BRB No. 99-902

ROBERT T. WATSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Jonathan H. Walker (Mason & Mason), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Remanding Case and Awarding Attorney Fees (98-LHC-106) 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). 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 the law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant originally filed a claim for disability and medical benefits for a permanent

disability related to exposure to asbestos at work. After this case was transferred to the Office of Administrative Law Judges, claimant dropped the claim for disability benefits, and employer agreed to pay the costs of monitoring claimant's pulmonary condition. Claimant's counsel filed a petition for a fee for work performed before the administrative law judge. Counsel requested 12.5 hours at an hourly rate of $185, plus 1.25 hours at an hourly rate of $40, plus $65.83 in expenses, for a total fee of $2,428.33. Employer objected to the hourly rate, to work performed before the district director, to the cost of $2.25 for a transcript, and to work performed on October 30, 1997, August 27, 1998, and February 2, 1999, as being excessive, not necessary and/or duplicative. In a reply, claimant's counsel explained the reasons behind each of those requests.

Because there is no longer any dispute over the merits of the case, the administrative law judge remanded the case to the district director for disposal of the claim. Decision and Order at 2. With regard to the fee petition, the administrative law judge concluded that an hourly rate of $165 is appropriate and he rejected both claimant's and employer's assertions that fee rates of $185 or $150 are more reasonable. Decision and Order at 2. The administrative law judge disallowed any fee for work performed before the district director; however, he awarded the $2.25 transcript fee as being a reasonable and necessary expense. *Id.* at 2-3. With regard to employer's specific objections to the work performed on the three above-mentioned dates, the administrative law judge stated:

> Employer bases its objections on the grounds that these entries are excessive, unnecessary, or duplicative. However, Employer does not offer documentation to support its objections. Under these circumstances, Employer's contentions have no merit.

Decision and Order at 2. Consequently, he awarded a total fee of $1,848.33. *Id.* at 3. Employer appeals the fee award. Claimant has not filed a response.

Employer makes three arguments on appeal. First, it contends the administrative law judge erred in awarding a fee based on a rate of $165 per hour in light of the Altman Weil Pensa *1997 Survey of Law Firm Economics* and in light of the Board's affirmance of an hourly rate of $155 in *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.* 202 F.3d 259 (4th Cir. 1999)(table). Contrary to employer's assertions, the decision in *Parks* does not set forth the hourly rate to be applied, but merely reaffirms the well-established principle that the amount of a fee award, and, hence, the hourly rate which applies, is determined by the judicial body awarding the fee – in this case, the administrative law judge. *Parks*, 32 BRBS at 97-98; *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The administrative law judge rationally considered the evidence submitted by both parties and arrived at a reasonable hourly rate. Employer has not shown error in awarding a fee based on this rate. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 173, *aff'd on*

recon. en banc, 32 BRBS 251 (1998); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

Next, employer contends the administrative law judge erred in failing to reduce the fee in light of claimant's limited success in that he only obtained medical benefits for monitoring his lung condition. Employer failed to raise this issue before the administrative law judge, and we decline to address it for the first time on appeal. *McKnight*, 32 BRBS at 173; *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Finally, employer asserts that the administrative law judge erred in requiring the submission of "documentation" in support of its objections that certain services were excessive, unnecessary or duplicative. Employer's assertion has merit. An employer need only raise the objections, and it is for the administrative law judge to decide, using his knowledge of the case, his experience and the law. The administrative law judge must then determine, based on the information before him, whether a reduction of the hours requested is warranted. *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 380 (1979). That employer does not produce additional "documentation" to support its objections is an insufficient reason for declining to address employer's concerns.[1] Consequently, we must vacate the award of an attorney's fee and remand the case for the administrative law judge to reconsider the fee petition and employer's objections that certain entries therein represent excessive, unnecessary or duplicate work, as well as claimant's reply to these objections.

[1]Contrary to the administrative law judge's statement, *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982), and *Collins v. General Dynamics Corp.*, 14 BRBS 458 (1981), do not require employer to submit documentation to supports its objection to the fee. Rather, they require the district director and the administrative law judge to give rational explanations and to substantiate their decisions to award or reduce a fee. *Swain* and *Collins* also state that "merely adopting" an employer's statement of objection does not constitute valid reasoning in support of the fee award.

Accordingly, the administrative law judge's fee award is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge