

HERMAN S. PICEYNSKI)	
)	
Claimant-Respondent)	
v.)	
)	
DYNCORP)	DATED ISSUED: <u>Oct. 30, 2000</u>
)	
and)	
)	
INSURANCE COMPANY OF THE)	
STATE OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Attorney's Fees of James W. Kerr, Jr, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Michael D. Murphy (Murphy & Walker, L.L.P.), Houston, Texas, for employer/carrier.

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 (94-LHC-2387) of Administrative Law Judge James W. Kerr, 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sought disability compensation under the Act, asserting that he is totally disabled as a result of numerous health problems sustained as a result of his use of anti-nerve gas pills, pyridostigmine bromide, and his exposure to six SCUD missile explosions, oil well smoke, and various other unknown toxic substances while working for employer in Saudi Arabia during Operation Desert Storm.¹ In a Decision and Order filed on March 14, 1997, after finding that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption and that employer had not produced specific and comprehensive evidence sufficient to establish rebuttal, the administrative law judge awarded claimant temporary and permanent total disability compensation, as well as permanent partial disability compensation commencing May 26, 1995. In addition, the administrative law judge awarded claimant medical benefits, and determined that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

¹Claimant's alleged health problems included the following: skin rashes over most of his body that leave permanent scars; bleeding gums and the loss of all his teeth; joint pain; dizziness and loss of balance; memory loss; poor concentration; chronic diarrhea and stomach problems; chronic headaches; redness of the eyes; ringing in the ears; chronic fatigue; sexual impotence; chronic cough at night and loss of sleep; chronic muscle soreness and muscle spasms at night; and diabetes requiring medication.

On March 21, 1997, employer filed a motion for reconsideration with the administrative law judge. In an Order dated March 27, 1997, the administrative law judge denied employer's motion. Thereafter, on March 24, 1997, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration in which he requested that the administrative law judge modify his Decision and Order to reflect that claimant is covered under the Defense Base Act;² additionally, the Director asserted that the administrative law judge's Decision and Order was in error in that it purported to address a question of reimbursement under the War Hazards Compensation Act, a question over which the Secretary has exclusive jurisdiction. *See* 42 U.S.C. §1704(a)(3). Lastly, the Director challenged the administrative law judge's award of Section 8(f) relief to employer. ⑥ April 25, 1997, the administrative law judge issued an Order in which he informed the parties that in light of the arguments raised in the Director's motion for reconsideration, he believed it was necessary for him to reevaluate whether there was an injury under the Act. In his subsequent decision, after reiterating that it was necessary to reevaluate the entire record, the administrative law judge found that claimant failed to establish that his medical problems were causally related to any unusual toxic poisoning or chemical/ bacterial deficiency and denied the claim accordingly. Claimant appealed this denial of benefits to the Board.

In its Decision and Order, the Board determined that it was unable to affirm the administrative law judge's denial of benefits as his rebuttal analysis did not fully address claimant's medical conditions consistent with case law and, moreover, he did not discuss all of the relevant evidence as required by the Administrative Procedure Act. The Board thus vacated the administrative law judge's denial of benefits and remanded the case for further consideration. *See Piceynski v. Dyncorp*, BRB No. 97-1451 (July 17, 1998)(unpublished).

In his Decision and Order on Remand Awarding Benefits, the administrative law judge awarded claimant permanent total disability compensation from April 19, 1991, and continuing, based upon an average weekly wage of \$538. 33 U.S.C. §908(a). Additionally, he found employer entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Subsequent to this award, claimant's attorney sought a fee of \$212,416.50, representing 903.9 hours of services rendered at an hourly rate of \$235, plus costs of \$17,640.82. Employer filed objections to this fee request. Claimant's counsel responded to employer's objections, and thereafter sought a fee for 8 hours of time spent defending his fee request.

In his Supplemental Decision and Order, the administrative law judge acknowledged employer's objections, reduced counsel's requested hourly rate to \$200, disallowed 7.5 hours sought for local travel time, and thereafter awarded claimant's attorney a fee of \$180,880,

²The administrative law judge's initial Decision and Order refers to the claim as falling under the Longshore Act itself rather than under the Defense Base Act extension.

representing 904.4 hours of services rendered at a rate of \$200 per hour, plus costs of \$17,640.82.

Employer now appeals, asserting that the administrative law judge erred in not further reducing both the hourly rate and the number of hours sought by counsel. Claimant responds, urging affirmance of the administrative law judge's fee award in its entirety.

Employer initially challenges the hourly rate awarded to claimant's counsel by the administrative law judge. Specifically, employer asserts that the awarded hourly rate of \$200 is excessive, and that a rate of between \$100 and \$150 per hour would be more appropriate in this case. In addressing this specific contention in his supplemental decision, the administrative law judge found the reduced hourly rate of \$200 to be reasonable in light of the novel and complex issues presented in the instant case, the expertise of claimant's counsel, and the prevailing rates in the geographic area wherein this case arose. As the administrative law judge specifically considered employer's objection and thereafter reduced the amount requested from \$235 to \$200 per hour, we hold that employer has not met its burden of showing that the administrative law judge abused his discretion in this regard. *See Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000); *Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer next argues that the administrative law judge erred in allowing a fee for the time expended by claimant's counsel in preparing his fee petition. We disagree. Contrary to employer's assertion, time spent preparing a fee application is compensable if the time awarded is reasonable. *See 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 S.Ct. 2215 (2000); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 97 (CRT)(9th Cir. 1996); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). We therefore affirm the administrative law judge's decision to allow claimant's counsel the opportunity to request reimbursement for the time spent preparing and defending his fee petition.

Employer additionally challenges the number of hours requested by counsel and approved by the administrative law judge. Specifically, employer avers that claimant's counsel's fee petition lacks billing judgement and that the ultimate fee awarded to counsel by the administrative law judge is unreasonable. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, which provides that an awarded attorney's fee must be reasonable, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 21 BRBS 94

(1988). The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. *See, e.g., Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). In the instant case, claimant's counsel filed a 68 page fee petition in which he requested, after documenting over 825 individual time entries, reimbursement for 911.9 hours of services rendered before the administrative law judge, including in excess of 50 hours for reviewing non-medical newspapers and magazines, communications with bookstores, secretaries and other support personnel, the preparation of a bibliography, and 48.8 hours for the preparation of the fee petition itself. In response to counsel's fee petition, employer filed multiple specific and general objections. After initially agreeing with employer that counsel's request for local travel expenses should be reduced by 7.5 hours, the administrative law judge summarily awarded counsel all of his remaining requested hours. Specifically, the administrative law judge found that the remaining disputed hours "are reasonable and necessary, not excessive for the work done and contributed to a successful prosecution of the case." *See* Supplemental Decision and Order at 3.

After a thorough review of employer's contentions on appeal as well as the administrative law judge's supplemental decision, we conclude that the administrative law judge's fee award must be vacated, as the administrative law judge did not sufficiently address employer's objections in determining a reasonable fee for the necessary work in this case. Specifically, in its objections to the fee request at issue here, employer raised both specific and general objections to the reasonableness of the time entries set forth in claimant's counsel's 68 page fee petition. The administrative law judge's summary acceptance of counsel's hours, without discussion of employer's objections, renders it impossible for the Board to determine whether the time sought is reasonable and necessary in this case. *See* 33 U.S.C. §928; 20 C.F.R. §702.132. Accordingly, given the cursory nature of the administrative law judge's supplemental decision, we vacate the administrative law judge's fee award and remand the case for reconsideration of claimant's counsel's fee petition in light of employer's objections. *See Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

Lastly, employer challenges the administrative law judge's decision to award claimant's counsel reimbursement for eight travel-related entries totaling \$2,327.60, as well as \$1,065 in photocopying expenses.³ In awarding counsel the entire \$17,640.82 in costs that he requested, the administrative law judge summarily found, without discussion of employer's specific objections, that all of counsel's costs are "recoverable." *See*

³Specifically, employer challenges the travel expenses sought on March 11 and 12, 1995, March 14, 1995, October 5 through 8, 1996, February 27 through March 2, 1999, July 29, 1999, and September 20 and 21, 1999.

Supplemental Decision and Order at 3. As the administrative law judge did not address employer's specific objections to counsel's itemized costs, we vacate his award of costs for the eight specific travel-related entries and photocopying costs raised by employer on appeal. On remand, the administrative law judge must address employer's objections to these itemized expenses. *See* 33 U.S.C. §928(d); *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). As employer does not challenge the remaining \$14,248.22 in costs awarded to counsel by the administrative law judge, the award of those expenses is affirmed.

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed during the initial appeal of this case to the Board. *See Piceynski v. Dyncorp*, BRB No. 97-1451 (July 17, 1998)(unpublished); *see also* 20 C.F.R. §802.203. Specifically, counsel seeks a fee of \$42,858.12, representing 182.375 hours of legal services rendered at a rate of \$235 per hour, \$1,025, representing 5 hours rendered defending his fee petition at a rate of \$205 per hour, and \$2,024.01 in expenses. Employer, in response, challenges the number of hours and the hourly rate sought by claimant's counsel.

Claimant is entitled to an attorney's fee payable by employer for successfully prosecuting his claim. *See* 33 U.S.C. §928; *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). After reviewing counsel's fee petition and employer's objections, we agree with employer that the hourly rates requested, \$235 and \$205, are excessive; we therefore reduce the hourly rates to \$200. *See Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998). Employer additionally challenges the number of hours requested by counsel. In his response brief, claimant's counsel concedes that the fee petition presented to the Board contains entries for services rendered collecting new evidence in support of claimant's motion for modification before the administrative law judge. *See* Claimant's response brief at 6. Our review of counsel's fee petition reveals that counsel has documented 132.75 hours of services rendered in researching, locating and reviewing additional materials in support of claimant's claim, and in attending various medical conferences around the country while claimant's appeal was pending before the Board. As these services were not performed in furtherance or support of claimant's pending appeal before the Board, they are disallowed. *See* 20 C.F.R. §802.203. Similarly, \$1,878.48 of the \$2,024.01 in expenses sought by claimant's counsel relate to work performed in support of claimant's subsequent motion for modification before the administrative law judge; thus, we disallow the \$1,878.48 sought by counsel and we award the remaining \$145.53 for expenses incurred by counsel in furtherance of his appeal before the Board. Accordingly, we approve 49.625 hours of necessary services rendered by counsel in support claimant's appeal to the Board in BRB No. 97-1451, at a rate of \$200 per hour, for a total fee of \$9,925, and \$145.53 in costs, payable directly to counsel by employer. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Supplemental Decision and Order awarding claimant's counsel an attorney's fee and costs is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion. Claimant's counsel is awarded a fee of \$9,925, and costs of \$145.53, for worked performed before the Board in BRB No. 97-1451, payable directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge