BRB No. 01-0968

JAMES R. BLACKMON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
M-I DRILLING FLUIDS COMPANY	)	DATE ISSUED: Sept. 13, 2002
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Laurence E. Best and Peter S. Koeppel, New Orleans, Louisiana, for claimant.

Tobin J. Eason, New Orleans, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-954) of Administrative Law Judge C. Richard Avery 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 was working on a Chevron oil rig in the Gulf of Mexico on March 1, 2000, when he injured his knees, back and neck. He underwent back and neck surgeries in 2000 and post-hearing knee surgery in June 2001. Claimant filed a claim under the Jones Act, 46 U.S.C. §688(a), a claim under the Longshore Act, and third-party suits against employer, Chevron USA, Incorporated, and Halliburton Energy Services, Incorporated. After the district court determined that claimant was a longshoreman and not a seaman, the Jones Act claim was dismissed and claimant dismissed employer from the third-party claim. In February 2001, employer converted its "maintenance and cure" payments to payments of longshore compensation, and the parties stipulated that employer is liable for, and was paying, compensation to claimant. Jt. Ex. 1. At the hearing on June 4, 2001, employer agreed to pay claimant's reasonable and necessary medical expenses. Accordingly, the only remaining issue before the administrative law judge was the amount of claimant's counsel's fee.[1]

Claimant's counsel filed a fee petition seeking a total of $40,012.81. This amount represented 145.75 hours, at a rate of $225 per hour, plus $7,219.06 in expenses. Employer filed objections, contending, *inter alia*, the hourly rate was excessive, hours identified on time spent processing a loan for claimant were impermissible, certain hours associated with time spent on the tort litigation should be disallowed, and amounts itemized prior to the date the case was referred to the Office of Administrative Law Judges should be denied. The administrative law judge agreed he could not award a fee for work performed prior to January 5, 2001, so he disallowed 55.25 hours. He also agreed the hourly rate should be reduced, and he awarded a fee based on an hourly rate of $175. Decision and Order at 3. The administrative law judge also disallowed 5.5 hours spent in acquiring a loan for claimant and the finance charges associated with that loan, and he disallowed all expenses related to photocopying, traveling, telephone calls, mileage, courier

[1]Prior objections raised by employer to an award of interest and a Section 14(e), 33 U.S.C. §914(e), penalty were deemed abandoned, as the administrative law judge found employer did not address those issues in its post-trial brief. Decision and Order at 2.

service and Federal Express charges. *Id.* at 3-4. Consequently, the administrative law judge awarded claimant's counsel $17,685.07, representing 85 hours at $175 per hour, plus $2,810.07 in expenses.[2] Employer appeals the fee award, and claimant responds, urging affirmance.

[2]Although claimant's counsel states he is uncertain how the administrative law judge arrived at a figure of $2,810.07 for expenses, and that he must have excluded the over-$2,000 charge for a site inspection, our calculations show that said amount must have been included. That is, the administrative law judge excluded expenses paid prior to January 5, 2001, and all travel, mileage and courier expenses, as well as the final entry for overhead costs, leaving the costs for medical records, witness fees, transcript fees, and the costs for the inspection, arriving at a total of $2,810.07.

Employer contends the fee petition includes services performed in furtherance of claimant's tort litigation and that it should not be held liable for those services under the Act. Specifically, employer argues that services relating to the depositions of the vocational rehabilitation counselor and the physicians, to the inspection of the injury site, and to discovery responses should be disallowed. As these costs were generated under the authority of the district court, employer argues that claimant's counsel should not be permitted to recover a fee for these services twice.[3] Claimant's counsel responds, arguing that the services involving the depositions and discovery all related directly to claimant's medical condition and his ability to work. He also asserts that the charge for the site inspection is compensable as the information established that claimant was a longshoreman, as employer had argued, and not a seaman. Thus, counsel states that the services identified were useful in reaching the stipulation with employer on the date of the hearing that claimant was entitled to medical benefits. Further, counsel argues that he has not received a fee in the tort litigation, thus negating any argument of double recovery. The administrative law judge rejected employer's argument, stating that, although the services were performed in pursuit of the unsuccessful Jones Act claim, they were beneficial to the preparation and ultimate resolution of this claim. Accordingly, he found the services to be recoverable as reasonable and necessary to the prosecution of the claim under the Act. Decision and Order at 3-4.

In this case, claimant's attorney participated in a number of depositions, and the depositions all took place after the Longshore claim was filed and prior to June 4, 2001, when employer stipulated to medical benefits at the hearing before the administrative law judge. Tr. at 6-7. Counsel charged for this time, as well as for time to review discovery responses related to the medical issues and for time and costs associated with a safety engineer's inspection of the injury site. An attorney's fee under the Act must be reasonably commensurate with the necessary work done, and must take into account the quality of the representation, the complexity of the issues and the amount of benefits awarded. *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979

[3]Employer also asserts it should not be liable for any services awarded prior to the date it filed its notice of controversion on June 20, 2000. We need not address this contention, as all services rendered prior to January 5, 2001, were disallowed by the administrative law judge as having been performed prior to the date the case was transferred to the Office of Administrative Law Judges.

(1978); 20 C.F.R. §702.132. Because the parties disputed claimant's entitlement to medical benefits until the date of the hearing when employer agreed to pay them, and because the disputed services itemized in the fee petition concerned medical opinions and other aspects related to obtaining medical benefits and compensation, it was reasonable for the administrative law judge to have determined that the services were pertinent to claim under the Act, and, as such, are recoverable under Section 28 of the Act, 33 U.S.C. §928. The services at issue are made no less necessary for the compensation claim under the Act merely because they are also useful in the ongoing tort litigation. *Roach v. New York Protective Covering*, 16 BRBS 114 (1984); *Eaddy v. R.C. Herd & Co.*, 13 BRBS 455 (1980); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978).

Employer also argues that the decision in *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980), stands for the proposition that, even though the services were relevant to the claim under the Act, counsel cannot request a fee for services rendered in conjunction with the third-party litigation in a petition under the Act but can seek a fee only for services rendered exclusively in pursuit of the claim for compensation. We disagree. In *Luke*, the United States Court of Appeals for the Fifth Circuit held that the claimant's attorneys, who represented him in both his Longshore claim and a prior successful tort suit for which they had received a fee, were also entitled to a fee for the successful prosecution of the claim under the Act. The Court stated that counsel must submit itemized statements showing the time spent at each stage of the proceedings and that "insofar as . . . their work in the tort case reduced the time they would otherwise have had to spend on the [Longshore case,] this must be reflected in the fee allowed under the Act." *Luke*, 619 F.2d at 424, 12 BRBS at 343. Thus, *Luke* supports the proposition that, where work in the two cases overlapped, counsel could receive payment only once for those services.

Claimant's counsel here concedes that *Luke* prohibits the double recovery of fees for work common to the Longshore and tort cases. We have already affirmed the administrative law judge's finding that the services at issue here were reasonable and necessary to the claim for compensation and medical benefits under the Act. Employer argues that the services were also necessary for the tort litigation, and claimant's counsel does not dispute this assertion. However, according to counsel, he has not sought or received a fee for these services from the tort litigants, as the case is ongoing and there is only a potential for recovery contingent upon claimant's success in the litigation. Thus, as the services were reasonable to the claim under the Act, and as counsel has not been paid for this work previously, there is no prohibition against counsel seeking and receiving a fee for these reasonable services under Section 28 of the Act. Consequently, as there is no evidence that the administrative law judge's award under the Act results in a double recovery for

counsel, *Luke* does not require a reduction in the fee. *Luke*, 619 F.2d 418, 12 BRBS 338; *see also Roach*, 16 BRBS at 116.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge