

KEITH MIERNICKI)
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 Claimant-Respondent)
)
 v.)
)
 DULUTH, MISSABE & IRON RANGE)
 RAILWAY COMPANY)
) DATE ISSUED:
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

James D. Robinson, Jr., Duluth, Minnesota, and James A. Sage (Petersen, Sage & Cuzzo, P.A.), Duluth, Minnesota, for the claimant.

D. Edward Fitzgerald (Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A.), Duluth, Minnesota, 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's Fees (90-1311) of Administrative Law Judge Charles W. Campbell 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who worked as an electrician for employer in 1981 and 1982, retained the services of attorney James D. Robinson, Jr., to assist him in pursuing a claim for occupational hearing loss benefits under the Act. Subsequently, attorney James A. Sage was substituted as the attorney of record. In his decision on the claim, which was controverted by employer, the administrative law judge awarded claimant more than \$10,000 in disability compensation for a 13 percent binaural hearing impairment pursuant to 33 U.S.C. §908(c)(13)(B), based upon an average weekly wage of \$624.94, as well as past and future medical expenses.

Thereafter, Mr. Robinson sought an attorney's fee of \$1,585.50, representing 15.1 hours at \$105 per hour, plus \$92.10 in expenses for work performed before the administrative law judge. Mr.

Sage, who succeeded Mr. Robinson after he withdrew from the case, also requested a fee of \$5,725, representing 45.8 hours at \$125 per hour, plus expenses of \$1,141. Employer objected to both fee petitions.

In a Supplemental Decision and Order, the administrative law judge awarded Mr. Robinson a fee of \$1,491, representing 14.2 hours at an hourly rate of \$105, plus expenses of \$92, and awarded Mr. Sage the entire fee he requested. Employer appeals the fee awards made by the administrative law judge on various grounds, and claimant responds, urging affirmance.

The fees awards made by the administrative law judge are affirmed. Contrary to employer's assertions, the administrative law judge did not refuse to consider the amount of benefits awarded in determining the reasonableness of the fee. The administrative law judge noted that the requested fee was approximately 60 percent of the benefits awarded, but found that this fact did not necessarily mean that the fee requested was improper and that to limit the fee based on the amount of the compensation gained would have the deleterious effect of driving competent counsel from the field. *See, e.g., Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994)(McGranery, J., dissenting)(Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). The administrative law judge thus did not abuse his discretion in this regard.

Employer next argues that in awarding Mr. Sage a fee based on an hourly rate of \$125, the administrative law judge ignored the affidavit of Duayne Anderson and the fee petition filed by Mr. Robinson, which indicated that an hourly rate of about \$100 was the usual and customary rate for Longshore work. In determining the applicable hourly rate, however, the administrative law judge explicitly considered employer's objection and found that the \$125 hourly rate requested was reasonable for the time period in which the work was done. Inasmuch as employer's unsupported assertions are insufficient to establish that the hourly rate he awarded is unreasonable, we reject employer's argument and affirm the \$125 hourly rate awarded by the administrative law judge. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer also asserts that fee awarded by the administrative law judge is excessive and that, absent justification for a change in counsel attributable to the employer, it should not be compelled to pay twice for reviewing medical records, for legal research and for the development of information concerning noise levels at employer's facility. The administrative law judge, however, considered employer's arguments below and, acting within his discretion, rationally concluded that although claimant's reasons for changing counsel were not apparent, a change in counsel can be considered one of the normal incidents of litigation and that the time claimed by counsel showed no indication of abuse. Although employer avers that a fee of \$3,500 to be shared between the attorneys would be reasonable and appropriate, the fee awards made by the administrative law judge are affirmed, as employer's assertions are insufficient to establish that the administrative law judge abused his discretion in awarding the fees. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge