

BRB No. 04-0310

OLLIE J. FLANDERS )  
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 Claimant-Petitioner )  
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 v. )  
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 COOPER / T. SMITH STEVEDORING ) DATE ISSUED: JUN 7, 2004  
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 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Granting Attorney Fees and the Decision and Order on Motion to Reconsider Attorney Fee Decision of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Christina R. L. Norris, Louisville, Kentucky, for claimant.

Douglas A. U'Sellis (U'Sellis & Kitchen, PSC), Louisville, Kentucky, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Granting Attorney Fees and the Decision and Order on Motion to Reconsider Attorney Fee Decision (2001-LHC-1180) of Administrative Law Judge Thomas F. Phalen, Jr., 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who injured his back in a work-related injury on March 23, 1993, filed a claim for benefits under the Act on March 21, 1994. On February 6, 2001, claimant received notice that the case had been referred to the Office of Administrative Law Judges, and a hearing was held before the administrative law judge on December 11, 2001. In a Decision and Order - Awarding Benefits issued on October 31, 2002, the administrative law judge

awarded claimant permanent total disability and medical benefits<sup>1</sup> and directed claimant's counsel to file within 30 days a fee petition in conformance with 20 C.F.R. §702.132. Claimant filed his fee petition, requesting a fee of \$30,082.10 for legal work<sup>2</sup> and \$2,224.79 in costs, for a total amount of \$32,306.89. On January 16, 2003, employer filed a response to counsel's fee petition, objecting, first, to the time itemized for work performed prior to the date the claim was filed and, second, to the time itemized for preparation of the fee petition. On February 11, 2003, claimant filed a reply to employer's objections, in which he reasserted his entitlement to a fee for time spent preparing the fee petition and, in addition, requested a supplemental fee of \$2,297.50.<sup>3</sup> Employer filed a response dated February 27, 2003.

In a Supplemental Decision and Order Granting Attorney Fees issued on April 1, 2003, the administrative law judge first disallowed 50.2 hours of time requested by counsel for work performed during the period from October 5, 1993 through February 2, 2001, during which time the case was before the district director. Next, addressing employer's objection to the time requested for the preparation of counsel's fee petition, the administrative law judge determined that counsel is entitled to a fee for a reasonable amount of time spent in preparing her fee application; he thereafter disallowed 3.37 hours of the 11.95 hours itemized for preparation of the fee petition on the basis that these 3.37 hours represented time spent calculating fees for work performed at the district director level. Lastly, the administrative law judge disallowed the entire \$2,297.50 requested in counsel's supplemental fee petition for the time period from December 10, 2002 through February 11, 2003, on the basis that the case was not before him during that period of time. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$24,772.62, representing \$22,571.05 for legal services performed in the period from February 6, 2001 through December 5, 2002, and

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<sup>1</sup> On December 5, 2002, employer filed an appeal of the administrative law judge's Decision and Order –Awarding Benefits with the Board, BRB No. 03-0234, and thereafter, claimant filed a cross-appeal, BRB No. 03-0234A. Subsequently, pursuant to the parties' respective motions to withdraw their appeals, both appeals were dismissed by the Board.

<sup>2</sup> Claimant's attorney's fee request represents a total of 178.3 hours of services performed by counsel, a law clerk and a paralegal. Counsel's hourly billing rate for her own work ranged from \$100, her 1993 billing rate, to \$190, her current billing rate. The hourly rate for law clerk work was \$50 and for paralegal work was \$45.

<sup>3</sup> Counsel's request for a supplemental fee in the total amount of \$2,297.50 consists of a request for \$776.75 for legal services and costs associated with the appeals to the Board, BRB Nos. 03-0234/A, and a request for \$1,520.75 for services performed from December 10, 2002 through February 11, 2003, involving work to obtain medical services and to ensure the correct payment of past due benefits and interest in accordance with the administrative law judge's Decision and Order – Awarding Benefits.

\$2,201.57 in expenses.

Claimant filed a motion for reconsideration of the attorney's fee award, asserting that the administrative law judge has the authority to award attorney's fees for work performed before the district director and the Board; in the alternative, claimant requested that the administrative law judge specifically provide counsel additional time to submit fee petitions to the district director and the Board. The administrative law judge denied claimant's motion for reconsideration on May 14, 2003.

On appeal, claimant challenges the administrative law judge's disallowance of a fee for work performed before the district director and the Board; alternatively, claimant requests that the Board remand the case to allow counsel to file fee petitions with the district director and the Board.<sup>4</sup> Employer responds, urging affirmance.

We reject claimant's contention that the administrative law judge erred in failing to award a fee for the legal services which were performed while this claim was before the district director and the Board. Contrary to claimant's position on appeal, the Act provides that the decision-maker at each level in the resolution of a claim may award a fee for work performed at that level. *See generally* 33 U.S.C. §928(c). In this case, the administrative law judge specifically directed claimant's counsel to file a fee application in conformance with Section 702.132 of the Act's implementing regulations, which provides, in pertinent part, that:

Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed (*See* 33 U.S.C. §928(c)). The application shall be filed and serviced upon the other parties within the time limits specified by such district director, administrative law judge, Board, or court. . . .

20 C.F.R. §702.132(a). Thus, pursuant to the provisions of Section 28(c) of the Act and Section 702.132(a) of the Act's regulations, an administrative law judge may award a fee only for the services rendered between the date the case was referred to the Office of Administrative Law Judges and the conclusion of the case before him.<sup>5</sup> *See Stratton v.*

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<sup>4</sup> Claimant does not dispute the administrative law judge's reduction in the number of hours approved for preparation of the fee petition. *See* Cl. br. at 1 n.1.

<sup>5</sup> Contrary to claimant's argument on appeal, *see* Cl. br. at 11-12, the decision of the United States Court of Appeals for the D.C. Circuit in *Hensley v. WMATA*, 690 F.2d 1054, 15

*Weedon Engineering, Co.*, 35 BRBS 1 (2001) (*en banc*); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). We therefore hold that the administrative law judge properly declined to award a fee for services performed during the period from October 5, 1993 through February 2, 2001, prior to the date the case was referred to the Office of Administrative Law Judges. Likewise, the administrative law judge correctly denied claimant's counsel's request for a fee for work performed subsequent to December 5, 2002, the date on which the administrative law judge's Decision and Order was appealed to the Board. Claimant may file separate fee applications with the appropriate bodies before which this work was performed.<sup>6</sup>

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees and the Decision and Order on Motion to Reconsider Attorney Fee Decision are affirmed.

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BRBS 43(CRT) (D.C. Cir. 1982), does not stand for the proposition that the administrative law judge is vested with the authority to award a fee for work performed at each level in the resolution of the claim. In *Hensley*, the claimant's attorney had moved in the United States Supreme Court for approval of attorney's fees for services performed in successfully opposing the employer's petition for writ of certiorari. Rather than awarding counsel a fee, the Supreme Court delegated to the United States Court of Appeals for the D.C. Circuit the authority to award claimant's counsel a fee for work performed at the Supreme Court level. Thereafter, the D.C. Circuit awarded attorney's fees for claimant's attorney's work before the Supreme Court, emphasizing that it was vested with the authority to do so "in the circumstances of this case where the Supreme Court has made an explicit choice to leave the fee decision to this court." 690 F.2d at 1057, 15 BRBS at 45(CRT). Citing the provision at 33 U.S.C. §928(c) that "the Board or court *may* approve an attorney's fee for *the work done before it* by the attorney for the claimant," (emphasis added) the D.C. Circuit stated that "... had not the Supreme Court delegated us the task, we would be inclined to think the matter more appropriately considered there." *Id.* In contrast to the particular circumstances in *Hensley* in which the D.C. Circuit awarded a fee for work performed at the Supreme Court level *only* because the authority to do so was explicitly delegated to it by the Supreme Court, the administrative law judge in the instant case has not been delegated the authority to award attorney's fees for work performed before the district director or the Board.

<sup>6</sup>We reject employer's contention that claimant is precluded from filing attorney's fee petitions for work performed before the district director and the Board by virtue of the administrative law judge's Decision and Order issued on October 31, 2002, in which claimant was granted thirty days in which to submit a fee application. The time frame set forth in the administrative law judge's decision applies solely to the fee request for work performed before the administrative law judge, and is not binding upon the district director or the Board.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge