

JAMES H. TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: <u>Oct. 31, 2003</u>
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

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

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

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying 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).

Claimant worked as a chipper. He had three knee surgeries in 1994 and returned to work in 1996. On January 11, 1996, he was working in an awkward position in order to protect his knees, and 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. Tr. at 9-10, 16-17, 19, 34. Employer voluntarily paid permanent partial disability benefits beginning in October 1997, based on an average weekly wage of \$717.35 and on claimant=s actual part-time wages, resulting in a compensation rate of \$390.23. Emp. Exs. 8, 9. In May 2000, employer erroneously sent claimant a check in the amount of \$1,457.90 as an unused annual leave payment. Tr. at 23. In March 2001, it sent claimant a letter asking for the return of \$2,608.94. Claimant agreed to pay back \$1,000 in April 2001. Employer stopped paying permanent partial disability benefits until it recouped the balance of \$1,608.94 and then recommenced 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 July 2001, employer recalculated claimant=s permanent partial disability benefits using full-time wages from identified suitable alternate employment instead of claimant=s actual part-time wages, resulting in a reduced compensation rate of \$364.90. Emp. Exs. 8, 9.

Before the administrative law judge, the parties raised the issues of whether claimant was entitled to reimbursement of the benefits employer withheld as credit against the payment of unused annual leave and whether claimant=s part-time wages are representative of his wage-earning capacity. Although the parties agreed on other facts, having noted a difference between the average weekly wage on which his benefits were based, \$717.35, and the figure typed on employer=s Pre-Hearing Statement, \$935.54, claimant would not stipulate to the average weekly wage. Tr. at 5-6. After the hearing but prior to the issuance of the Decision and Order, the parties stipulated to an average weekly wage of \$606.65. Decision and Order at 1-3. In his decision, the administrative law judge found that the May 2000 payment was designated as unused annual leave and not as an advance payment of compensation; therefore, employer is not entitled to credit the payment against its liability for workers= compensation benefits, and he found that employer owed claimant \$1,608.94 in permanent partial disability benefits. *Id.* at 8. Additionally, the administrative law judge found that claimant=s actual part-time earnings do not fairly represent his post-injury wage-earning capacity. Based on the wages from full-time suitable alternate employment identified by employer, the administrative law judge determined that claimant=s adjusted wage-earning capacity is \$201.09. Using the agreed upon average weekly wage and the newly calculated wage-earning capacity, the administrative law judge found that the appropriate compensation rate for claimant=s benefits is \$270.37 per week. *Id.* at 6-7. After awarding claimant benefits and employer relief from the Special Fund, 33 U.S.C. ' 908(f), the administrative law judge permitted claimant=s counsel to file a petition for an attorney=s fee. *Id.* at 8-9. No party appealed the administrative law judge=s decision.

Claimant=s counsel submitted a petition for an attorney=s fee for services rendered between July 26, 2001, and May 31, 2002, in the amount of \$7,533.75. Employer argued that counsel was not entitled to a fee because claimant was unsuccessful in obtaining additional benefits or, at most, counsel is entitled only to a substantially reduced fee because claimant

was only partially successful. Employer also challenged specific itemized entries. The administrative law judge concluded that claimant was partially successful in the prosecution of his case, as he established entitlement to the amount withheld by employer, but he failed to establish that the wages from his part-time work represented his wage-earning capacity. The administrative law judge then stated that, in light of the partial success, he was inclined to award counsel a fee but could not do so based on the petition filed, as he could not differentiate between work on the successful issue and work on the unsuccessful issue, and he would not make an arbitrary guess. Supp. Decision at 2. He, therefore, denied the 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 successful issue. If counsel could submit such a fee petition, the administrative law judge stated he would then decide whether claimant=s success on the first issue could overcome the net loss of benefits resulting from the lower stipulated average weekly wage and the higher post-injury wage-earning capacity. *Id.* at 2-3. Counsel declined the invitation to submit a revised fee petition and, instead, filed this appeal. Employer responds, urging the Board to affirm the denial of an attorney=s fee.

On appeal, claimant=s counsel contends the administrative law judge erred in denying a fee because claimant was fully successful in his claim for benefits. Alternatively, if claimant is considered partially successful, counsel argues that the administrative law judge cannot require him to file a fee petition designating only the hours worked on the successful issues. Rather, he argues that the administrative law judge can award a fee commensurate with the necessary work performed based on the fee petition filed.

An attorney=s fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. '928, and the applicable regulation, 20 C.F.R. '702.132, which provide that the award of any attorney=s fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass=n*, 22 BRBS 434 (1989). However, if a claimant obtains only a limited degree of success, then the fact-finder should award a fee in an amount that is reasonable in relation to the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992).

Initially, we reject counsel=s assertion that claimant was fully successful in this case. The administrative law judge addressed two issues: a credit issue and a wage-earning capacity issue. It is clear that claimant successfully proved his entitlement to the \$1,608.94 withheld by employer in an attempt to recoup its erroneous payment of unused annual leave. Decision and Order at 8; *see generally Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986). Equally clear, however, is that claimant was unsuccessful on the issue of whether his part-time earnings as a security guard fairly represent his post-injury wage-earning capacity.

The administrative law judge determined that claimant is capable of working 40-hours per week and, thus, has a higher post-injury wage-earning capacity than he asserted. Decision and Order at 6-7. Additionally, the parties stipulated to an average weekly wage that is significantly less than the \$717.35 on which employer based its voluntary payments of benefits. In conjunction, these two factors resulted in claimant=s permanent partial disability benefits being reduced by more than \$6,200 per year. Therefore, we affirm the administrative law judge=s determination that claimant=s success was limited.<sup>1</sup> 33 U.S.C. § 928(b); see generally *Boe v. Dep=t of the Navy/MWR*, 34 BRBS 108 (2001). 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. *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (decision on recon.).

In light of our affirmance of the administrative law judge=s determination that claimant was partially successful in this claim for benefits and is entitled to a fee, we next address counsel=s argument that he is not required to submit a fee petition containing only the hours of work performed on the successful issues, as the administrative law judge could have awarded a fee based on the fee petition filed. In this regard, counsel is correct.

Although an administrative law judge cannot mechanically disallow a fee for services performed on unsuccessful issues, *Stowars v. Bethlehem Steel Corp.*, 19 BRBS 134 (1986), if the issues can be differentiated or severed, no fee is permitted for services performed on the unsuccessful issues. *Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT); see also *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1<sup>st</sup> Cir.), cert. denied, 488 U.S. 992 (1988). The issues involved in this case, a credit issue and a wage-earning capacity/average weekly wage issue, are exclusive and independent of one another and, thus,

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<sup>1</sup>We reject counsel=s assertion that the negotiated average weekly wage of \$606.65 should be considered a success. See generally *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9<sup>th</sup> Cir. 2003). Employer voluntarily paid benefits based on an average weekly wage of \$717.35, and an average weekly wage of \$606.65 represents a loss of \$110.70 per week. While the record contains one letter stating employer=s position that claimant=s average weekly wage was \$104, there is nothing in the record to reflect that employer took any action, such as decreasing claimant=s benefits, based on this position. Rather, the record indicates that average weekly wage would not have been an issue had claimant not raised it.

are severable. Therefore, counsel is not entitled to a fee for work performed on the issue involving average weekly wage or wage-earning capacity. *Id.*; *Hensley*, 461 U.S. 424; *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

However, counsel did not file an application for a fee that distinguishes the work he devoted to each issue. Section 702.132(a) of the regulations, 20 C.F.R. ' 702.132(a), requires an attorney=s fee petition to describe with particularity the professional status of the person performing the work, the billing rate, and the hours devoted to each category of work. *See Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4<sup>th</sup> Cir.), *cert. denied*, 439 U.S. 979 (1978). Counsel=s fee application is in compliance with the regulation, and it provides sufficient detail for the administrative law judge to award a fee. While it is understandable that the administrative law judge sought to award an accurate fee, a fee petition which details work by issue is not required by the statute or regulations, and it is not necessary to an appropriate fee award. Accordingly, we vacate the administrative law judge=s denial of an attorney=s fee, and we remand the case for the award of an attorney=s fee. *See Ahmed*, 27 BRBS at 27. On remand, the administrative law judge must determine the level of claimant=s success in this case and award a fee commensurate with the work done to achieve that level of success considering the fee petition, the objections and any other pertinent evidence found in the administrative record. *See generally Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002). As is within his discretion, he may reduce the fee requested by a percentage based upon the degree of claimant=s success, he may reduce the hourly rate and/or the number of hours requested, or he may use any rational means to arrive at a dollar figure he deems commensurate with the necessary work performed on the successful issue.<sup>2</sup> *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *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) (5<sup>th</sup> Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT). The administrative law judge should explain the rationale for his determination regarding the amount of the fee awarded. *See generally Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

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<sup>2</sup>The administrative law judge may renew his efforts to seek additional information from the parties to assist him in rendering his decision.

Accordingly, the administrative law judge's Supplemental Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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PETER A. GABAUER, JR.  
Administrative Appeals Judge