BRB No. 00-0695

BRIAN J. HARVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARGILL MARINE & TERMINALS, INCORPORATED	)	DATE ISSUED: March 29, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees and Order Denying Motion for Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Jay W. Beattie and William M. Tomlinson, Portland, Oregon, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fees and Order Denying Motion for Reconsideration (1999-LHC-0202) of Administrative Law Judge Edward C. Burch 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).

Claimant filed a claim seeking periods of temporary total and temporary partial disability benefits, a continuing award of permanent partial disability benefits, and medical benefits for injuries he allegedly sustained as a result of his exposure to

grain dust while working for employer on July 23, 1997.[1] In his Decision and Order Awarding Benefits issued on November 18, 1999, the administrative law judge found claimant entitled to a *de minimis* award of $1 per week commencing on June 2, 1999, and reimbursement of unpaid medical expenses as well as all reasonable medical costs necessitated in the future.

Claimant's counsel thereafter submitted a fee petition to the administrative law judge requesting an attorney's fee of $16,678.67, representing 78.75 hours at $200 per hour plus costs of $928.67.[2] Employer filed objections to the fee petition. In his Order Awarding Attorney's Fees, the administrative law judge determined that the requested hourly rate of $200 was appropriate, but that the number of hours requested by counsel was excessive in light of the limited success achieved in this case. In accordance with *Hensley v. Eckerhart*, 461 U.S. 421 (1983), the administrative law judge reduced the fees requested by 50 percent, and thus awarded an attorney's fee of $8,075, plus the requested costs of $928.67. Claimant's motion for reconsideration was denied by the administrative law judge. Claimant appeals the reduction in the fee requested. Employer responds, urging affirmance.

In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court

---

[1]Following this exposure, claimant developed pulmonary symptoms including headaches, fatigue, swelling in his glands, difficulty breathing, a burning cough, fevers and the development of lesions on his arms and groin area. Claimant was subsequently diagnosed with occupational asthma by Dr. Tara and organic dust toxic syndrome by Drs. Lawrence and Friend.

[2]The fee petition covered all of the work performed by claimant's counsel both at the district director and administrative law judge levels. As recognized by the administrative law judge, the parties stipulated to a single order awarding fees for the entirety of the work performed by claimant's counsel in this case.

created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434; *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. 1988), *cert. denied*, 488 U.S. 997 (1988). If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. The Court, however, provided no rule or formula for a calculating a fee. *Hensley*, 461 U.S. at 435-436; *see also Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Moreover, in cases arising under the Act, the regulations require that an administrative law judge take into account the quality of the representation and the complexity of the legal issues involved, in determining the amount of an attorney's fee. *See* 20 C.F.R. §702.132(a).

In the present case, the administrative law judge, citing *Hensley*, 461 U.S. 421, found that claimant achieved only partial success in the pursuit of his claim. Specifically, the administrative law judge determined that claimant was successful on the issues of causation and entitlement to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, but that claimant was unsuccessful in establishing that he has a current loss of wage-earning capacity due to his work-related injury. Additionally, the administrative law judge noted that although claimant's *de minimis* award may increase to a more substantial amount in the future, such an increase will not occur unless claimant first establishes that his work-related injury has resulted in an actual loss of wage-earning capacity. The administrative law judge then determined, based upon his review of the evidence and legal issues in this case, that approximately half of the professional time devoted to this case involved claimant's unsuccessful effort to establish a current loss of wage-earning capacity. Accordingly, the administrative law judge concluded, after consideration of the factors contained at 20 C.F.R. §702.132(a), the particular facts and issues of this case, and claimant's relative degree of success, that claimant's counsel is entitled to a fee for one-half of the hours requested. On reconsideration the administrative law judge explicitly considered and rejected claimant's counsel's contention that his fee should have been reduced by, at most, only 15 percent, given that he spent most of his time on the issue of causation. Specifically, the administrative law judge reconsidered the evidence and legal issues in the case and again determined that the attorney's fees requested by claimant's counsel are unreasonable based

upon the limited success obtained.[3] The administrative law judge therefore reiterated that a 50 percent reduction of the attorney's fees requested is appropriate, and accordingly, denied claimant's counsel's motion for reconsideration.

As the reduction of hours in the instant case was reasonable, and the Board has previously affirmed such across the board reductions where the administrative law judge determined that claimant achieved limited success, the administrative law judge's decision to reduce the number of hours requested by 50 percent is affirmed. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999)(50 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999) (90 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (2000)(75 percent reduction in attorney's fees is reasonable given claimant's failure to succeed in the prosecution of his primary claim for permanent total and partial disability compensation).

Accordingly, the administrative law judge's Order Awarding Attorney's Fees and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]On reconsideration, the administrative law judge reviewed but ultimately rejected an Affidavit of Time which was submitted by claimant's counsel in an effort to prove that he only spent 12.375 hours of attorney time on the issues of loss of wage-earning capacity and additional temporary total disability benefits.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge