BRB No. 93-2448S

JANNIE G. VEAL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joseph J. Lowenthal, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for the self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (92-LHC-1593) of Administrative Law Judge C. Richard Avery 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).[1] 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).

[1]Claimant initially appealed the administrative law judge's Decision and Order in this case, and employer initially filed a protective cross-appeal. BRB Nos. 93-2448, 93-2448A. Both of these appeals were ultimately dismissed by the Board by Order dated June 30, 1994. The only remaining appeal is that of the fee award.

On February 18, 1988, claimant suffered a severe burn injury to her right arm while working for employer as a welder. Claimant attempted to return to light duty and regular duty work for employer on several occasion, but was ultimately terminated for failure to report to work on August 24, 1989. Claimant sought temporary total disability compensation through April, 1991[2] and permanent partial disability benefits thereafter. Employer controverted the claim, asserting that no compensation was due after June 6, 1989, because claimant returned to work on that date and had no physical impairment rating sufficient to establish entitlement under the schedule. 33 U.S.C. §908(c)(1)-(19).

The administrative law judge awarded claimant temporary total disability benefits from February 18, 1988 to July 27, 1992, and permanent partial disability benefits thereafter for a one percent loss of use of her right arm under Section 8(c)(13) and (19) of the schedule, 33 U.S.C. §908(c)(3),(19). The administrative law judge also determined that claimant was entitled to reimbursement for the medical treatment provided by Dr. DiVincenti and to future medical benefits. The administrative law judge, however, denied the remaining medical expenses claimed. *See* 33 U.S.C. §907(b),(d).[3]

Claimant's counsel thereafter submitted a fee petition for work performed before the administrative law judge, requesting $1,147, representing 13.50 hours at $85 per hour for services performed in 1989; $4,475, representing 44.75 hours at $100 per hour for 1990; $3600, representing 36 hours at $100 per hour for work performed in 1991; $5,375, representing 53.75 hours at $100 per hour for work performed in 1992; and $18,975,

[2]Employer voluntarily paid claimant temporary total disability benefits during several of claimant's absences from work.

[3]Employer filed a motion for reconsideration of the administrative law judge's initial Decision and Order, arguing that the administrative law judge had erred in neglecting to allow employer a credit for $8,000 in compensation previously paid which claimant had agreed employer was entitled to receive. In a dated August 23, 1993, the administrative law judge granted employer's motion.

representing 126.5 hours at $150 per hour for work performed in 1993, plus expenses totalling $7,146.80. Claimant's counsel thus requested a total fee of $33,597 plus expenses totalling $7,147.80.[4]

The administrative law judge issued a Supplemental Decision and Order Granting Attorneys Fees on March 7, 1994. After considering the attorney's fee petition and employer's objections thereto, he disallowed the 98.5 hours requested prior to the February 27, 1992, referral date, found that an hourly rate of $90 was reasonable and appropriate given that the case was not complex, and disallowed 4 hours claimed on August 31 and September 1, 1993, for preparation of counsel's fee petition. With regard to the remainder of the hours requested, the administrative law judge indicated that while he was unwilling to find that the tasks were not in some way related to the preparation of this claim for trial because employer has offered no proof in support of its objections, the results achieved did not warrant a fee award for 167.75 hours. The administrative law judge noted that claimant's success in pursuing her claim was limited in that while she managed to obtain a greater amount of temporary total disability benefits than that voluntarily paid by employer, she was unsuccessful as to some large medical bills, and was only awarded 2.4 weeks of permanent partial disability benefits. Accordingly, he determined that a fee of $9,000, representing 100 hours at $90 per hour was reasonable and appropriate. With regard to the costs claimed, the administrative law judge found that employer was relieved of liability for the $4,881 in expenses claimed for Dr. Osborne's evaluation by virtue of his original decision but found the remaining $2,265.80 in costs claimed were compensable. Employer appeals the administrative law judge's fee award on various grounds. Claimant has not responded to employer's appeal.

Initially, we reject employer's assertion that the fee petition is not sufficiently specific to support the fee award, as we conclude that the fee petition substantially complies with the regulatory requirements of 20 C.F.R. §702.132. *See generally National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979).

Employer's assertion that the fee awarded by the administrative law judge is excessive is also rejected. Employer maintains that the $9,000 fee award is unreasonable given the limited success of the litigation and is not reasonably commensurate with the necessary work done, the quality of the representation provided, the complexity of the legal issues involved, and the amount of compensation gained. Employer specifically argues that excessive and undocumented amounts of time were claimed for drafting and reviewing correspondence, for research, for telephone calls, and for deposition, hearing, and trial

[4]The administrative law judge erroneously stated in his Supplemental Decision and Order that counsel had requested 270.25 hours of services at $150 per hour.

preparation.

We affirm the administrative law judge. The administrative law judge specifically considered the lack of complexity of the case and the quality of the representation in determining the applicable hourly rate. Moreover, after considering the amount of benefits claimant obtained, the degree of claimant's success, and the quality of the representation provided, he found that the overall fee requested was excessive and that counsel should have been more conservative in the time she expended given the state of the evidence. In reducing the fee to $9,000, the administrative law judge found that a higher fee would ignore the outcome of the litigation and the excessive amount of time spent on research, telephone calls, and review of items. The administrative law judge thus considered the factors cited by employer in entering the fee award and substantially reduced the fee accordingly.

As employer's assertions on appeal are insufficient to establish an abuse of discretion by the administrative law judge in this regard, we decline to further reduce or disallow the hours awarded by the administrative law judge. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). Inasmuch as counsel was successful in obtaining more than $34,000 in temporary total disability compensation, $558.48 in scheduled permanent partial disability compensation, and past and future medical benefits, the $9,000 fee he awarded is clearly not unreasonable.

Employer also argues that the administrative law judge erred in holding it liable for the costs incurred in association with the evaluations/depositions performed by Drs. Bagalman, Ross, Stamps, and DiVincenti pursuant to Section 28(d) of the Act, 33 U.S.C. §928(d). Employer argues initially that inasmuch as the administrative law judge determined that employer was relieved of liability for the cost of the Dr. Osborne's evaluation by virtue of his decision on the merits which found Dr. Osborne's treatment unauthorized, he should also have disallowed the costs claimed for Dr. Bagalman's report and deposition and Dr Ross' deposition under the same rationale. Moreover, employer contends that the administrative law judge erred in awarding the $757.50 claimed for the evaluation and report of Dr. Stamps because this expense was not presented as part of claimant's case in chief and no bill was attached to the fee petition.[5] Finally, employer challenges the administrative law judge allowance of $200 in costs for a report by Dr. Frank DiVincenti.

[5]Although employer also contends that the cost of a vocational rehabilitation evaluation can be likened to an economic consultant's projection of claimant's wages, which was held not to be recoverable in *Smelcher v. National Steel & Shipbuilding, Co.*, 6 BRBS 215 (1977), we decline to address this argument as it was not adequately briefed. *See Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

We reject employer's arguments. Where, as here, a claimant prevails and benefits are awarded, a fee for a physician's report submitted in support of claimant's case may be awarded pursuant to Section 28(d). *See Luter v. Newport News Shipbuilding & Dry Dock Co.,* 19 BRBS 103 (1986). Moreover, an administrative law judge may not deny the costs and fees of a particular witness merely because the claimant was not ultimately successful on the particular issue for which the witness's evidence was offered. *See Lorenz v. FMC Corp.,* 12 BRBS 592 (1980). The relevant inquiry is whether claimant's counsel reasonably believed the witness was necessary to adequately protect claimant's interest at the time the cost was incurred, and whether the cost claimed is reasonable. *See Hardick v. Campbell Industries*, 12 BRBS 265 (1980)(S. Smith, J., dissenting). Inasmuch as the cost of a physician's report or deposition is generally recoverable and the standard for determining the compensability of Section 28(d) costs differs from that for determining the compensability of claimant's medical expenses under Section 7, employer has failed to establish that the administrative law judge's decision to allow all costs associated with the opinions and deposition testimony provided by Drs. Bagalman and Ross constitutes an abuse of discretion. *See generally Topping v. Newport News Shipbuilding & Dry Dock Co.,* 16 BRBS 40, 44 (1983).

We further conclude that the administrative law judge's award of costs for the vocational report and evaluation of Dr. Stamps was proper. Although claimant was only ultimately awarded temporary total disability benefits and permanent partial disability benefits for a scheduled injury, these costs are compensable because she had also claimed permanent partial disability compensation based on loss in wage-earning capacity; claimant's counsel thus could reasonably view these costs as necessary to establish entitlement at the time the services were performed. *See Hardick*, 12 BRBS at 269-270. The decision to award these costs despite the fact that the actual bills were not submitted was within the administrative law judge's discretion as such is not required under the applicable regulation, 20 C.F.R. §702.132.

Lastly, we reject employer's argument that the administrative law judge erred in awarding $200 in costs for a report prepared by Dr. Frank DiVincenti. Employer argues that this cost is not properly recoverable because the only medical report of Dr. DiVincenti of which employer is aware was dated September 23, 1988, prior to the time period claimed in the fee petition. We note, however, that the administrative law judge's Decision and Order on the merits refers to a letter dated March 26, 1990, in which Dr. DiVincenti described having seen claimant on April 26, 1989. On these facts, employer has failed to establish that the administrative law judge's allowance of this cost constituted an abuse of his discretion. *See generally Topping*, 16 BRBS at 44.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge