BRB Nos. 08-0824
and 08-0824A

J.A.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	DATE ISSUED: 07/23/2009
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Attorney Fee Order and Order Denying Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree, San Diego, California, for claimant.

Roy D. Axelrod, Solana Beach, California, for self-insured employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Attorney Fee Order and Order Denying Reconsideration (2007-LHC-01099) of Administrative Law Judge Russell D. Pulver 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. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On August 24, 2004, claimant was working as a welder when he fell while walking down stairs, injuring his buttocks and back. He worked light duty at employer's

facility until he was terminated in October 2004. Subsequently, claimant began working as a welder in non-covered employment. Claimant sought authorization for spinal fusion surgery to treat his continuing complaints of back pain. In addition, claimant sought continuing temporary partial disability benefits under the Act.

The administrative law judge found that the proposed spinal surgery was as reasonable as any of the proposed alternative treatments for claimant's continuing back pain, and thus, found that employer is responsible for payment of the medical expenses associated with the surgery. 33 U.S.C. §907; Decision and Order Awarding Benefits at 20. The administrative law judge also found that claimant did not establish that his average weekly wage was higher than the $474.87 to which employer had agreed in the pre-hearing submissions and that claimant has not reached maximum medical improvement. In addition, the administrative law judge found that claimant is unable to return to his usual duties as a welder at employer's facility, but that claimant's wages at his post-injury job accurately reflect his wage-earning capacity. Thus, as claimant's earnings since August 6, 2006 have exceeded his average weekly wage, the administrative law judge awarded claimant the nominal amount of $1.50 per week.[1] *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); Decision and Order Awarding Benefits at 26.

Subsequently, claimant's attorney submitted a fee petition for work performed before the administrative law judge in the amount of $66,057.17, representing 114.50 hours of legal services provided by Eric A. Dupree at the hourly rate of $400 and 60.30 hours of legal services provided by Paul R. Myers at the hourly rate of $200. Employer filed objections to the fee petition.

In his Attorney Fee Order, the administrative law judge noted Mr. Dupree's requested hourly rate of $400 for legal services, but found that the evidence does not support an hourly rate higher than $285 for Longshore attorneys in San Diego, California. Likewise, the administrative law judge reduced the requested hourly rate for counsel's associate, Mr. Myers, to $175. The administrative law judge considered claimant's limited success on the merits pursuant to the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and found that time spent on the depositions of Ms.

[1] The administrative law judge found that claimant's actual wages were $320 per week from November 1, 2004 through August 15, 2005, which results in temporary partial disability benefits in the amount of $103.20 per week for that time period. Claimant's actual wages from August 16, 2005 through August 6, 2006, averaged $360 per week, which results in temporary partial disability benefits of $76.53 per week. 33 U.S.C. §908(e), (h).

Yandall and Mr. Fawcett related to issues on which claimant did not prevail. Thus, the administrative law judge rejected payment for the 7.4 hours. However, the administrative law judge found that the remaining hours requested "were not severable" from the medical benefits issue that was successfully prosecuted, and therefore, declined to further reduce the number of hours awarded. Therefore, the administrative law judge awarded claimant's counsel a fee of $38,325, representing 98 hours of legal services by Mr. Dupree at the hourly rate of $285, and 59.4 hours of legal services by Mr. Myers at the hourly rate of $175. The administrative law judge denied claimant's motion for reconsideration of the fee award.

On appeal, employer contends that the administrative law judge erred in failing to account for claimant's limited success by further reducing the number of hours awarded. In addition, employer contends that the administrative law judge erred in awarding a fee for work performed by Mr. Myers that was clerical in nature, and thus not compensable. Claimant responds, urging affirmance of the administrative law judge's decision on these issues, to which employer filed a reply brief. On cross-appeal, claimant contends that the administrative law judge erred in reducing the hourly rate requested by Mr. Dupree. Employer responds, urging affirmance of the administrative law judge's reduction in the requested hourly rate. Claimant has filed a reply brief.

Employer contends that the administrative law judge did not properly account for claimant's limited success in his award of an attorney's fee. The administrative law judge found that the time spent for the post-hearing depositions of Ms. Yandall and Mr. Fawcett was not compensable because it related to the average weekly wage issue, on which claimant did not prevail. In reviewing the other requested hours, the administrative law judge found that the remaining time was spent on a range of issues, on which claimant was fully, or partially, or marginally successful. Attorney Fee Order at 4-5. He concluded that he would not limit the award further because the hours were not severable among the issues on which claimant had had varying degrees of success. *Id.* at 5.

The United States Supreme Court has held that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983); *see also George Hyman Constr. Co. v. Brooks,* 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan,* 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied,* 488 U.S. 997 (1988). If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley,* 461 U.S. at 435-436. The courts have recognized the broad discretion of the adjudicator in assessing the amount of an attorney's fee pursuant to *Hensley* principles. *Id.* at 436; *see, e.g., Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *Horrigan*, 848 F.2d 321, 21

BRBS 73(CRT). The adjudicator may sever the services on the unsuccessful claims from those on the successful claims, *see Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT), or may find it appropriate to make an across-the-board reduction in the fee to account for limited success. *See, e.g., Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91, 94 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999).

The administrative law judge in this case found that he could not "readily excise the surgery issue hours from the other hours spent on the marginally successful issues," and thus would not limit the amount of the fee award further "because the main surgery issue was successfully prosecuted and the majority of the hours were not severable." Attorney Fee Order at 5. However, the Supreme Court held in *Hensley* that "a reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. *Id.* at 436. The Court stated that the most critical factor is the degree of success obtained. *Id.* at 437. Thus, contrary to the administrative law judge's finding, it is not necessary that the services be "severable" in order to adjust the amount of a reasonable fee to account for limited success. As the administrative law judge acknowledged claimant's limited success, but did not address whether an across-the-board reduction would be appropriate, we vacate the administrative law judge's award of an attorney's fee and remand the case for further findings. *Fagan*, 33 BRBS at 94; *Ezell*, 33 BRBS at 30-31.

Employer further avers that the administrative law judge erred in failing to disallow certain attorney services for work it contends is clerical in nature. Time spent by attorneys on traditionally clerical duties is not compensable. *Quintana v. Crescent Wharf & Warehouse Co.* 18 BRBS 254 (1986); *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980). The administrative law judge reviewed counsel's fee petition and found that Mr. Myers's work was "unglamorous" because he is a less experienced attorney. The administrative law judge held that an attorney should be compensated for completing essential administrative work based on his professional status. Attorney Fee Order at 3, *citing Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978)(rejecting employer's argument that the administrative law judge was required to reduce counsel's rate for administrative work such as telephone conferences, writing and reviewing letters, as opposed to purely legal work). Although simple tasks may be considered legal work, and thus compensable under the Act, *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994), *modifying on recon.*, 28 BRBS 27 (1994), the inquiry relates to the nature of the tasks rather than the professional status of the person performing them. Therefore, as the administrative law judge did not analyze the specific tasks performed by Mr. Myers and determine whether such work would more accurately be characterized as clerical in nature, on remand he must reconsider this issue. *See generally Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 903 (7th Cir. 2003)

(administrative law judge properly awarded attorney fees to counsel whose work the administrative law judge found to be more than just clerical).

On cross-appeal, claimant contends that the administrative law judge erred in reducing the hourly rate awarded for Mr. Dupree's services from $400 to $285. The administrative law judge reviewed the evidence submitted by claimant to justify the requested rate of $400. He rejected surveys that gave little specificity to either the geographic area or practice specialty. In addition, he found that the documentation regarding the hourly rate for attorneys in the San Francisco or Los Angeles areas was not dispositive of the appropriate hourly rate for an attorney in the San Diego area, where the present case was litigated. He also rejected the affidavit of Mr. Zuccaro because it was simply a restatement that $400 is a reasonable hourly rate in San Diego. The administrative law judge concluded that counsel had not met his burden of establishing that $400 is a reasonable hourly rate for attorneys in San Diego, and summarily found that the "customary market rate" for attorneys practicing in San Diego is $285.

Although the administrative law judge provided an analysis of the evidence proffered by counsel to establish a prevailing market rate, we are unable to uphold the administrative law judge's rationale for reducing counsel's requested hourly rate in light of the intervening opinions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America*, 557 F.3d 1049 (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041 (9th Cir. 2009). The administrative law judge in the instant case did not provide a basis for his finding that the customary market rate for Longshore attorneys in the San Diego area is $285 per hour. For the reasons set forth by the Ninth Circuit in *Christensen* and *Van Skike*, we vacate the administrative law judge's hourly rate determination and remand the case for the administrative law judge to determine a reasonable hourly rate, consistent with these decisions. *H.S. v. Dept. of Army/NAF*, ___ BRBS ___, BRB Nos. 08-0533, 08-0596 (Apr. 10, 2009).

Accordingly, the administrative law judge's Attorney Fee Order is vacated, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge