



BRB No. 16-0232

WARREN IOPA	)	
	)	
Claimant, to the use of	)	
	)	
JAY LAWRENCE FRIEDHEIM	)	
	)	
Claimant's Attorney-Petitioner	)	
	)	DATE ISSUED: <u>Jan. 10, 2017</u>
v.	)	
	)	
SALTCHUK-YOUNG BROTHERS,	)	
LIMITED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Striking Fee Petition and the Order Denying Reconsideration of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Jay Lawrence Friedheim (Admiralty Advocates), Honolulu, Hawaii, for claimant.

Norman R. Lezy and Marc A. Centor (Cox, Wootton, Lerner, Griffin & Hansen LLP), Honolulu, Hawaii, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel appeals the Order Striking Fee Petition and the Order Denying Reconsideration (2013-LHC-00094) of Administrative Law Judge Richard M. Clark 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 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant alleged that he injured his tailbone during the course of employment for employer as a machine operator and that he missed time from work due to this injury during the period from January 17 to February 19, 2012.<sup>1</sup> Thereafter, claimant returned to full-duty work at his usual job. After referral of the claim to the Office of Administrative Law Judges (OALJ), employer paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from January 17 to February 1, 2012. At the hearing, claimant sought compensation for additional days of temporary total disability and a continuing nominal award.

In his decision, the administrative law judge found claimant entitled to compensation for all the days he missed work and that claimant's injury reached maximum medical improvement on August 3, 2012. Decision and Order at 8-10. The administrative law judge denied claimant a nominal award, finding that he did not show a significant possibility of future economic harm. *Id.* at 10-12. The administrative law judge stated that, "[a] fee petition that comports with 20 C.F.R. §702.132 must be filed within 21 days from the date of this order." *Id.* at 12.

On June 8, 2015, claimant's counsel filed with the administrative law judge a request for an attorney's fee for work performed before the Office of Workers' Compensation Programs (OWCP). *See* Order Striking Fee Petition (Order) at 2. After counsel was apprised of the filing error, he filed a fee petition on October 27, 2015 for work performed before the administrative law judge. *Id.* Counsel sought a fee of \$27,435 and costs of \$2,396.02. *Id.* Employer moved to strike the fee petition because it was filed well after the 21-day deadline set in the administrative law judge's decision.

In his Order, the administrative law judge denied the fee counsel sought in the June 8, 2015, petition because it was comprised of work performed exclusively before the

---

<sup>1</sup> Claimant specifically alleged he missed work from January 17 to February 1, 2012; February 3 to February 6, 2012; and February 10 to February 19, 2012. Employer stipulated that claimant sustained a work injury and that he is entitled to medical benefits. Decision and Order at 2

OWCP. *Id.* at 3. The administrative law judge also denied claimant’s counsel a fee for work performed before the OALJ because the fee petition was untimely filed and counsel failed to show “excusable neglect or any other reason for failing to timely file his request for fees or otherwise seek an extension of the deadlines.” *Id.* The administrative law judge denied claimant’s motion for reconsideration. Order Denying Reconsideration at 2.

On appeal, claimant’s counsel challenges the administrative law judge’s denial of an attorney’s fee. Employer responds that the administrative law judge’s Order denying a fee is well-reasoned and should be affirmed.

In his Order, the administrative law judge analyzed employer’s motion to strike claimant’s counsel’s fee petition pursuant to 29 C.F.R. §18.32(b)(2) (2015)<sup>2</sup> and the four factors enumerated by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P’ship*, 507 U.S. 380, 395 (1996) for excusing a late filing in a bankruptcy proceeding.<sup>3</sup> The administrative law judge found that employer was prejudiced by the cost and the time required to reconstruct a file from digital storage. He also found that employer’s counsel’s memory of the details of the case receded with time, which affects the ability to recall and object to specific items in the fee petition. Order at 4. The administrative law judge found that the passing of nearly 280 days after the deadline before counsel submitted the (incorrect) OWCP fee petition is a “substantial delay.” The administrative law judge also noted that counsel did not file the correct fee petition until over a month after he was informed of the incorrect filing. In all, 15 months elapsed until the correct fee petition was filed. *Id.* The administrative law judge concluded that the length of the delay and counsel’s failure to request an extension or to

---

<sup>2</sup> Section 18.32(b)(2) provides:

(b) Extending time. When an act may or must be done within a specified time, the judge may, for good cause, extend the time:

\*\*\*

(2) On motion made after the time has expired if the party failed to act because of excusable neglect.

29 C.F.R. §18.32(b)(2) (2015).

<sup>3</sup> The factors enumerated in *Pioneer* for an excusable neglect determination are: 1) prejudice to the opposing party; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and, 4) whether the movant acted in good faith. *Pioneer Inv. Services*, 507 U.S. at 395.

explain the delay to the administrative law judge's satisfaction "weighs strongly" against him. *Id.* at 5. The administrative law judge concluded claimant's counsel did not show "excusable neglect" for the late filing. The administrative law judge thus struck the fee petition, recognizing the harshness of the sanction.

Neither the Act nor the regulations governing fee petitions to an administrative law judge specifies a time period for filing a fee petition.<sup>4</sup> 33 U.S.C. §928; 20 C.F.R. §702.132; *see Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997). However, Section 702.132(a), 20 C.F.R. §702.132(a), states that the fee application "shall be filed . . . within the time limits specified by . . . [the] administrative law judge. . . ." *See generally Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d 81 (6th Cir. 1985).

In his July 31, 2014 decision, the administrative law judge specified that claimant's counsel must file an attorney's fee petition within 21 days, i.e., by August 21, 2014. Claimant's counsel, however, did not file any petition for an attorney's fee in this case until June 8, 2015, and he did not file the proper fee petition until October 27, 2015. Additionally, the administrative law judge found that claimant's counsel never requested an extension of time for filing his fee petition in this case. Order at 5. The administrative law judge further found that "none of [claimant's counsel's] late filings, even construing them liberally, amount to such a request or demonstrate any reason that prevented him from adhering to the timeframe in the July 31 [2014] Order or requesting an extension." *Id.*; 29 C.F.R. §18.32(b).

Claimant's counsel has failed to establish that the administrative law judge abused his discretion in this matter. *Bankes*, 765 F.2d 81. The administrative law judge recognized the harshness of the sanction imposed, *see Paynter v. Director, OWCP*, 9 BLR 1-190 (1986) (Ramsey, C.J., dissenting), but his decision is rationally based on

---

<sup>4</sup> The regulation governing fee petitions to the Board states that:

Within 60 days of the issuance of a decision or non-interlocutory order by the Board, counsel or, where appropriate, representative for any claimant who has prevailed on appeal before the Board may file an application with the Board for a fee. Where the Board remands the case and the administrative law judge on remand issues an award, a fee petition may be filed within 60 days of the decision on remand. In the event that a claimant who was unsuccessful before the Board prevails on appeal to the court of appeals, his or her representative may within 60 days of issuance of the court's judgment file a fee application with the Board for services performed before the Board.

consideration of relevant factors. Consequently, as the administrative law judge reasonably found that claimant's counsel failed to show excusable neglect for filing his fee petition well beyond the 21-day time limit imposed by the administrative law judge in his July 31, 2014 decision, we affirm the administrative law judge's decision to strike the fee petition as untimely. 20 C.F.R. §702.132; 29 C.F.R. §18.32(b) (2015). Consequently, we affirm the administrative law judge's denial of an attorney's fee.

Accordingly, the administrative law judge's Order Striking Fee Petition and the Order Denying Reconsideration are affirmed.

SO ORDERED.

---

JUDITH S. BOGGS  
Administrative Appeals Judge

---

RYAN GILLIGAN  
Administrative Appeals Judge

---

JONATHAN ROLFE  
Administrative Appeals Judge