

MARCO TARABOCCHIA)
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 Claimant-Respondent)
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 v.)
)
 INTERNATIONAL TERMINAL) DATE ISSUED:
 OPERATING COMPANY,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Attorney's Fees on Remand of Anastasia T. Dunau, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Cornelius V. Gallagher (Linden & Gallagher), New York, New York, for self-insured employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Attorney's Fees on Remand (91-LHC-0062) of Administrative Law Judge Anastasia T. Dunau 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).

This is the third time that this case has been before the Board on appeal of the attorney's fee. To briefly recapitulate, claimant injured his neck, right shoulder, and lower back on June 24, 1978. In her Decision and Order dated June 2, 1982, the administrative law judge awarded claimant compensation for permanent total disability plus interest on past due benefits; she also granted employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Subsequently, after noting that no objections to claimant's fee petition had been filed by employer, the administrative law judge awarded claimant's attorney a fee of \$13,000 plus expenses of \$1,000. Employer appealed the fee to the Board.

In its first decision, the Board remanded the case to the administrative law judge with instructions to consider the objections to the fee petition filed by employer on August 3, 1982. Additionally, the administrative law judge was directed to provide an explanation for the bonus which the administrative law judge awarded claimant's attorney in addition to the fee based on the number of hours at an hourly rate.¹ *See Tarabocchia v. International Terminal Operating Co.*, BRB No. 83-0634 (Feb. 18, 1987)(unpublished)(Decision I).

On remand, in an order dated April 23, 1987, the administrative law judge noted the Board's instructions and employer's objections, which had been submitted but which had not been brought to her attention. However, the administrative law judge also noted that employer filed its objections on August 3, 1982, approximately two weeks after they were due; thus, she concluded that employer's objections had been untimely filed. *See* Decision on Remand I at 4. Finding no excuse for employer's delay in filing its objections, the administrative law judge refused to consider them. Accordingly, the administrative law judge reinstated her original fee award. *See* Decision on Remand I at 4. Employer again appealed to the Board.

In its second decision, the Board affirmed the administrative law judge's refusal to consider employer's objections to the hourly rate and the number of hours requested; accordingly, the Board affirmed the administrative law judge's award of an attorney's fee of \$8,187.50, representing 32.75 hours of services performed at a rate of \$250 per hour. However, as the administrative law judge had awarded an attorney's fee of \$13,000, the Board determined that, in the absence of an explanation regarding the amount awarded above the fee for the time specifically set forth in counsel's fee petitions, it could not affirm the award. Accordingly, the Board vacated the awarded bonus and again remanded the case to the administrative law judge for an explanation of the additional \$4,812.50 awarded. *See Tarabocchia v. International Terminal Operating Co.*, BRB No. 87-1297 (Aug. 28, 1990)(unpublished)(Decision II).

In her Decision and Order Awarding Attorney's Fees on Remand dated September 12, 1991 (Decision on Remand II), the administrative law judge affirmed her decision to award a bonus to claimant's attorney. The administrative law judge stated that the instant case was a complex and close one, that the results obtained were extremely good, that claimant's counsel was "one of the most able claimant's attorneys," and that claimant's attorney's expending only 32.25 hours in obtaining such lucrative results for his client indicated his expertise. *See* Decision on Remand II at 4. The administrative law judge further noted that 8 1/2 years had passed since she had reconsidered counsel's fee request and that claimant's attorney had subsequently died while waiting for his fee. *See* Decision on Remand II at 3. Accordingly, the administrative law judge reinstated her award to claimant's attorney of a fee of \$13,000, plus \$1,000 in expenses.

On appeal, employer again contends that the administrative law judge improperly awarded

¹Claimant's attorney, in his fee petitions, requested a fee of \$8,187.50, representing 32.75 hours for services performed at an hourly rate of \$250.

claimant's counsel a bonus of \$4,812.50. Specifically, employer avers that the lack of complexity in this case does not merit the excessive bonus awarded because the only issue controverted was further causally related disability which, employer alleges, is a basic routine issue which requires no exceptional effort on the part of an experienced attorney. Further, employer contends that the award of an hourly rate of \$250 for services performed in 1981 adequately compensated claimant's attorney. Claimant responds, urging affirmance.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which states, in relevant part, that:

...[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the complexity of the legal issues involved and the amount of benefits awarded... .

20 C.F.R. §702.132. The Board has recognized that it is within the discretion of the administrative law judge to award a fee in excess of the amount arrived at by multiplying the hourly billing rate times the number of compensable hours. *See Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986), *aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988); *Muscella*, 12 BRBS at 274. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In her second Decision on Remand, the administrative law judge addressed the relevant factors of complexity, the size of claimant's award, and claimant's counsel's expertise when setting forth her rationale for awarding counsel a fee higher than the one requested. Specifically, the administrative law judge found the case required great expertise on the part of claimant's attorney since the issues of claimant's continuing physical and psychological disabilities were close ones.² Although on appeal employer argues that the issues presented in this case were routine, it has set forth no specifics in support of that contention. We, therefore, decline to disturb the administrative law judge's determinations regarding the complexity of this case.

The administrative law judge next noted that substantial benefits were received by claimant as a result of his attorney's efforts. *See* Decision on Remand II at 4. In 1981, claimant, who was 57 years old at the time, received an ongoing permanent total disability award of \$237.07 per week, as well as \$11,457.11 in penalties and interest. On appeal, employer does not contend that the benefits received by claimant were not substantial. Thus, we decline to disturb the administrative law judge's finding regarding the substantial nature of the benefits received by claimant.

Further, the administrative law judge specifically stated that "to achieve [claimant's permanent total disability award] in a difficult case with only 32.25 hours work bespeaks of a great deal of expertise on the part of claimant's counsel." Decision on Remand II at 4. Employer

²Regarding the complexity of the case at bar, the administrative law judge noted that, despite the passage of time, she still remembered the formal hearing. *See* Decision on Remand II at 4, n.4.

concedes that the bonus awarded by the administrative law judge

is not subject to attack on the basis of the quality of representation. [Claimant's counsel] was well qualified to perform legal work under the Act, as evidenced by his reputation and skilled prosecution of longshore claims.

See Employer's brief at 3. Thus, employer agrees with the administrative law judge on the issue of the expertise demonstrated by claimant's counsel in this case.

Lastly, in reinstating her award to claimant's counsel, the administrative law judge recognized the long delay that has transpired since she initially awarded counsel a fee; specifically, it is now almost 13 years since the award was entered on behalf of claimant. In *Missouri v. Jenkins*, 491 U.S. 274 (1989), the United States Supreme Court held that in considering a fee award rendered under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, enhancement for delay in payment is, where appropriate, part of a "reasonable attorney's fee." *Jenkins*, 491 U.S. at 282. The Court reasoned that fees are to be based on market rates for services rendered, and compensation received by counsel several years after services are rendered is not equal to the same dollar amount received for services promptly paid when performed. Thus, there must be "an appropriate adjustment for delay in payment - whether by application of current rather than historic rates, or otherwise..." *Id.* at 284. See also *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 13 BRBS 2-364 (1990); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982). Moreover, in *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638 (1992), the Court specifically stated that its case law construing what is a "reasonable fee" under the various federal fee-shifting statutes applies uniformly to all of them. *Dague*, 505 U.S. at 559, 112 S.Ct. at 2641.

In the case at bar, the administrative law judge fully addressed and explained the basis for her decision to award counsel a fee in excess of the hours and rates documented by counsel. The administrative law judge has set forth a detailed explanation of the factors which she considered in awarding the fee, and employer has set forth no arguments which discredit the administrative law judge's interpretation of the case. It is well-settled that the party challenging the reasonableness of an attorney's fee award bears the burden of showing that the award was contrary to law or was arbitrary and capricious or an abuse of discretion. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980). In the instant case, employer has failed to meet its burden. Accordingly, based upon employer's failure to meet its burden as well as the administrative law judge's complete discussion of the circumstances present in the instant case, we hold that the administrative law judge did not abuse her discretionary authority in awarding counsel a fee in excess of the sum documented by counsel. See *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). We therefore affirm the fee awarded to counsel by the administrative law judge.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge