

BRB No. 99-0279

LONNIE A. CRANSTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MARINE TERMINALS)	DATE ISSUED:
CORPORATION)	
)	
and)	
)	
MAJESTIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Awarding Attorney's Fees of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Bruce A. Bottini (Bottini, Bottini & Oswald, P.C.), Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl, Olson, Busch & Pfeifer, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fees (97-LHC-2254) of Administrative Law Judge Edward C. Burch 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. See, *e.g.*, *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim for benefits under the Act based upon a work-related injury he sustained to his back on February 14, 1994. The administrative law judge awarded claimant permanent partial disability compensation under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on an 8.2 percent loss in wage-earning capacity,¹ and denied claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, for treatment provided by Drs. Greenleaf and Keenan. Thereafter, claimant's counsel submitted a petition for an attorney's fee for work performed before the administrative law judge, requesting a fee totaling \$15,392, representing 96.2 hours of legal services performed at an hourly rate of \$160, and \$4,825 in expenses. Employer filed objections to the fee requested. In his Order Awarding Attorney's Fees, the administrative law judge, after considering employer's specific objections to the fee request, reduced the hours sought by counsel to 59.495, and the requested expenses to \$1,550.50. Thus, the administrative law judge awarded claimant's counsel an attorney's fee of \$9,519.20, and \$1,550.50 in expenses.

On appeal, claimant challenges the administrative law judge's reductions made in the number of hours and the amount of expenses sought. Specifically, claimant contends that the administrative law judge erred in reducing the fee entries due to the limited success of the claim, and further contends that the administrative law judge erred in reducing various fee entries for failure to itemize the entries on a line by line basis. Lastly, claimant avers that the administrative law judge erred in reducing the requested costs in relation to the testimony of claimant's vocational counselor and Dr. Greenleaf. Employer responds, urging affirmance of the administrative law judge's fee award. Claimant replies, reiterating the arguments raised in his appeal.

In reducing counsel's fee request, the administrative law judge relied on the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 421 (1983), wherein the Court held that an attorney's fee award should be for an amount that is reasonable in relation to the results obtained. *Id.*, 461 U.S. at 435-436. Pursuant to *Hensley*, the administrative law judge reduced by 10 percent the time counsel sought for reviewing the hearing transcripts, and preparing and drafting the closing written argument, as counsel failed to succeed on the issue of entitlement to medical benefits under Section 7 of the Act, 33 U.S.C. §907, and these entries would likely include time allocated to the issue of medical benefits. In addition, in view of

¹Claimant asserted that he suffered a loss in wage-earning capacity of approximately 23 percent.

the fact that claimant achieved only partial success in obtaining permanent partial disability compensation, the administrative law judge reduced by 65 percent the time allocated to obtaining the opinion of claimant's vocational counselor Richard Ross, as the administrative law judge gave no weight to Mr. Ross' opinion in determining claimant's loss of wage-earning capacity. As the administrative law judge's reductions are reasonable, and the Board has previously affirmed across the board reductions where the administrative law judge determined that claimant achieved limited success, the administrative law judge's above-mentioned reductions are affirmed. See *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998).

The administrative law judge additionally determined that several entries in counsel's fee petition did not comply with Section 702.132 of the regulations, 20 C.F.R. §702.132, as they did not provide an hourly breakdown of the time spent on particular activities. These entries, from December 17, 1997 to June 25, 1998, listed the total number of hours and the various services rendered on each day, but did not itemize the time spent on each allocated activity. Thus, the administrative law judge found that these entries did not conform with the requirements of Section 702.132, and reduced the fee award for these entries by 50 percent, from 43.8 hours to 21.9 hours.² See Order Awarding Attorney's Fees at 5-6. We hold that claimant's assertions on appeal are insufficient to meet his burden of proving that the administrative law judge abused his discretion in reducing the number of hours requested in this regard, as the administrative law judge rationally found that the relevant entries were not adequately explained in accordance with Section 702.132 of the regulations. See, e.g., *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999); *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*)(Brown and McGranery, JJ., dissenting on other grounds).

²Section 702.132 provides that an attorney's fee application must "be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status . . . of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work." 20 C.F.R. §702.132(a).

Lastly, claimant challenges the administrative law judge's decision to reduce the amount of the requested costs. In the instant case, the administrative law judge applied a *Hensley* analysis in addressing the costs sought by claimant, finding that since claimant achieved only partial success in obtaining an award of permanent partial disability compensation, the costs awarded should be reduced in proportion to the success obtained. Thus, the administrative law judge reduced the costs requested by 65 percent, from \$2,879.50 to \$1,550.50. We agree with claimant that this reduction cannot be affirmed. Section 28(d) of the Act, 33 U.S.C. §928(d), the only statutory provision authorizing the administrative law judge to assess costs, provides that where an attorney's fee is awarded against an employer or carrier there may be a further assessment against such employer or carrier for costs, fees, and mileage for necessary witnesses attending the hearing at the instance of claimant. In *Ezell*, the Board specifically rejected the assertion that counsel's request for costs should have been reduced based on a *Hensley* analysis. Rather, the Board held that Section 28(d) requires only the analysis of the reasonableness and necessity of the costs incurred by counsel in litigating the case, and that no additional analysis is required. *Ezell*, 33 BRBS at 31. For the reasons stated in *Ezell*, we hold that the administrative law judge erred by applying a *Hensley* analysis to the issue of costs. We therefore vacate the reduction in the costs sought, and we remand the case for consideration of whether the costs requested by claimant's counsel were reasonable and necessary.

Accordingly, the administrative law judge's reduction of the costs sought is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge