BRB No. 00-258

LEE D. VERHINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 27, 2000
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & 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 Supplemental Decision and Order Awarding Attorney's Fees (1998-LHC-2875) 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 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 and employer stipulated that employer, pursuant to Section 7 of the Act, 33 U.S.C. §907, would be liable "for all past, present and future medical bills incurred for treating, testing and surveillance of" claimant's asbestos-related

condition. Supp. Decision and Order at 1; Decision and Order Accepting the Stipulations of the Parties at 3. Following acceptance of the stipulations, claimant's counsel, Mr. West, filed a petition for an attorney's fee in the amount of $1,805, to which employer subsequently filed objections. Over employer's objections, the administrative law judge awarded a fee based on an hourly rate of $185 and found that claimant was fully successful in the prosecution of his claim. Consequently, he declined to reduce the fee in general on those grounds. With regard to employer's specific objections, the administrative law judge disallowed 2.25 hours, and he awarded a total fee of $1,388, representing 6.75 hours at $185 per hour, two hours at $40 per hour, and $60 in expenses. Supp. Decision and Order at 2-3. Employer appeals the fee award, and claimant has not responded.

Employer first contends the administrative law judge erred in awarding a fee based on an hourly rate of $185 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 in all cases, 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). In making his determination, the administrative law judge considered the evidence submitted by both parties, including claimant's submission of the Altman Weil Pensa *1998 Survey of Law Firm Economics*. He then took into account the geographic area, the complexity of the case, the quality of the representation and counsel's experience and approved an hourly rate of $185. In his discretion, the administrative law judge arrived at a reasonable hourly rate, and employer has not shown error in his awarding a fee based on this rate. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986); 20 C.F.R. §702.132.

Next, employer contends the administrative law judge erred in finding that claimant successfully prosecuted his claim. Employer asserts that because claimant withdrew his claim for permanent partial disability benefits and because he obtained only medical monitoring, he is not entitled to a fee, or, alternatively, is entitled only to a reduced fee. Claimant, in his brief before the administrative law judge, argued that he was fully successful because the claim in its entirety was disputed and he succeeded in establishing employer as the responsible party in his quest for medical benefits. Employer asserts that it agreed to the medical monitoring stipulation so as

to avoid costly litigation, and it reserved its last covered employer defense in the event claimant later asserts a claim for disability compensation. Regardless, after this case was transferred to the Office of Administrative Law Judges, employer agreed to pay claimant's medical costs associated with his asbestos-related condition. While that amount may be nominal at present, it could increase significantly if claimant's condition worsens. Therefore, we cannot agree with employer's categorization of the outcome as "*de minimis,*" *see generally Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993), and we affirm the administrative law judge's finding that claimant's success "is not so minimal as to warrant an across the board reduction" of the fee. Supp. Decision and Order at 2.

We also cannot agree with employer's contention that claimant was not successful in the prosecution of this claim. Employer's reliance on the Board's decision in *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) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000), in support of its assertion, is misplaced. In *Hill*, the claimant was unsuccessful in his claim for disability benefits because his claim was filed in an untimely manner, *Hill*, 32 BRBS at 191-192, but he succeeded in obtaining medical benefits, a claim for which is never time-barred. In light of his partial success, the Board affirmed the administrative law judge's determination that claimant's counsel were not entitled to a fee in the full amount requested but were entitled only to a portion thereof. *Id.* at 192.[1] In the case presently before us, claimant withdrew his claim for disability benefits and then the parties agreed upon stipulations, including employer's liability for the payment of medical expenses – past, present and future – for claimant's asbestos-related condition. Establishing entitlement to past, present and future medical benefits by stipulation constitutes a successful prosecution of the claim, entitling counsel to a fee. *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987); *see generally Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989). Moreover, a fee of $1,388 for 8.75 hours of work is not unreasonable given this result. Therefore, we affirm the administrative law judge's determination that claimant succeeded in prosecuting his claim and that his attorney is entitled to the fee awarded. As employer has not challenged any other aspect of the fee award, we affirm the administrative law judge's fee award in its entirety.

[1]The Fifth Circuit also affirmed the Board's affirmance of the administrative law judge's fee award.

Accordingly, the administrative law judge's Supplemental 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