BRB No. 10-0613

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| DANIEL CASE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| BUNGE NORTH AMERICA, INCORPORATED | ) | DATE ISSUED: 06/15/2011 |
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| and | ) | |
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| PACIFIC EMPLOYER'S INSURANCE | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Supplemental Decision and Order Approving Attorney's Fees of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Alton D. Priddy (Priddy, Cutler, Miller & Meade, PLLC), Louisville, Kentucky, for claimant.

B. Matthew Struble (Thompson Coburn, LLP), St. Louis, Missouri, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Approving Attorney's Fees (2005-LHC-2563) of Administrative Law Judge William S. Colwell 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 was seriously injured in May 2001 while working for employer. The parties stipulated that he was temporarily totally disabled from May 15, 2001, through June 8, 2003, and employer paid benefits until June 9, 2003, based on an average weekly wage of $260. Claimant filed a claim for permanent total disability benefits under the Act, which employer disputed. Just prior to the hearing in this case, claimant also raised the issue of his correct average weekly wage.

Administrative Law Judge Miller rejected claimant's assertion that he is totally disabled and found that, although claimant cannot return to his usual work, employer established the availability of suitable alternate employment and claimant's post-injury wage-earning capacity is $281.60 per week. Judge Miller also rejected claimant's assertion that his average weekly wage should be calculated using Section 10(b), 33 U.S.C. §910(b); however, using Section 10(c), 33 U.S.C. §910(c), he found that claimant's average weekly wage is $340 and the resulting compensation rate is $38.54. Decision and Order at 15-17, 19. Claimant appealed, and the Board affirmed the finding that claimant is permanently partially disabled but remanded the case because the administrative law judge did not determine the date on which employer established the availability of suitable alternate employment and erred in failing to account for inflation in his wage-earning capacity determination. *D.C. [Case] v. Bunge North America, Inc.*, BRB No. 07-0795 (Feb. 29, 2008). On remand, Judge Miller found that claimant's post-injury wage-earning capacity adjusted for inflation is $248 per week, and claimant is entitled to permanent partial disability benefits at a rate of $61.33 per week commencing March 16, 2006, the date employer established suitable alternate employment.[1] Corrected Decision on Remand at 5-7. The decision on remand was not appealed. As a result of the remand proceedings, claimant obtained nearly three more years of temporary total disability benefits, at a higher average weekly wage than employer had used, as well as an ongoing award of permanent partial disability benefits based on an inflation-adjusted wage-earning capacity that resulted in higher compensation than that to which employer claimed claimant was entitled.

In 2007, claimant had filed a fee petition with Judge Miller for work performed between April 12, 2002, and May 23, 2007, and employer had responded with objections. That fee petition, which is now before us, was not addressed until June 2010, when Judge

[1]Judge Miller specifically noted that the Board did not disturb his average weekly wage finding. Corrected Decision on Remand at 7 n.7.

Colwell addressed it after Judge Miller's retirement.[2] Claimant's counsel requested a fee of $48,800, representing 195.2 hours at an hourly rate of $250, plus $6,493.96 in expenses, for a total fee request of $55,293.96. Judge Colwell (the administrative law judge) denied a fee and costs for the time the case was before the district director, April 12, 2002, through August 31, 2005, and stated that the remaining request was for $41,720.95, representing 147.1 hours at $250 per hour, plus $4,945.95 in expenses. Although he stated that counsel may not be awarded a fee for work on an unsuccessful issue, the administrative law judge found that claimant was successful in increasing his benefits following "significant litigation efforts," and he awarded the entire remaining amount, rejecting employer's objections. Supp. Decision and Order Approving Attorney's Fees (June 17, 2010). Employer appeals this fee award, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in awarding fees and costs on those issues on which claimant failed to succeed. Specifically, employer argues that claimant did not raise the average weekly wage issue until April 2006, and that, therefore all work prior to April 1, 2006, was related to his unsuccessful assertion that he was permanently totally disabled. It also argues that the work after that date involved work on both the average weekly wage issue and the permanent total disability issue and must be reduced by a percentage because claimant was only partially successful; employer also asserts the costs related to the unsuccessful issue must be reduced. Employer also challenges the hourly rate awarded to claimant's counsel.

Employer does not dispute that claimant's counsel is entitled to an employer-paid fee under the Act. An attorney's fee must be awarded in accordance with Section 28, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provide that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). If a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *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. 992 (1988).

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[2]The Board issued a fee award to claimant's counsel for the work performed before it. *Case v. Bunge North America, Inc.*, BRB No. 07-0795 (July 29, 2009) (Order). Judge Miller awarded a fee for work performed before him when this case was on remand in 2008.

In awarding a fee in this case, the administrative law judge stated that, prior to the adjudication of the claim, claimant received temporary total disability benefits based on an average weekly wage of $260 which ceased on June 9, 2003, and after Judge Miller's 2009 decision, claimant was entitled to temporary total disability benefits until March 15, 2006, and to ongoing permanent partial disability benefits thereafter at a higher rate than he initially ordered. Supp. Decision and Order at 2. The administrative law judge reasoned that although claimant did not succeed in gaining permanent total disability benefits, he obtained a higher permanent partial disability award based on a higher average weekly wage and extended his temporary total disability payments for nearly three years. He rejected employer's argument that the time incurred after the average weekly wage issue was raised should be reduced because he found "that there were significant time and resources expended by both parties as well as by Judge Miller and the Board on this issue." Supp. Decision and Order at 3. As the administrative law judge concluded that average weekly wage was a "significant" issue, he did not reduce the requested fee. *Id.* Additionally, he rejected employer's assertion regarding the requested hourly rate of $250, as he found that was a reasonable rate in light of the nature and quality of the services rendered and the complexity of the issues. The administrative law judge awarded the claimed expenses. *Id.* at 3-4.

Although claimant did not obtain the permanent total disability benefits he sought, counsel's work prior to April 2006 did not result in claimant's being "unsuccessful" as employer argues, but, rather, he was "partially successful" because he gained a significant amount of additional temporary total disability benefits over that paid by employer and was awarded continuing permanent partial disability benefits. Similarly, the work performed after March 30, 2006, also resulted in claimant's being "partially successful" because he was awarded compensation based on an average weekly wage lower than he sought but higher than that used by employer. In addressing a fee in a case where a claimant is partially successful, the Supreme Court's decision in *Hensley* provides that the administrative law judge should focus on the significance of the overall relief obtained in relation to the hours reasonably expended on the case. *Hensley*, 461 U.S. at 434-435. Thus, if the claimant achieves only partial or limited success, the product of the hours expended on litigation as a whole times a reasonable hourly rate may result in an excessive award. Therefore, the fact-finder should award a fee only in an amount which is reasonable in relation to the results obtained. *Id.*, 461 U.S. at 436, 440; *see Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

In this case, the administrative law judge noted that claimant was not fully successful, described the extent of claimant's success, and awarded his attorney the entire fee requested. However, in citing support for his decision to award the full fee requested, the administrative law judge incorrectly summarized the procedural history of this case.

Specifically, he stated that Judge Miller spent "significant" time *on remand* on the average weekly wage issue as the Board vacated his finding on that issue and claimant achieved a higher average weekly wage on remand. However, claimant's average weekly wage was not appealed to the Board, and the Board did not vacate that finding. Judge Miller so noted in his decision on remand. *See* n.1, *supra*. In fact, no efforts were spent on this issue by the Board or by Judge Miller on remand. Rather, the increase in compensation on remand occurred because the Board remanded the case for Judge Miller to recalculate wage-earning capacity to account for inflationary effects. Claimant did, however, obtain a higher average weekly wage than employer paid as a result of the initial proceedings before the administrative law judge although not as high as the calculation he sought. As the administrative law judge's decision does not fully explain why claimant's partial success warranted awarding the full fee requested, we vacate the fee award and remand the case for him to reconsider the fee petition and objections. *Hensley*, 461 U.S. 424; *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). On remand, the administrative law judge must explain his rationale for the amount of the fee he awards. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3$^{d}$ Cir. 2001); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP,* 195 F.3d 790, 33 BRBS 184(CRT) (5$^{th}$ Cir. 1999), *cert. denied,* 530 U.S. 1213 (2000); *Ahmed*, 27 BRBS 24.

Employer also challenges the hourly rate awarded by the administrative law judge. Employer states that $250 is excessive as counsel's rate was $175 when this claim began in 2002 and as $250 is 40 percent higher than $175, thereby greatly exceeding any allowable interest rate. We reject employer's argument that the administrative law judge erred in awarding a fee based on a rate of $250. It is within the administrative law judge's discretion to award a reasonable hourly rate. *See Jeffboat, L.L.C. v. Director, OWCP [Furrow]*, 553 F.3d 487, 42 BRBS 65(CRT) (7$^{th}$ Cir. 2009); *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009). This case was first before the administrative law judge in 2005, and it was reasonable for him to award a fee at the current rate to account for the delay in payment of the fee.[3] *See generally Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9$^{th}$ Cir. 1999); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4$^{th}$ Cir. 1999). As employer has not shown an abuse of discretion, we affirm the administrative law judge's award of an hourly rate of $250.

[3]Employer argues that claimant delayed proceeding with this case because he did not seek an informal conference until well after he filed the claim. Employer's argument is not persuasive because it is the delay between the time the services were performed and the time of payment that accounts for any enhancement due to delay, and not claimant's alleged delay in seeking a formal resolution.

Lastly, employer argues that it should not be held liable for costs related to the issues on which claimant was "unsuccessful."[4] As claimant was at least "partially successful" on all issues, employer's argument is unpersuasive. Moreover, the Board previously has rejected an employer's argument that a *Hensley* analysis should apply to the award of costs. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). The test for determining whether costs should be assessed against an employer is whether they were reasonable and necessary to protect the claimant's interests at the time they were incurred. *Id.*; 33 U.S.C. §928(d); *Hardrick v. Campbell Industries, Inc.*, 12 BRBS 265 (1980); 20 C.F.R. §702.135. Employer does not contend that the costs requested were not reasonable and necessary at the time they were incurred. *Zeigler Coal Co. v. Director, OWCP,* 326 F.3d 894 (7th Cir. 2003). As employer has not shown an abuse of the administrative law judge's discretion, we affirm the awarded costs.

Accordingly, the administrative law judge's fee award is vacated, and the case is remanded for the administrative law judge to reconsider the fee petition and objections in accordance with this decision. The administrative law judge's award of costs and his determination that an hourly rate of $250 is appropriate are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4]The costs requested primarily consisted of travel expenses for counsel and deposition expenses for the vocational witness who asserted claimant is totally disabled.