of 3.5 hours of attorney services at the hourly rate of $200. The administrative law judge's order is affirmed in all other respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge