

BRB No. 99-1258

DAVID KING )  
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 Claimant-Respondent ) DATE ISSUED:  
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 v. )  
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 M & M DIESEL SERVICE )  
 CORPORATION )  
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 and )  
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 LOUISIANA WORKERS' )  
 COMPENSATION CORPORATION )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Aubrey E. Denton (Porter, Denton & Guidry, L.L.P.), Lafayette, Louisiana, for claimant.

Paul D. Bufone (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (98-LHC-1610) of Administrative Law Judge Larry W. Price 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, e.g., Muscella v. Sun*

*Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his neck on July 19, 1993, during the course of his employment for employer as a diesel mechanic. An MRI administered on October 1, 1993, revealed significant spinal cord compression and herniation at C5-6, and mild compression at C4-5. On December 2, 1993, claimant underwent an unsuccessful discectomy and fusion at C5-6, which was performed by Dr. Judice, who withdrew shortly thereafter from the practice of neurosurgery. Employer voluntarily paid continuing benefits under the Act for temporary total disability from October 2, 1993, 33 U.S.C. §908(b), and it approved Dr. Phillips as claimant's treating physician. Dr. Phillips recommended a discogram at C3-4 and at C6-7 to determine what, if any, additional surgery would benefit claimant. Employer refused to authorize this test. In his Decision and Order, the administrative law judge credited the opinion of Dr. Phillips, and found that a discogram is reasonable and necessary for the treatment of claimant's injury. The administrative law judge further stated that employer is liable for further surgery if the results of the discogram so warrant.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting an attorney's fee of \$24,053.75, representing 137.45 hours of services rendered at a rate of \$175 per hour, plus expenses of \$2,746.13. Employer filed objections to the fee requested. In a Supplemental Decision and Order, the administrative law judge, after considering the objections raised by employer, denied 54.1 hours of services rendered while the case was pending before the district director and reduced by 4.25 the remaining hours sought by counsel to 79.1, reduced the hourly rate to \$150, denied as office overhead expenses claimed for Federal Express mailings, and awarded claimant's counsel an attorney's fee of \$11,865, plus \$2,708.63 for expenses. On appeal, employer challenges the administrative law judge's fee award. Claimant responds, urging affirmance.

Employer challenges the number of hours and the hourly rate awarded by the administrative law judge on the basis that this was a single issue case and the hourly rate is not justified by the number of hours for which claimant's counsel was awarded a fee. Moreover, employer asserts that specific time entries are either vague, unnecessary, excessive, duplicative or clerical.

Section 702.132, 20 C.F.R. §702.132, provides that the award of an 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 Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134 (CRT)(10th Cir. 1997); *see also Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, the administrative law judge credited claimant's counsel's response to employer's objections and found that employer failed to prove that the attorney time requested was not reasonable and necessary for the preparation of the claim. The

administrative law judge also found that an hourly rate of \$150 is fair and reasonable.

With regard to the compensable hours, the administrative record in this case establishes that the sole issue presented to the administrative law judge for adjudication at the November 17, 1998, formal hearing was the necessity of the proposed discogram. However, in its pre-hearing statement filed on April 24, 1998, employer contested, *inter alia*, causation and the nature and extent of claimant's disability, including the availability of suitable alternate employment. These issues remained contested by employer up to November 3, 1998, when employer and claimant filed joint stipulations on these and other issues. Thus, contrary to employer's assertion, this was an actively litigated claim until shortly before the formal hearing. *See generally Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995). The test for determining the necessity of work performed by counsel is whether, at the time it was performed, the attorney reasonably believed it was necessary to establish entitlement. *See, e.g., Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Given that several contested issues were resolved only shortly prior to the formal hearing, employer has not established error on the part of the administrative law judge in awarding a fee for all necessary hours expended while the case was pending before the administrative law judge's office. Accordingly, we reject employer's contention that the number of hours and hourly rate awarded should be reduced based on the lack of complex issues ultimately resolved as a result of the hearing.<sup>1</sup>

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<sup>1</sup>We similarly decline to reduce the award of \$1,203.79 in expenses for services provided claimant by Stephanie Chalfin, a vocational consultant. Employer has not shown that the administrative law judge abused his discretion in awarding this expense as employer specifically listed as contested issues on its April 24, 1998, pre-hearing statement whether claimant can return to work and vocational rehabilitation. That Ms. Chalfin was not called as a witness at the hearing does not negate the necessity of the services at the time they were performed. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). We also reject employer's contention that a \$413.16 Westlaw charge is non-compensable as office overhead. Employer failed to establish that this legal research expense was not reasonable or necessary.

We also reject employer's contention that certain entries on the fee petition fail to adequately describe the nature of the time expended or the identity of the person who performed the task. A review of claimant's fee petition reveals that counsel's entries are sufficiently specific to satisfy the regulatory criteria. *See Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988); 20 C.F.R. §702.132(a). Moreover, the administrative law judge adequately addressed employer's challenge to various itemized entries. As employer has not met its burden of showing that the administrative law judge abused his discretion in this regard, the number of hours awarded by the administrative law judge are affirmed. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Finally, employer's specific objection to counsel's method of billing in minimum increments of three-tenths of an hour is rejected, as the administrative law judge reduced certain entries to one-eighth of an hour and one-quarter of an hour, thereby giving tacit approval to the remaining charges billed at three-tenths of an hour as necessary work performed. Thus, the administrative law judge's award conforms to the criteria set forth by the United States Court of Appeals for the Fifth Circuit. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999). Accordingly, we affirm the attorney's fee awarded to claimant's counsel by the administrative law judge.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge