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 Claimant-Petitioner )  
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 v. )  
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 NORTHROP GRUMMAN SHIP SYSTEMS, ) DATE ISSUED: 09/22/2009  
 INCORPORATED )  
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 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fee and Compensation Order Award of Attorney's Fee on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney's Fee and Compensation Order Award of Attorney's Fee on Reconsideration (Case No. 07-175942) of District Director David A. Duhon 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, a painter, injured his right shoulder at work on July 18, 2005, but continued to work until November 2005 when he was restricted from repetitive work with his right arm. Claimant underwent arthroscopic surgery in March 2006 and was at maximum medical improvement as of August 29, 2006. Although unable to return to his

pre-injury job, claimant worked for employer in modified positions at his usual wages from July 18 to November 1, 2005, July 15 to August 19, 2006, November 7 2006 to February 12, 2007, and May 15 to July 2007. Employer paid total disability benefits from November 2, 2005 to July 14, 2006, and from August 20 to October 14, 2006, and partial disability benefits from October 15 to November 6, 2006, and from February 13 to May 14, 2007. Claimant worked for a different employer from April 30 to May 15, 2007 and from July 30, 2007 to May 19, 2008, when he was discharged.

In his Decision and Order, Administrative Law Judge Patrick M. Rosenow awarded claimant compensation for temporary total disability from November 2, 2005 to July 14, 2006, and from August 20 to 28, 2006, and for permanent total disability from July 18 to July 29, 2007. He found claimant was permanently partially disabled from February 13 to April 29, 2007, based on a post-injury wage-earning capacity of \$320.00. From April 30 to May 15, 2007, and from July 30, 2007 forward, the administrative law judge found claimant permanently partially disabled based on a post-injury wage-earning capacity of \$480.00. The administrative law judge found that claimant's average weekly wage is \$581.76. Thus, claimant's ongoing compensation award is \$67.84 per week. 33 U.S.C. §908(c)(21), (h).

Subsequently, claimant's attorney submitted a fee petition to the district director seeking an attorney's fee of \$4,871.25, representing 21.25 hours of legal services at \$225.00 per hour plus expenses of \$90. Employer filed objections, contending that the hourly rate was excessive, certain requested hours were excessive or not warranted, and that the fee should be reduced based on claimant's limited success. The district director addressed employer's objections and reduced the hourly rate to \$200, disallowed one of the itemized entries, and reduced the award by one-half to reflect claimant's limited success. Accordingly, he awarded an attorney's fee of \$2,480.63. On claimant's motion for reconsideration, the district director found his award consistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and affirmed it.

Claimant appeals, alleging the district director erred in reducing his fee by one-half based on limited success. Claimant contends the district director failed to account for the success claimant achieved on the issue of the extent of his disability. Claimant asserts that his success was not insubstantial and that the district director erred in concluding otherwise. Employer responds, urging affirmance of the district director's award.<sup>1</sup>

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<sup>1</sup> Claimant's motion to supplement the record is moot, since, as employer contends, the documents he seeks to admit are already part of the evidentiary record.

The district director reduced the fee by one-half based on claimant's limited success in pursuing his claim. The district director stated that the issue of average weekly wage was one of the major issues in dispute and the administrative law judge awarded compensation based on an average weekly wage which was both lower than claimant proposed (between \$682 and \$710) and that paid voluntarily by employer (\$588.07). EX 5.

In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under a fee-shifting statute. Specifically, the Court created a two-prong test focusing on whether the claimant failed to prevail on claims that were unrelated to the claims on which he succeeded and whether claimant achieved a level of success that makes the hours reasonably expended times a reasonable hourly rate a basis for making the fee award. *Hensley*, 461 U.S. at 434. This analysis is applicable to all fee-shifting statutes, and the Fifth Circuit, within whose jurisdiction this case arises, has thus stated that it is appropriate to tailor fee awards to a claimant's limited success. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5<sup>th</sup> Cir. 1993); *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1<sup>st</sup> Cir.), *cert. denied*, 488 U.S. 997 (1988).

The district director noted claimant's success in obtaining an ongoing award of permanent partial disability, but found he was unsuccessful of the issue of increasing his average weekly wage; in fact, it was decreased. The district director stated that average weekly wage was the only issue discussed at the first informal conference and that it also was discussed at the second informal conference concerning claimant's entitlement to ongoing benefits. Due to claimant's lack of full success, therefore, the district director awarded a fee of one-half of that requested.

We reject claimant's contention of error. The adjudicator is afforded considerable discretion in determining the amount of an attorney's fee where claimant does not achieve full success. *See Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3<sup>d</sup> Cir. 2001); *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). In *Hensley*, 461 U.S. at 440, the Supreme Court directed that "[a] reduced fee award is appropriate if the relief . . . is limited in comparison to the scope of the litigation as a whole." As claimant has not established an abuse of the district director's discretion or that the award is not in accordance with law, we affirm the district director's attorney's fee award.

Accordingly, the Fee Orders of the district director are affirmed.

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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BETTY JEAN HALL  
Administrative Appeals Judge