

JAMES H. TAYLOR)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: <u>Mar 23, 2005</u>
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein and Charlene Parker Brown (Montagna, Breit, Klein and Camden, L.L.P.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth Shaw, L.L.P), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees (2001-LHC-2606) of Administrative Law Judge Fletcher E. Campbell, 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time that this case is before the Board. To reiterate the facts, claimant worked as a chipper. He had three knee surgeries in 1994 and returned to work in 1996. On January 11, 1996, he injured his back. Claimant was unable to return to his usual work and began employment as a part-time security guard in a retirement community. Employer voluntarily paid claimant permanent partial disability benefits

beginning in October 1997, based on an average weekly wage of \$717.35 and loss of wage-earning capacity in his part-time work, resulting in a compensation rate of \$390.23. In May 2000, employer erroneously sent claimant a check for \$1,457.90, as an unused annual leave payment. In March 2001, it sent claimant a letter asking for the return of \$2,608.94.¹ Claimant agreed to pay back \$1,000 in April 2001. Employer thereafter stopped paying claimant permanent partial disability benefits until it recouped the balance of \$1,608.94, and then it resumed payments. Tr. at 24-25. Claimant filed a claim for reimbursement of benefits in the amount of the \$1,608.94 withheld by employer.

In his initial decision, the administrative law judge found that employer's May 2000 payment to claimant was designated as unused annual leave rather than an advance payment of compensation, and that therefore employer is not entitled to credit that payment against its liability for workers' compensation benefits. The administrative law judge found that employer owed claimant \$1,608.94 in permanent partial disability benefits. The administrative law judge then determined that claimant's wages from the part-time job he was performing did not fairly represent claimant's wage-earning capacity and that his wage-earning capacity should be based on an ability to perform available suitable full-time, rather than part-time, work. Consequently, the administrative law judge awarded claimant benefits of \$270.37 per week, a rate significantly lower than the \$390.23 voluntarily paid to claimant by employer.

Claimant's counsel subsequently submitted a petition for an attorney's fee of \$7,533.75, representing 27.35 hours for work at a rate of \$225 per hour for Attorney Klein, seven hours at \$160 per hour for Attorney Brown, and 3.25 hours performed by a paralegal at \$80 per hour, for services rendered between July 26, 2001, and May 31, 2002. Employer filed objections. The administrative law judge reasoned that claimant was partially successful in the prosecution of his case, as he established entitlement to the amount withheld by employer, but was not successful on the issue of wage-earning capacity; therefore, in light of claimant's partial success, he was inclined to award counsel a fee, but could not do so based on the petition filed because he could not differentiate between work on the successful issue and work on the unsuccessful issue, and he declined to make an arbitrary guess. The administrative law judge, therefore, denied claimant's counsel's fee request; however, he invited claimant's counsel to file a motion for reconsideration and submit another fee petition identifying the time spent working on the issue on which it was successful, and stated that he would then decide whether claimant's success on the first issue could overcome the net loss of benefits

¹ The disparity in the amounts is owing to the fact that \$1,457.90 reflects the net amount claimant received after employer made various withholdings from the gross amount of \$2,781.

resulting from the lower stipulated average weekly wage and the higher post-injury wage-earning capacity.

On appeal, the Board held that because the credit issue and the wage-earning capacity/average weekly wage issue are exclusive and independent of one another, they are severable, and that counsel is not entitled to a fee for work performed on the issue upon which he did not prevail. Next, the Board affirmed the administrative law judge's determination that claimant's success was limited.² The Board stated that as claimant was partially successful in his claim, his attorney is entitled to a fee commensurate with the work performed considering the degree of success and agreed with claimant's counsel's argument that he is not required to submit a fee petition containing only the hours of work performed on the successful issues. *See Taylor v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0247 (Oct. 31, 2003) (unpublished). Accordingly, the Board vacated the administrative law judge's denial of an attorney's fee and remanded the case for the award of an attorney's fee, stating that even though counsel did not file an application for a fee that distinguishes the work he devoted to each issue, counsel's fee application is in compliance with the Act's implementing regulation and provides sufficient detail for the administrative law judge to award a fee.

On remand, in his Supplemental Decision and Order, the administrative law judge reduced by half the hours counsel requested for time spent writing and editing claimant's brief, from eight to four for counsel, and from seven to 3.5 for co-counsel. The administrative law judge then reduced Attorney Klein's requested hourly rate from \$225 to \$112.50, Attorney Brown's requested hourly rate from \$160 to \$80, and counsel's paralegal's hourly rate from \$80 to \$40. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$3,036.88, representing 23.35 hours of legal services performed at a rate of \$112.50 per hour for Mr. Klein, 3.5 hours of legal services performed at a rate of \$80 per hour for Ms. Brown, and 3.25 hours at \$40 per hour for paralegal services.

On appeal, claimant challenges the fee awarded by the administrative law judge. Employer responds, urging affirmance. In contending that the administrative law judge's fee award cannot stand, claimant argues that the administrative law judge doubly penalized him by reducing both the time requested for writing and editing the brief and

² The parties stipulated that claimant's average weekly wage was \$606.65, rather than the \$717.35 on which employer based its voluntary payments of benefits of \$390.23 per week, for loss of wage-earning capacity in his part-time job. On July 9, 2001, employer began paying claimant \$364.90 per week, based on loss of wage-earning capacity in a full-time job. Claimant was awarded permanent partial disability compensation of \$270.37 per week.

reducing the hourly rate requested for preparing his case and the hourly rate requested. We agree. In *Hensley v. Eckerhart*, 461 U.S. 421 (1983), 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 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 *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); *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). In the instant case, it is undisputed that the wage-earning capacity issue on which claimant failed to prevail is unrelated to the claim regarding employer's annual leave overpayments on which claimant did succeed. Accordingly, the administrative law judge, in accordance with the first prong of the *Hensley* case, properly severed the work performed by claimant's attorneys on that unsuccessful issue and disallowed the four hours itemized for that work by Attorney Klein, and 3.5 hours itemized by Attorney Brown. See *Brooks*, 963 F.2d at 1538-1540, 25 BRBS at 167-171(CRT).

The administrative law judge was then required to award a reasonable hourly rate under the regulation, 20 C.F.R. §702.132, and to consider the second prong of the *Hensley* inquiry, i.e., the reasonableness of the total fee in light of the degree of success achieved on the successful issue. See *Brooks*, 963 F.2d at 1540, 25 BRBS at 171-172(CRT). The administrative law judge's reduction of claimant's attorneys' and paralegal's hourly rates was based on the lack of success on the wage-earning capacity issue, rather than on a finding as to a reasonable hourly rate under the regulatory criteria, 20 C.F.R. §702.132. We therefore agree with claimant that the administrative law judge's reduction of the hourly rates cannot be affirmed. The administrative law judge's reductions of Attorney Klein's requested hourly rate of \$225 to \$112.50, Attorney Brown's requested hourly rate of \$160 to \$80, and the paralegal's hourly rate of \$80 to \$40 are vacated, and the case is remanded for a determination of an appropriate fee for work performed in this case in accordance the regulatory standards, 20 C.F.R. §702.132. After the administrative law judge determines the total fee based on the number of hours performed on the successful issue and a reasonable hourly rate, he must then determine, under the second prong of *Hensley*, whether it is a "reasonable" fee considering claimant's success in obtaining the additional \$1,608.94 withheld by employer. See generally *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is vacated, and the case is remanded for reconsideration consistent with this opinion.³

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³ Claimant's counsel seeks an attorney's fee for services performed before the Board in the prior appeal, BRB No. 03-0247. We will defer action upon this request until after the administrative law judge has issued his decision on remand and the extent of claimant's success is known. *See* 20 C.F.R. §802.203(c); *Whyte v. Gen'l Dynamics Corp.*, 8 BRBS 706 (1978). Accordingly, the fee request is denied at this time.