BRB Nos. 11-0335
and 11-0335A

EDWARD BELL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: 01/20/2012
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney Fees and the Decision on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

William S. Vincent, Jr., W. Jared Vincent, and V. Jacob Garbin (Law Offices of William S. Vincent, Jr.), New Orleans, Louisiana, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Supplemental Decision and Order Awarding Attorney Fees and the Decision on Motion for Reconsideration (2007-LHC-1688) of Administrative Law Judge Patrick M. Rosenow 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 administrative law judge's 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on November 4, 2006, while working for employer. Employer paid claimant temporary total disability benefits from November 5, 2006, through May 21, 2007. Claimant filed a claim for permanent total disability benefits. At the hearing, claimant conceded he could work making $5-$10 per hour. The administrative law judge found that claimant's shoulder injury is compensable and that claimant is entitled to temporary total disability benefits from November 4, 2006, through October 18, 2007, and permanent partial disability benefits thereafter based on post-injury earning capacities of $293.40 per week (October 19, 2007 through February 1, 2008), $767.15 per week (February 2 through February 28, 2008), and $1,034.85 per week (thereafter). Claimant also sought medical benefits. Although the administrative law judge found that claimant's doctors were his treating physicians, he remanded the case to the district director for a finding of whether employer was prejudiced by the failure of the doctors to comply with the Act's reporting requirements, 33 U.S.C. §907(d)(2).[1] Both parties appealed this decision.

On appeal, the Board held, *inter alia*, that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's work injury aggravated a pre-existing back condition, and it reversed the administrative law judge's finding that claimant's back injury is not compensable. As claimant's back condition did not further impair him from working, the Board affirmed the administrative law judge's findings

[1]The district director found that employer was not prejudiced by the non-compliance and ordered it to pay claimant medical benefits.

regarding suitable alternate employment and post-injury wage-earning capacity.[2] *Bell v. Ceres Marine Terminals*, BRB Nos. 09-0513/A (Feb. 23, 2010).

Claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. He requested a fee of $72,015.62, representing 284.375 hours of services at hourly rates of $275 and $225, and $15,192.10 in costs. Employer filed objections, and counsel filed a response, which included a request for an additional fee for 11.75 hours of services, plus expenses. Employer filed a reply, and claimant's counsel filed another response and requested an additional fee. The administrative law judge determined that $250 and $225 are reasonable hourly rates, and that claimant was partially, not fully, successful, warranting an across-the-board reduction of 20 percent of the otherwise awardable fee. The administrative law judge then addressed each objection raised by employer, reducing or disapproving certain entries because they entailed clerical work or were otherwise not allowable. He awarded 103.58 hours at an hourly rate of $250 and 73.5 hours at an hourly rate of $225, for a total of $42,432.50 for attorney services. He also awarded $15,192.10 in expenses, which included $4,557.70 for expenses related to Dr. Stokes's services. Counsel filed a motion for reconsideration, challenging the reduction for clerical work and asserting entitlement to an additional fee for defending his fee request. The administrative law judge modified the award to reflect the approval of one specific entry which had been mistakenly reduced. Therefore, the administrative law judge awarded an additional $31.25 resulting in a total fee award of $57,655.85, representing $42,463.75 in attorney's services, plus expenses of $15,192.10, but otherwise denied the motion for reconsideration. Both parties appeal the administrative law judge's fee award.

Employer contends the administrative law judge erred in: 1) finding that it is not relieved of liability under Section 28(b), 33 U.S.C. §928(b), by virtue of its offer to abide by the decision of an independent medical examiner (IME); 2) in awarding the costs for Dr. Stokes's services; and 3) in awarding a supplemental fee to counsel for responding to its objections.[3] Claimant urges the Board to reject employer's arguments. The Director,

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[2]Employer challenged the denial of Section 8(f), 33 U.S.C. §908(f), relief. The Board vacated the denial and remanded the case for further consideration. On remand, the administrative law judge again denied the request. Decision and Order (Sept. 9, 2010). Employer appealed this decision, but the appeal was dismissed at employer's request so that it could pursue modification pursuant to Section 22, 33 U.S.C. §922.

[3]Employer also asserts that, under *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), the burden of proof of showing the accuracy, reasonableness, and necessity of a fee entry is on counsel as the proponent of the fee request but that the administrative law judge placed on it the burden of showing that its objection to a given entry should be sustained. Under the administrative law judge's

Office of Workers' Compensation Programs (the Director) responds, urging the Board to vacate the fee award because the administrative law judge failed to identify the provision under which employer is liable for counsel's fee. She urges the Board to remand the case for further consideration and does not take a position on the amount of the fee awarded. BRB No. 11-0335. Claimant cross-appeals, contending that the fee should be awarded under Section 28(a), 33 U.S.C. §928(a), and not Section 28(b), and that the reductions for clerical work and partial success were in error. Employer responds, again maintaining that it is not liable for any fee under Section 28(b) and urging rejection of claimant's remaining arguments. BRB No. 11-0335A.

Initially, we agree with the Director that the administrative law judge did not determine which provision of the Act authorizes an employer-paid fee to claimant's counsel. The administrative law judge set forth the law under both subsections (a) and (b), 33 U.S.C. §928(a), (b), but did not make a finding as to which provision applies to this case. Rather, he addressed whether claimant successfully prosecuted his case under Section 28(a) as well as whether employer could avoid fee liability Section 28(b). Generally, Section 28(a) applies when an employer declines to pay any benefits within 30 days of receiving notice of the claim, while Section 28(b) applies where the employer begins paying benefits voluntarily, and then a controversy arises regarding the claimant's entitlement to benefits. 33 U.S.C. §928(a), (b); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *W.G. [Gordon] v. Marine Terminals Corp.*, 41 BRBS 13 (2007); *see FMC Corp. v. Perez*, 128 F.3d 908, 31 BRBS 162(CRT) (5th Cir. 1997). Claimant asserts that Section 28(a) applies to this case, and employer asserts that Section 28(b) applies. As the parties disagree and findings of fact are necessary, the administrative law judge must resolve this issue before it can be determined whether the

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caption addressing excessive/unnecessary entries, he stated that the party challenging the fee has the burden of showing that the fee is unreasonable or excessive and that an employer does not meet this burden if it does not challenge specific entries or provide support for its assertions. Supp. Decision and Order at 7-8. Although the administrative law judge may have misplaced the burden, *see Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), he nevertheless addressed all of employer's objections and disapproved or reduced many entries based on these objections, and it appears he put the burden on claimant's counsel to justify his fee request. For example, with regard to at least two entries, the administrative law judge stated that "Claimant does not respond specifically to this entry and does not provide evidence" of its reasonableness, so he reduced the time requested. Supp. Decision and Order at 10. As employer does not specify how the administrative law judge's application of the law is detrimental to it, we reject employer's assertion.

requisite elements have been satisfied such that employer is liable for an attorney's fee.[4] Accordingly, we vacate the administrative law judge's award of an attorney's fee payable by employer, and we remand the case for him to determine which liability provision of Section 28 applies to this case.

In the interest of judicial economy, however, we shall address the remaining contentions of the parties. First, we address employer's assertion that it should be relieved of liability for the attorney's fee because it offered to abide by the findings of an IME pursuant to Section 28(b) and to pay benefits based on those findings.[5] Section 28(b) states in pertinent part:

> The foregoing sentence [regarding requirements for an employer's liability for a fee] shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made.

33 U.S.C. §928(b). Employer asserts that on November 2, 2007, while this case was pending before the administrative law judge, it agreed to have claimant examined by an independent medical examiner selected by the district director and be bound by the

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[4]Section 28(a) of the Act provides that the employer is responsible for a reasonable attorney's fee in addition to the compensation award when it "declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director]" and thereafter claimant utilizes the services of an attorney in the successful prosecution of his claim. Section 28(b) applies where the employer has paid or tendered compensation pursuant to Section 914(a), (b), 33 U.S.C. §914(a), (b), and a controversy develops over the amount of additional compensation due. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that the following are prerequisites to an employer's liability under Section 28(b): (1) an informal conference; (2) a written recommendation from the district director; (3) the employer's refusal to accept the written recommendation; and (4) the employee's procuring of the services of an attorney to achieve a greater award than what the employer was willing to pay after the written recommendation. *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

[5]If employer is liable for claimant's attorney's fee pursuant to Section 28(a), this portion of Section 28(b) is wholly inapplicable.

examiner's opinion. In a January 15, 2008, order the administrative law judge denied the request for an IME, because the delay in remanding the case to the district director for such an examination could not be justified. The administrative law judge found this portion of Section 28(b) inapplicable because this case involved a dispute not only over the extent of claimant's shoulder impairment but also over the compensability of claimant's back injury. The administrative law judge rejected employer's assertion that its offer was broad enough to include its agreement as to the compensability any back-related disability. As the case involved more than just a dispute over the extent of claimant's shoulder impairment, the administrative law judge found that the avoidance clause, based on the offer of paying benefits pursuant to the findings of an IME under Section 28(b), is not applicable. Supp. Decision and Order at 7.

Section 28(b) is very specific and provides that the "if the controversy relates to degree or length of disability," then an employer may avoid liability by making certain offers based on the findings of an IME. 33 U.S.C. §928(b); *see Hadel v. I.T.O. Corp. of Baltimore*, 6 BRBS 519 (1977). The administrative law judge correctly found that the controversy in this case involved not only the extent of disability related to claimant's shoulder but also the compensability of claimant's back injury. As compensability is an issue separate from those identified in this portion of Section 28(b), it was rational for the administrative law judge to find that employer cannot avoid fee liability on this basis. Therefore, we affirm the administrative law judge's decision declining to relieve employer of liability for a fee pursuant to Section 28(b), as employer has not shown there was an abuse of discretion in doing so.[6] 33 U.S.C. §928(b).

Next, we reject employer's assertion that the administrative law judge erred in holding it liable for a fee for counsel's defense of his fee petition in this case. The administrative law judge addressed the requests for a fee for responding to employer's objections and determined that the hours requested were reasonable, as they were in reply to employer's two response briefs containing 28 and 16 pages of objections respectively. Employer has not shown that the administrative law judge abused his discretion in this regard, as counsel is entitled to a reasonable fee for pursuing and defending his fee petition. *See Bogden v. Consolidation Coal Co.*, 44 BRBS 121 (2011) (*en banc*); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156 (2009); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *see generally Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998).

[6]In light of our opinion, we need not address the issue of whether the timing of employer's request for an IME evaluation was proper, as it was requested of the administrative law judge instead of the district director, or whether the Act requires a medical examination to have taken place for the avoidance provision to apply.

We also reject employer's assertion that it is not liable for expenses related to the services of Dr. Stokes, a vocational consultant. Employer contends claimant was not successful on the issue of suitable alternate employment, so the cost of Dr. Stokes's testimony, on which claimant relied, should be denied. Section 28(d) of the Act, 33 U.S.C. §928(d), states:

> In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer. . . .

The test for determining whether costs should be assessed against an employer is whether they were reasonable and necessary to protect the claimant's interests at the time they were incurred. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hardrick v. Campbell Industries, Inc.*, 12 BRBS 265 (1980); 20 C.F.R. §702.135. Further, the Board has rejected the argument that a "partial success" analysis should apply to the award of costs. *Ezell*, 33 BRBS 19. As employer does not contend that the costs for Dr. Stokes's services were not reasonable and necessary at the time they were incurred, it has shown no abuse of discretion, and we affirm the award of these costs. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003).

In his cross-appeal, counsel first contends the administrative law judge erred in disapproving a fee for work that was "clerical," as counsel performed all tasks pursuant to the rules of professional conduct in Louisiana and due to employer's filings and "threats" with sanctions. Counsel also contends he bore the costs for medical treatment and is entitled to an upward adjustment of the fee to account for the money that was advanced over the past four years. We reject counsel's argument that clerical services performed by an attorney, such as reviewing a date-stamped copy of the LS-18 Pre-Hearing Statement or sending a copy of said document to claimant, should not have been rejected or should have been awarded at a lower rate. The administrative law judge addressed each objection and counsel has not shown that he abused his discretion in finding the disallowed services to be clerical and in denying a fee for them. *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980). Further, we reject counsel's request for a delay enhancement to his fee, as that issue was not raised before the administrative law judge. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

Counsel next contends the administrative law judge erred in reducing the overall fee awarded by 20 percent to reflect claimant's partial success. We reject claimant's contention. The administrative law judge found that claimant was fully successful in defeating employer's contention that he is not disabled at all, but was only partially

successful in establishing the extent of his loss in wage-earning capacity.[7] In this regard, claimant conceded he had a post-injury wage-earning capacity of $200 to $400 per week, but the administrative law judge found that claimant had an ongoing wage-earning capacity of $1,034.85 per week. Based on the specific facts of this case, we affirm the administrative law judge's reduction of the fee award as it is based on a proper exercise of his discretion. The administrative law judge took into account the amount of the fee request and rationally found that, in view of the amount of benefits awarded, *see* 20 C.F.R. §702.132(a), a reduction of 20 percent of the allowable hours is warranted. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2010). We affirm this finding as claimant has not established an abuse of the administrative law judge's discretion in the administrative law judge's award of an attorney's fee of over $42,000.

Accordingly, the administrative law judge's award of an attorney's fee payable by employer is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7]Claimant was fully successful in establishing the compensability of his back injury and his entitlement to medical benefits by virtue of the decisions of the Board and the district director. *See generally Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981).