

BRB Nos. 06-0846
and 06-0949

GREGORY HASCHAK)
)
Claimant-Respondent)
)
v.)
)
KVAERNER PHILADELPHIA SHIPYARD,) DATE ISSUED: 06/29/2007
INCORPORATED)
)
and)
)
SIGNAL MUTUAL INDEMNITY)
ASSOCIATION, LTD.)
)
Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor, and the Compensation Order Approval of Attorney Fee of Emma Riley, District Director, United States Department of Labor.

Thomas R. Uliase (Uliase & Uliase, P.C.), Haddon Heights, New Jersey, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2005-LHC-00742) of Administrative Law Judge Ralph A. Romano, BRB No. 06-0846, and the Compensation Order Approval of Attorney Fee (Case No. 04-036636) of District Director Emma Riley, BRB No. 06-0949, 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).¹ 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 Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his left leg and knee in a November 17, 2003, work accident. Employer voluntarily paid periods of temporary total disability benefits from December 12, 2003 to June 23, 2004, and from October 26, 2004 to November 1, 2004. Employer also paid medical benefits, including the treatment provided by Dr. Mendez, a board-certified orthopedic surgeon, who performed arthroscopic surgery on claimant's left knee on December 4, 2003. Post-surgical complications developed, namely deep vein thrombosis (DVT), which delayed claimant's recuperation period. A dispute developed over claimant's entitlement to ongoing disability and medical benefits, and claimant filed a claim for continuing temporary total disability benefits and medical benefits. Claimant also alleged that he sustained lumbar spine and psychological injuries, in addition to the leg injury, which left him unable to perform any employment and required ongoing medical treatment. The matter was referred to the Office of Administrative Law Judges (OALJ) on January 6, 2005, for a formal hearing after the matter could not be resolved at the informal conference.

In his decision on the merits, the administrative law judge denied claimant's claim for back and psychological injuries. Due to the leg injury, the administrative law judge found that claimant was unable to return to his usual employment and had not reached maximum medical improvement. The administrative law judge found that employer established suitable alternate employment beginning March 15, 2004. The administrative law judge awarded claimant temporary total disability benefits from December 4, 2003 to March 14, 2004, and ongoing temporary partial disability benefits from March 15, 2004. 33 U.S.C. §908(b), (e). The administrative law judge rejected employer's assertion that claimant willfully underreported his earnings for the period from "November 17, 2003 to the present," and thus found that the forfeiture provisions of Section 8(j) of the Act, 33 U.S.C. §908(j), are inapplicable. Finally, the administrative law judge awarded claimant medical benefits for the treatment rendered by Drs. Bogart and DiGiovanni, vascular specialists who treated claimant's DVT, and denied payment for the services of Dr. Salvo and Dr. Lieberman.

In light of the successful prosecution of the claim, claimant's counsel sought an attorney's fee from both the district director and the administrative law judge. The

¹ In an Order dated September 29, 2006, the Board consolidated employer's appeals.

district director discussed and rejected employer's objections and awarded claimant's counsel the requested attorney's fee of \$6,026.27, including expenses of \$241, payable by employer. The administrative law judge summarily overruled employer's objections and awarded claimant's counsel the requested attorney's fee of \$17,235.50, plus \$7,977.30 in costs, to be paid by employer.

On appeal, employer challenges both the administrative law judge's and district director's awards of an attorney's fee. Claimant responds, urging affirmance.

Employer argues that the administrative law judge's fee award violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as he failed to fully discuss and render adequate findings regarding its objections to the fee petition. We agree with employer that the administrative law judge did not adequately explain the basis for the fee award in view of employer's detailed objections to the fee petition. The administrative law judge's attorney's fee award states in its entirety:

Counsel for Claimant having submitted his petition therefor, and there being partial opposition filed thereto, it is hereby

ORDERED, that Employer shall pay counsel for Claimant the sum of \$17,235.50 for attorney fees, and \$7,977.30 costs.

Employer's objections are overruled.

Supp. Decision and Order at 1. The Board is unable to review the propriety of the fee award under its standard of review where the administrative law judge has not provided any rationale for his findings. Therefore, we vacate the administrative law judge's Supplemental Decision and Order, and we remand the case for an adequate discussion of employer's objections to counsel's fee request and a determination of a reasonable fee under the regulatory criteria, 20 C.F.R. §702.132. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

With regard to the district director's fee award, employer first contends that the fee petition fails to meet the minimum standards for a fully-supported application and should have been rejected for that reason. The district director found it possible to discern the extent and character of the work performed, the professional status of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work. Compensation Order Approval of Attorney Fee at 2. Contrary to employer's contention, the fee petition fulfills counsel's burden to provide a complete, sworn statement of the professional status of each person performing such work, and the normal billing rate for such person, and we reject

employer's assertion that claimant's counsel has a greater burden of proof. *See generally National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975); *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988); 20 C.F.R. §702.132.

Employer also contends that the district director did not adequately account for the fact that claimant did not succeed on all the claims he asserted, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1981). In this regard, employer notes that claimant did not successfully prosecute his claim for a psychological injury or for ongoing total disability benefits and alleges that the district director erred in awarding the full fee merely because the work was "necessary" at the time counsel performed the services.

We reject employer's contention, as the district director properly considered *Hensley* and claimant's success as a whole. Comp. Order at 3 (Obj. #5). The district director discussed employer's objection based on claimant's lack of full success in pursuing his claims. The district director found, however, that employer had suspended all compensation payments and that claimant succeeded in having compensation restored. The district director also found that claimant succeeded in defeating employer's Section 8(j) forfeiture claim. The district director concluded in view of this success that the fee requested "is reasonable in relation to the results obtained." *Id.* Employer has not established that the district director abused her discretion in her consideration of the degree of claimant's success pursuant to *Hensley*, and we therefore affirm her finding. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2002). In addition, the district director adequately addressed employer's objections to various itemized entries. *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Employer's contention on appeal that the district director failed to state whether she was awarding a fee pursuant to Section 28(a) or Section 28(b) need not be addressed as employer did not raise an objection to fee liability below. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Consequently, we affirm the district director's Compensation Order Approval of Attorney Fee as employer has not established that the district director abused her discretion in entering the award as requested.

Accordingly, we vacate the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, and remand this case to the administrative law judge for further consideration of employer's objections to counsel's fee petition. We affirm the district director's Compensation Order Approving Attorney Fees.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge