BRB No. 92-2338

WILLIE L. PALMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

John F. Unger (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (89-LHC-2460) of Administrative Law Judge Paul H. Teitler 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).

On May 8, 1990, Administrative Law Judge Paul H. Teitler issued a Decision and Order denying claimant's claim for additional temporary total disability benefits in connection with claimant's June 9, 1987, work-related injury to his back, neck, and shoulder. On appeal, the Board affirmed the administrative law judge's denial of additional compensation but remanded the case for him to consider whether employer's voluntary payments of temporary total disability benefits had been made based on the appropriate average weekly wage, a question on which the administrative law judge had deferred to the district director. *Palmer v. Sea-Land Services, Inc.*, BRB No. 90-1587 (March 19, 1992)(unpublished). On remand, employer agreed to pay claimant the average weekly

wage he sought, which resulted in claimant receiving an additional $3,670.

Thereafter, claimant's counsel sought an attorney's fee of $8,317.50, representing 43.25 hours plus expenses of $2,057.23, for work performed before the administrative law judge in connection with the claim. Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992), the administrative law judge determined that in light of the fact that claimant had not prevailed on his claim for additional compensation, he was to compute an appropriate fee as a function of the degree of claimant's success in obtaining employer's concession regarding the average weekly wage. After expressing difficulty with making this determination, the administrative law judge concluded that based on his review of the record 10 hours of services were necessary for the successful claim. Accordingly, claimant's counsel was awarded a fee of $2,000, representing 10 hours at $200 per hour plus expenses of $2,004.48. Employer appeals the administrative law judge's fee award, arguing that the administrative law judge erred in awarding claimant's counsel a fee for 10 hours and in awarding expenses related to his obtaining medical records and doctors' depositions. Claimant responds, urging affirmance.

We affirm the fee award made by the administrative law judge. In entering the fee award, after noting that claimant's success was limited to obtaining an additional $3,670 for claimant, the administrative law judge substantially reduced the amount of the requested fee, allowing only 10 hours of the 43.25 hours claimed. Although employer asserts that the fee should be overturned because there is no record evidence supporting the 10 hour award, we disagree. In *Hensley*, the Court recognized that where claimant's success is limited, there is no precise formula for determining a reasonable fee. The Court further recognized that the district court may attempt to identify specific hours that should be eliminated or it may simply reduce the award to account for the limited success, as the administrative law judge did in the present case. *Hensley*, 461 U.S. at 436, 437. Inasmuch as the administrative law judge considered the degree of claimant's success in making his fee award and 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).[1]

[1]Although employer asserts that the average weekly wage was basically uncontested, our review of the record indicates that prior to remand employer argued that claimant was entitled to compensation based on an average weekly wage of $537.62, while claimant asserted that the applicable average weekly wage is $724.80, the amount which employer ultimately agreed to pay.

We decline to address employer's contention that the administrative law judge improperly awarded claimant's counsel various expenses as employer is raising this argument for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the Supplemental Decision and Order Granting Attorney 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