

CLAUDE T. TAYLOR)

Claimant-Respondent)

v.)

NEWPORT NEWS SHIPBUILDING)
AND DRY DOCK COMPANY)

Self-Insured)

Employer-Petitioner)

DATE ISSUED: May 14, 2004

DECISION and ORDER

Appeal of the Supplementary Decision and Order-Awarding Attorney's Fees of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplementary Decision and Order-Awarding Attorney's Fees (2001-LHC-0715) of Administrative Law Judge Richard K. Malamphy 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 may be set aside only if the challenging party shows it 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 was injured during the course of his employment for employer as an NDT supervisor on January 17, 1976. Employer voluntarily paid claimant continuing compensation for partial disability of approximately \$66 per week from the date of claimant's injury until 1982, when claimant transferred to another position. Employer then

commenced voluntary payments to claimant of \$22.10 per week. On February 4, 1992, the district director issued a compensation order awarding claimant compensation of \$22.10 per week for temporary partial disability, 33 U.S.C. §908(e), resulting from his January 1976 work injury.

On May 23, 1997, employer filed an LS-18 pre-hearing statement requesting modification of the district director's order. 33 U.S.C. §922. On May 15, 1998, claimant also filed an LS-18 form requesting modification, alleging a mistake of fact in the district director's order. Employer subsequently withdrew its petition for modification, and it moved that the case be remanded to the district director for an informal conference on claimant's petition for modification. On July 1, 1998, Administrative Law Judge Huddleston issued an Order of Remand to the district director. In a supplemental decision, claimant's counsel was awarded an attorney's fee of \$2,520, representing 14 hours at a rate of \$180 per hour.

On December 21, 1999, the case was returned to the Office of Administrative Law Judges for a hearing on claimant's May 15, 1998, petition for modification. Claimant argued that the district director's February 1992 order was improperly entered and therefore was void *ab initio*, or alternatively, he alleged that employer paid an incorrect compensation rate from January 1976. At the hearing on August 30, 2000, the parties agreed to have the case remanded to the district director so that counsel for claimant and employer could review the administrative file on the claim from the date of injury in January 1976 to May 1998 when claimant filed for modification. On September 14, 2000, Administrative Law Judge Malamphy (the administrative law judge) issued an Order of Remand. On December 7, 2000, the district director informed the administrative law judge that the February 1992 order was validly issued and that the issues concerning modification of the order could not be informally resolved. Thus, the case was returned to the administrative law judge. At the hearing on August 14, 2001, the parties stipulated as to claimant's entitlement to additional compensation. The administrative law judge issued a decision on November 9, 2001, approving the parties' stipulations, wherein employer agreed to pay claimant continuing compensation for temporary partial disability from January 1, 1997, at the rate of \$28.39 per week.

Claimant's counsel filed a fee petition for work performed before the administrative law judge in which he requested a fee of \$4,785.10, representing a combined 26.93 hours of attorney time at \$200 per hour and paralegal time at \$75 per hour. In his supplemental decision, the administrative law judge addressed employer's objections and awarded claimant's counsel a fee totaling \$3,910.35. On appeal, employer challenges the attorney fee award. Claimant responds, urging affirmance.

Employer first argues that claimant's attorney is not entitled to a fee for services rendered from December 1999 to September 14, 2000, as employer asserts the services were solely directed toward having the district director's February 1992 order declared void. Employer contends that there was not a successful prosecution of this claim. The administrative law judge acknowledged that claimant's effort in having the district director's order voided was unsuccessful, but found that the increase in claimant's compensation rate supports an attorney fee award payable by employer. We reject employer's contention of error, and affirm the administrative law judge's finding. Pursuant to the parties' agreement, claimant prevailed in establishing claimant's entitlement to compensation from January 1, 1997, for temporary partial disability at a rate of \$28.39 per week. This resulted in claimant's obtaining additional compensation of \$327.08 per year, and past due compensation of approximately \$1,600 as of November 9, 2001, when the administrative law judge issued his decision accepting the parties' stipulations. Accordingly, as claimant's counsel's services resulted in claimant's obtaining greater benefits, we hold that the administrative law judge properly held employer liable for claimant's attorney fee. See *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd sub nom. Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990); see also 33 U.S.C. §928(a). Claimant's ultimate success renders an employer liable for all necessary work performed leading to that success. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*).

Employer next asserts that the administrative law judge erred by allowing a fee for "unnecessary" attorney time expended prior to the September 2000 Order of Remand on the unsuccessful issue, and also to gather information on the wages of co-workers from the date of injury forward.¹ The administrative law judge rejected employer's contentions. The administrative law judge found that certain services rendered by claimant's counsel prior to September 14, 2000, when the case was remanded to the district director for the parties to review the administrative file, were necessary to establish claimant's entitlement to additional compensation, and that claimant's counsel is entitled to a fee for time expended preparing for the hearing notwithstanding the fact that the contested issues were eventually disposed of by stipulations. Supplementary Decision and Order at 2-4. The administrative law judge also reduced or disallowed specific entries in response to employer's contentions

¹ In this regard, employer asserts that claimant did not prevail in his request for a cost of living adjustment to his compensation rate for partial disability. Employer states this request is evidenced by Claimant's Exhibit 4A. A review of the entire record and the transcripts for the August 30, 2000, and August 14, 2001, hearings shows no support for employer's contention that claimant sought a cost of living adjustment, and there were no exhibits admitted into the record at either hearing. As the administrative law judge discussed, counsel's discovery work concerning wages applied to claimant's claim that he had a greater loss in wage-earning capacity than that awarded by the district director.

that the time expended was entirely unrelated to the issue on which claimant prevailed, unrelated to the claim, redundant, or the attorney service was not actually provided. *Id.* at 5-8.

As the administrative law judge's findings are rational and in accordance with law, we reject employer's contention that the administrative law judge insufficiently reduced the requested fee. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001). The administrative law judge properly applied the regulatory criteria of 20 C.F.R. §702.132 to the fee application and the test for determining the necessity of work performed by counsel, *i.e.*, at the time it was performed, did the attorney reasonably believe it was necessary to establish entitlement? *See, e.g., O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). In this case, there is no evidence that claimant retained counsel for his January 1976 work injury prior to employer's filing for modification in May 1997 to terminate claimant's compensation. *See* August 30, 2000, hearing transcript at 3-5. At this time, claimant's counsel properly scrutinized employer's previous compensation payments from the date of injury in January 1976, and the district director's February 1992, compensation order. For example, claimant's counsel sought a *subpoena duces tecum* from the administrative law judge in which he requested that employer be ordered to document the wages earned by an NDT supervisor in January 1976 and at the present time, as well as the wages earned by an engineer analyst in January 1976 and at the present time. In response to employer's motion to quash this request, claimant's counsel answered that claimant was employed as an NDT supervisor at the date of his injury, and that he is currently employed as an engineer analyst. *See* June 8, 2000, response to Motion to Quash. Thus, the administrative law judge rationally found that this type of work by claimant's counsel was relevant to determine the extent of any loss of wage-earning capacity claimant sustained due to his work injury and whether the district director's order should be modified. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Based on this record, we affirm the administrative law judge's award of an attorney's fee for work claimant's counsel reasonably believed, at the time it was performed, was necessary to establish claimant's entitlement to benefits notwithstanding that, ultimately, the case was resolved by the parties' stipulating to claimant's entitlement to benefits. *See O'Kelley*, 34 BRBS at 44; *Maddon*, 23 BRBS at 61-62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1991).

Employer next challenges its fee liability because claimant did not prevail on an issue that was the subject of an informal conference before the district director. Employer did not raise this issue before the administrative law judge, and it cannot raise the issue for the first time on appeal. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *see also Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986) (informal conference is not a pre-requisite to fee liability); *contra Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS

109(CRT) (5th Cir. 2001) (Fifth Circuit holds that informal conference is pre-requisite to fee liability under Section 28(b)). Moreover, this contention is disingenuous in that the issue of the extent of claimant's partial disability was before the district director on remand from the administrative law judge. The district director specifically stated that the parties could not resolve this issue informally, and it is immaterial to the issue of fee liability whether the parties discussed this issue in the context of mistake in fact or change in condition.

Finally, employer challenges the administrative law judge's rejection of its contention that claimant's fee petition is impermissibly vague as to the services performed. The administrative law judge found that the fee petition on its face is reasonable, *see* 20 C.F.R. §702.132(a), and employer has not established an abuse of the administrative law judge's discretion in this regard. Supplementary Decision and Order at 6; *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). Thus, we reject employer's contention.

Accordingly, the administrative law judge's Supplementary Decision and Order-Awarding Attorney's Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge