

S.R.)
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 Claimant-Respondent)
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 v.)
)
 MID-SOUTH SERVICES,) DATE ISSUED: 09/11/2009
 INCORPORATED)
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 and)
)
 AMERICAN HOME ASSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Christopher R. Schwartz, Metairie, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (2008-LHC-0543) 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 must be affirmed unless 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 was injured while working for employer on May 6, 2007, prompting him to engage counsel for the purpose of obtaining benefits under the Act. An informal

conference was held via telephone on November 20, 2007, and the case was then transferred to the Office of Administrative Law Judges for a formal hearing. However, prior to the formal hearing, the administrative law judge granted employer's Motion to Compel claimant to submit to a second medical examination with a physician of its choosing, and shortly thereafter the parties reached an agreement to settle claimant's claim.¹ As a result of the agreement, the administrative law judge issued an Order of Remand on October 2, 2008, wherein he acknowledged the settlement, cancelled the formal hearing set for October 10, 2008, and remanded the case to the district director "for appropriate action." At that time, the administrative law judge also informed the parties that if they did not reach an agreement regarding attorney's fees that claimant's counsel had twenty days to submit a fee petition.

Claimant's counsel thereafter filed a petition with the administrative law judge seeking an attorney's fee totaling \$10,511, representing 45.7 hours at an hourly rate of \$230, plus expenses of \$550. Employer filed objections to the fee petition. After considering employer's objections, the administrative law judge reduced the hourly rate to \$225, and the requested hours by 13, which included a ten percent reduction in light of claimant's "lack of success." Accordingly, he awarded claimant's counsel a total attorney's fee of \$6,621.75.

On appeal, employer contends that the administrative law judge erred in finding it liable for claimant's attorney's fee as the requirements for the applicability of 33 U.S.C. §928(a) and/or 928(b) have not been met in this case. Alternatively, employer argues that the administrative law judge's ten percent reduction in the total attorney's fee, and consideration of its specific objections to the fee petition, are inadequate. Claimant responds, urging affirmance of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees.

Section 28(a) provides for an employer-paid fee if employer refuses to pay any compensation within 30 days of the date it receives notice of the claim from the district director.² See *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th

¹ Employer paid claimant \$19,404.75 on August 29, 2008, representing temporary total disability benefits for the period from May 7, 2007, through August 27, 2008, and \$260.35 as interest on the amount of compensation owed.

² Section 28(a), 33 U.S.C. §928(a), states in relevant part:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be

Cir. 2003); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993); *see generally* *W.G. v. Marine Terminals Corp.*, 41 BRBS 13 (2007). Section 28(a) states that employer will be liable for claimant's attorney's fee if "it declines to pay *any* compensation" within 30 days of its receipt of the claim from the district director. In this case, claimant's claim was filed on August 8, 2007, and employer did not pay any compensation until August 29, 2008, when, in accordance with the parties' agreement, it began to pay benefits. Consequently, pursuant to the plain language of Section 28(a), as employer did not pay any benefits to claimant within 30 days of receipt of the claim from the district director, it is liable for an attorney's fee for work involving all benefits due on the claim pursuant to Section 28(a) of the Act.³ *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415 (5th Cir. 2009); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

Turning to employer's alternative arguments, we first note that the administrative law judge explicitly considered and rejected employer's contention that the attorney's fee must be significantly reduced due to claimant's limited success. Supplemental Decision and Order at 2. In determining that only a ten percent reduction was warranted by the facts of this case, the administrative law judge found that "apparently the single area claimant failed to enhance was that of average weekly wage,"⁴ as he did obtain temporary total disability and medical benefits. Supplemental Decision and Order at 2. The United States Supreme Court has held that a fee award under a fee-shifting scheme should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *see also* *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 997 (1988). As employer has not established that the fee awarded by the administrative law judge is unreasonable in relation to the results

awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier....

³ Employer's contentions that it cannot be liable for an attorney's fee under Section 28(a) because claimant did not successfully prosecute his claim and because there was no formal order issued in this case are misplaced, since claimant obtained a sanctioned result when the claim was ultimately resolved via a 33 U.S.C. §908(i) settlement. *See generally* *Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004). Moreover, as the requirements for employer's liability for an attorney's fee under Section 28(a) have been met, we need not address employer's contentions relating to its potential liability under Section 28(b) of the Act.

⁴ As for the average weekly wage issue, claimant did not put forth any alternative figure and instead agreed to accept employer's calculation.

obtained by claimant,⁵ we reject employer's "limited success" argument and affirm the administrative law judge's ten percent reduction in the fee award. *Hensley*, 461 U.S. at 436; see *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001); *Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT).

As for employer's other objections, the administrative law judge, "after reviewing the objections," granted employer's request to reduce certain entries, specifically denied employer's requests with regard to certain other entries, and generally denied the "remaining objections posed by employer/carrier" on the ground that they were "conclusory and speculative assertions of the time required to perform various tasks." Supplemental Decision and Order at 2-3. The administrative law judge adequately addressed all of employer's objections and gave reasons for rejecting or approving each one. Employer has not established an abuse of the administrative law judge's discretion in this regard. See *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997). Consequently, we affirm the administrative law judge's award of an attorney's fee totaling \$6,621.75, payable by employer, as it has not been shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ In this case, claimant obtained \$19,404.75 in temporary total disability benefits and medical benefits. Moreover, as claimant notes, he did not oppose employer's motion for a second medical examination but rather the actual choice of the physician because of what he believed was, in light of 33 U.S.C. §907(f) of the Act, an unreasonable driving distance to that physician. The administrative law judge agreed with claimant in that he ordered that the second medical examination be at a more convenient location for claimant.