U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0283
and 18-0283A

STEVEN M. BROWN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/23/2019
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
ALLIED WORLD NATIONAL ASSURANCE COMPANY c/o BROADSPIRE	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney Fees and Costs and the Order Granting Reconsideration of Award of Attorney's Fees and Costs of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Howard S. Grossman and Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

Frank J. Sioli and Diego J. Arredondo (Sioli Alexander Pino), Miami, Florida, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals, and employer cross-appeals, the Supplemental Decision and Order Awarding Attorney Fees and Costs and the Order Granting Reconsideration of Award of Attorney's Fees and Costs (2016-LDA-00568) of Administrative Law Judge Paul C. Johnson, Jr., 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, based on an abuse of discretion or not in accordance with law. *See, e.g., Conoco Inc. v. Director, OWCP [Prewitt],* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

On or about July 13, 2014, claimant sustained injuries to his neck, back and both shoulders while working for employer. Employer voluntarily paid benefits. On October 23, 2015, employer controverted the claim because claimant would not attend a medical examination arranged by employer. Claimant filed a claim for benefits on January 20, 2016. An informal conference was held on February 17, 2016, and a Memorandum of Informal Conference was issued on February 24, 2016, recommending that employer reinstate its payment of temporary total disability compensation from October 23, 2015 and continuing and authorize medical treatment. On March 8, 2016, employer controverted the recommendation that it pay claimant temporary total disability compensation for the period from October 23 through December 13, 2015. Following the transfer of the claim to the Office of Administrative Law Judges, a formal hearing was scheduled for May 10, 2017. One day before the scheduled hearing, the parties reached an agreement resolving all disputed issues. On May 12, 2017, the administrative law judge issued an Order Approving Stipulations/Compensation Order, awarding claimant ongoing temporary total disability and medical benefits. 33 U.S.C. §§907; 908(b).

Claimant's counsel subsequently submitted a petition to the administrative law judge requesting $44,288.81 in an attorney's fee and costs. This figure represents 58.45 hours of lead counsel time at $450 per hour ($26,302.50); 35.7 hours of associate counsel time at $275 per hour ($9,817.50); 22.4 hours of paralegal time at $140 per hour ($3,136); and $5,032.81 in costs. Employer objected to the fee petition.

The administrative law judge awarded a fee based on a rate of $400 per hour for lead counsel time, $250 per hour for associate counsel time, and $100 per hour for paralegal time. He reduced lead counsel's time by four hours and paralegal time by 5.7 hours, and

disallowed $2,170.18 in costs. Accordingly, the administrative law judge awarded claimant's counsel $32,375 in attorney's fees and $2,862.63 in costs, payable by employer.

Claimant's counsel moved for reconsideration, and also filed a supplemental petition seeking an additional attorney's fee of $13,134.14, representing 27.9 hours of lead counsel time at $450 per hour ($12,555); 1.5 hours of associate counsel time at $275 per hour ($412.50); .4 of an hour of paralegal time at $140 per hour ($56); and $110.64 in costs, for work performed preparing and defending claimant's counsel's fee petition. Employer filed objections.

In his Order Granting Reconsideration, the administrative law judge reaffirmed the hourly rates previously awarded and reinstated .1 of an hour of lead attorney time previously disallowed. Consequently, he awarded claimant's lead counsel an additional fee of $40. Additionally, he awarded claimant's counsel the costs associated with obtaining deposition transcripts. With regard to counsel's supplemental fee request, the administrative law judge reduced lead counsel's time by 7.35 hours, associate counsel's time by 1.5 hours, and paralegal time by .3 of an hour, and disallowed all of the costs requested. Accordingly, the administrative law judge awarded claimant's counsel an additional fee of $8,230, payable by employer.

On appeal, claimant's counsel challenges only the hourly rate awarded for lead counsel's services and the administrative law judge's denial of the transportation expense associated with the May 10, 2017 formal hearing. Employer responds, urging affirmance on these issues.[1] BRB No. 18-0283. In its cross-appeal, employer challenges its liability for claimant's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b), and, alternatively, the amount of the fee to which counsel is entitled. Claimant filed a response brief, to which employer replied. BRB No. 18-0283A.

[1] In its response brief, employer contends claimant's appeal was not timely filed because his October 3, 2017, motion for reconsideration to the administrative law judge was not filed within 10 days of the date the district director filed the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Costs on September 21, 2017. *See* 20 C.F.R. §802.206(a), (b)(1). Because the administrative law judge addressed the motion for reconsideration on the merits, claimant's appeal to the Board, which was filed within 30 days of the date the Order on Reconsideration was filed by the district director, is timely. *See Bowman v. Lopereno*, 311 U.S. 262 (1940); *Zumwalt v. Nat'l Steel & Shipbuilding Co.*, 52 BRBS 17 (2018).

Employer, in its cross-appeal, challenges the administrative law judge's determination that it is liable for claimant's counsel's attorney's fee pursuant to Section 28(b), 33 U.S.C. §928(b),[2] because it accepted "most" of the claims examiner's recommendations and, following that acceptance, only a "minimal" period of compensation remained in dispute between the parties. Generally, Section 28(b) applies when the employer pays benefits voluntarily, a controversy arises regarding the claimant's entitlement to additional benefits, and claimant obtains a greater award after employer refused to pay benefits recommended by the district director.[3] *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Davis v. Eller & Co.*, 41 BRBS 58 (2007).

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[2] Section 28(b) states:

> If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [sic] to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely on the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation . . . . In all other cases any claim for legal services shall not be assessed against the employer or carrier.

33 U.S.C. §928(b). Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced "deputy commissioner" used in the statute.

[3] The parties agree that Section 28(a), 33 U.S.C. §928(a) is not applicable in this case. Employer paid benefits voluntarily and then stopped paying and controverted the claim. Thereafter, claimant filed a formal claim for benefits on January 20, 2016, which the district director served on employer on January 21, 2016. Employer alleges it resumed payment of benefits to claimant on February 19, 2016, after the informal conference and before the written recommendation was issued. Thus, employer contends it paid benefits within 30 days of its receipt of the claim, thereby precluding its liability for counsel's fee

In this case, it is undisputed that: 1) an informal conference was held on February 17, 2016; 2) a written recommendation was made by the claims examiner on February 24, 2016; 3) employer filed a LS-207 Notice of Controversion on March 8, 2016, challenging the recommendation that it pay claimant temporary total disability benefits for the period of October 23 through December 13, 2015; and 4) claimant's attorney thereafter obtained temporary total disability benefits for this disputed period through resort to the adjudication process.[4] Thus, as the four preconditions were fulfilled, we affirm the administrative law judge's determination that employer is liable for an attorney's fee pursuant to Section 28(b).[5] *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Davis,* 41 BRBS 58; *Anderson v. Associated Naval Architects,* 40 BRBS 57 (2006). The fact that employer accepted some of the written recommendations does not negate its refusal of the recommendation to pay benefits from October 23 through December 13, 2015.

Employer next contends that any fee awarded to claimant's counsel must be based solely on the difference between the amount of compensation obtained by claimant and the amount previously tendered by employer. Employer thus asserts that any fee awarded must be limited to a fraction or percentage of the controverted compensation amount claimant obtained for the period of October 23, 2015 to November 1, 2016.

In addressing the compensability of the services claimed, the administrative law judge discussed employer's objections at length and rejected them. *See* Supplemental Decision and Order at 5 – 6, 8 – 11. He found that claimant was entitled to raise new issues before him and that claimant successfully prosecuted these issues. He stated that claimant was entitled to seek an ongoing award of benefits at a higher average weekly wage than

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pursuant to Section 28(a). There is no documentation supplied to support employer's payment as of February 19, 2016, as there is with other assertions. Nevertheless, as the parties agreed before the administrative law judge and reiterate on appeal that Section 28(a) is not applicable, we will proceed to address employer's Section 28(b) contention.

[4] Employer concedes that these four elements were met in this case. *See* Emp. Cross-Appeal Reply Br. at 13.

[5] The administrative law judge properly found that employer's reliance on *Flowers v. Marine Concrete Services, Inc.*, 19 BRBS 162 (1986), is misplaced since, unlike *Flowers* where claimant did not obtain greater compensation than employer agreed to pay, claimant in this case obtained greater compensation following employer's controversion of the claims examiner's written recommendation.

employer was paying, irrespective of whether these issues were addressed by the district director.[6] Thus, he awarded claimant's counsel a fee for these services.

We reject employer's contention that the administrative law judge erred. The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has not addressed whether the issues on which a claimant succeeds before an administrative law judge must have been the subject of the district director's written recommendation in order for fee liability to shift to employer. *See generally Pittsburgh & Conneaut Dock Co. v. Director, OWCP [Bordeaux]*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *R.S. [Simons] v. Virginia Int'l Terminals*, 42 BRBS 11 (2008). The administrative law judge permissibly held employer liable for a fee for all reasonable and necessary work on the issues on which claimant succeeded and we affirm his decision in this regard.

Next, we address the challenge of both claimant's counsel and employer to the hourly rate of $400 awarded to claimant's counsel. Claimant's counsel asserts the administrative law judge erred in reducing his requested hourly rate, while employer avers the evidence supports an hourly rate lower than that calculated by the administrative law judge. For the reasons that follow, we vacate the administrative law judge's hourly rate finding with respect to claimant's lead counsel.[7]

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The Court also has held that an

[6] The administrative law judge issued two interlocutory orders denying employer's motion to remand the case on the ground that the additional issues claimant raised were not ripe for adjudication. The administrative law judge denied employer's motion, stating that claimant was entitled to an order on the issues raised as employer "has started and stopped compensation, and varied the compensation rate, during the pendency of this claim. Claimant is not required to be subjected to these vagaries; he is entitled to know, one way or another, whether he is entitled to benefits. Indeed, the law requires that I issue a compensation order or deny the claim." May 3, 2017 Order at 3.

[7] We affirm, as unchallenged on appeal, the hourly rates awarded to claimant's associate counsel and paralegal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also Perdue*, 559 U.S. at 551. Thus, in this case, once the administrative law judge determined that South Florida is the relevant community for determining counsel's hourly rate, the burden was on claimant's counsel to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see also Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

In support of his hourly rate request, claimant's counsel presented his own affidavit and that of another attorney, as well as the 2016 Real Rate Report and a prior administrative law judge decision awarding him an hourly rate of $450. Employer, in objecting to counsel's requested hourly rate, presented prior fee awards to claimant's counsel and other longshore attorneys. While acknowledging the parties' evidence, the administrative law judge relied solely on "the $325.00 hourly rate routinely awarded by this office in 2009," Supplemental Decision and Order at 7, adjusted by the changes in the Consumer Price Index, to award claimant's lead counsel an hourly rate of $400.[8] *Id.* In his Order Granting Reconsideration, the administrative law judge stated that in determining a reasonable hourly rate he had considered, inter alia, both "the hourly rate routinely awarded for work before this office . . . [and] the prevailing rate for the Port of Miami." *See* Order Granting Recon. at 4.

We cannot affirm the $400 per hour award. While prior fee awards under the Act may constitute "inferential evidence" of a prevailing market rate in cases arising under the Act, *see Stanhope v. Electric Boat Corp.*, 44 BRBS 107 (2010), the administrative law judge was not presented with any evidence establishing that $325 per hour was awarded to longshore attorneys in 2009. Moreover, the administrative law judge did not cite any cases wherein an hourly rate of $325 was awarded in 2009, explain why it remains appropriate to use 2009 rates as the base rate, *see* n.8, *supra*, or cite any evidence or cases addressing the prevailing rate for Miami. The administrative law judge's conclusion, therefore, is arbitrary, as we are unable to review the basis for his finding. Consequently, we conclude that, at present, the administrative law judge's fee award cannot be affirmed. We vacate the administrative law judge's award of a $400 hourly rate for lead counsel and remand the case for further consideration of this issue.

[8] While an administrative law judge need not re-analyze the hourly rate issue in every case, he must do so with sufficient frequency such that a fee award reflects current, rather than historical, market conditions. *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1055, 43 BRBS 6, 9(CRT) (9th Cir. 2009).

Claimant's counsel also challenges the administrative law judge's denial of reimbursement for the cost of cancelled air travel to the formal hearing. Claimant's counsel asserts the administrative law judge did not consider that the scheduled formal hearing was cancelled pursuant to a settlement that was reached by the parties only one day before the hearing.

We agree that the administrative law judge's denial of reimbursement for this specific charge cannot be affirmed. In denying reimbursement, the administrative law judge summarily stated that "it is not reasonable for Claimant's counsel to hold Employer responsible for air travel which did not occur." *See* Supplemental Decision and Order at 12. On reconsideration, the administrative law judge expounded on his reasoning by finding that claimant's counsel had not explained "why the [cancelled] ticket was not purchased until the last minute."[9]

Claimant's counsel is entitled to reimbursement of reasonable travel expenses where the travel is necessary, reasonable, and in excess of that normally considered to be part of overhead. *See B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009); *Griffin v. Virginia Int'l Terminals, Inc.*, 29 BRBS 133 (1995); *see* Order Granting Recon. at 3. Claimant's counsel's office in located in Boca Raton, Florida, and the formal hearing was scheduled to be held in Columbia, South Carolina, on May 10, 2017. The parties requested that the formal hearing be cancelled only one day before that hearing was scheduled to be held. Consequently, the issue to be addressed by the administrative law judge is whether the purchase of a plane ticket to attend the scheduled hearing was necessary when counsel purchased it and whether the amount is reasonable.[10] *See generally Brinkley v. Dep't of the Army/NAF*, 35 BRBS 60 (2001) (Hall, C.J., dissenting on other grounds); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). We therefore vacate the administrative law judge's denial of this charge and remand the case for the administrative law judge to address the compensability of this cost. *See generally Holloway*, 43 BRBS at 135; *Brinkley*, 35 BRBS at 64.

[9] The cost of the ticket in question is $704.30.

[10] We are unable to determine from the record when the ticket in question was purchased.

Accordingly, the administrative law judge's $400-hourly rate award to claimant's lead counsel and his denial of travel expenses to the cancelled May 10, 2017 formal hearing, are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Costs and the Order Granting Reconsideration of Award of Attorney's Fees and Costs are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge