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 Claimant-Petitioner)
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 v.)
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 LOGISTEC USA, INCORPORATED) DATE ISSUED: 09/11/2009
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 and)
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 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION)
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 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fee and the Decision on Reconsideration of Supplemental Decision and Order Awarding Attorney Fee of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Montstream & May, LLP), Glastonbury, Connecticut, for claimant.

Peter D. Quay (Law Office of Peter D. Quay), Taftville, Connecticut, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fee and the Decision on Reconsideration of Supplemental Decision and Order Awarding Attorney Fee (2008-LHC-00574) of Administrative Law Judge Colleen A. Geraghty 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 slipped and fell and injured his left knee on January 15, 2007, during the course of his employment for employer as a longshoreman. He underwent knee surgery on May 24, 2007, to repair the anterior cruciate ligament. Employer voluntarily paid claimant compensation under the Act for temporary total disability. 33 U.S.C. §908(b). Claimant's treating physician, Dr. Luchini, released claimant to return to work on December 10, 2007. On April 1, 2008, Dr. Luchini opined that claimant's knee had reached maximum medical improvement and that claimant had a 20 percent impairment of the left knee under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides).

In her decision, the administrative law judge credited the parties' stipulation that claimant's left knee reached maximum medical improvement on April 1, 2008, and the deposition testimony of Dr. Luchini that a 20 percent impairment of the left knee is the equivalent of a 17 percent impairment of the lower extremity under the AMA Guides. The administrative law judge awarded claimant compensation under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for a 17 percent permanent partial leg disability. The administrative law judge thus noted that she need not consider claimant's alternate contention that he is entitled to benefits under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting a fee of \$13,591.06, representing 24.2 hours of attorney time by David Kelly at \$285 per hour, 12.4 hours of attorney time by Matthew Necci at \$245 per hour, and 4.5 hours of paralegal time at \$85 per hour, plus costs of \$3,216.56. In her Supplemental Decision, the administrative law judge reduced the hourly rate for Mr. Necci to \$225, and the hourly rate for paralegal work to \$80. The administrative law judge denied as unreasonable all fees sought for attorney time and expenses incurred in relation to the contention that claimant was entitled to permanent partial disability compensation under Section 8(c)(21) on the basis that this alternate theory was frivolous and unsupported by law. Accordingly, the administrative law judge found unnecessary the charges associated with Mr. Sabella, a vocational expert, who assessed claimant's loss of wage-earning capacity due to the work injury. Specifically, the administrative law judge reduced Mr. Kelly's requested time by 4.1 hours, 3.8 hours of time expended by Mr. Necci, 1.3 hours of paralegal time, and expenses totaling \$1,662.50. The administrative law judge further sustained employer's objections to an additional .2 of an hour requested for Mr. Kelly and 2.2 hours of paralegal time. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$9,326.06, representing \$7,772 in attorney and paralegal time and \$1,554.06 in costs.

In her decision on employer's motion for reconsideration of the fee award, the administrative law judge agreed with employer that the cost of Mr. Sabella's deposition transcript of \$348.10 should be deducted from the fee award and that, as Mr. Sabella was the only witness at the June 25, 2008 hearing, 1.7 hours of Mr. Kelly's time, or \$484.50, should be deducted as well. Accordingly, the administrative law judge reduced claimant's counsel's fee award from \$9,326.06 to \$8,493.47.

On appeal, claimant challenges the administrative law judge's denial of a fee for time and costs associated with pursuing a compensation award under Section 8(c)(21). Employer responds, urging affirmance of the fee award.

Claimant asserts that time and costs incurred in pursuing an award under Section 8(c)(21) were reasonable and necessary in view of employer's initial denial of the claim under Section 8(c)(2) and the ultimately successful award of benefits. Section 702.132, 20 C.F.R. §702.132, provides that the award of any 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). 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., O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). This test is also applicable to an award of costs. *See* 33 U.S.C. §928(d); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

In her Supplemental Decision, the administrative law judge found there is no dispute that claimant sustained a left knee injury and that the only issue before her was the specific impairment rating to be assigned to claimant's permanent knee disability. Supplemental Decision at 3-4, 4 n.4-5. The administrative law judge found that pursuant to the Supreme Court's holding in *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 14 BRBS 363 (1980), a claimant with a permanent impairment to a scheduled member is limited to an award under the schedule and cannot pursue a claim for permanent partial disability under Section 8(c)(21). The administrative law judge found that claimant did not articulate a basis for distinguishing his claim from *PEPCO*. Accordingly, the administrative law judge concluded that it was unreasonable for claimant's counsel to have incurred charges for attorney services and expenses devoted to pursuing a claim for permanent partial disability compensation under Section 8(c)(21), and she sustained employer's objection to services and expenses associated with Mr. Sabella, who testified and submitted a report assessing the extent of claimant's vocational disability due to his knee impairment.

We affirm the administrative law judge's denial of attorney time and costs associated with claimant's Section 8(c)(21) claim on the basis that the attorney services and costs related to this alternate theory of recovery under Section 8(c)(21) were not reasonable and necessary at the time they were expended or incurred. The administrative law judge correctly found that *PEPCO* establishes that where a claimant is permanently partially disabled by an injury falling under the schedule, such as the leg injury in this case, he is limited to a schedule award and cannot seek a higher recovery under Section 8(c)(21). *PEPCO*, 449 U.S. at 281-284, 14 BRBS at 368-370; *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000). Claimant alleges that employer initially denied the claim on the basis that a knee impairment does not entitle claimant to compensation for impairment to the lower extremity under Section 8(c)(2). However, in view of the well-established case precedent limiting claimant to a schedule award, employer's action cannot establish that services and costs associated with an attempt to establish entitlement to compensation under Section 8(c)(21) were reasonable, as there was no legal basis for claimant to obtain an award under this section.¹ Accordingly, the administrative law judge did not abuse her discretion in finding that it was unreasonable for claimant's counsel to incur charges for attorney services and expenses devoted to pursuing a claim for permanent partial disability compensation under Section 8(c)(21), and in disallowing a fee for services and expenses on this basis. *See generally Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

We also reject claimant's contention that his success in obtaining a compensation award renders these services and costs compensable pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Claimant contends he was not unsuccessful on the Section 8(c)(21) issue as it was not addressed by the administrative law judge, and that, moreover, he achieved full success. In *Hensley*, the Supreme Court specifically stated that when a party "has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436. If the claimant achieves only partial or limited success, the fee award should be for an amount that is reasonable in relation to the results obtained. *Id.* at 435-436. *Hensley* requires an analysis of whether, based on the results obtained, a fee request may be excessive based solely on the number of hours reasonably expended in the course of the litigation times a reasonable hourly rate. Although claimant obtained a full award of scheduled permanent partial disability benefits, the administrative law judge rationally found it was not reasonable in view of applicable law

¹ We note that there was no claim for temporary partial disability benefits based on a loss of wage-earning capacity, 33 U.S.C. §908(e), (h), and that all services disallowed by the administrative law judge occurred after claimant's knee injury reached maximum medical improvement on April 1, 2008.

for counsel to have performed specific services and incurred certain expenses under these circumstances. Nothing stated in *Hensley* prevents the administrative law judge from completely disallowing unnecessary services despite a full recovery. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). Thus, we affirm the administrative law judge's rejection of attorney time and costs related to the claim under Section 8(c)(21). As claimant has not established that the attorney's fee awarded is arbitrary, based on an abuse of discretion or inconsistent with law, it is affirmed.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fee and the Decision on Reconsideration of Supplemental Decision and Order Awarding Attorney Fee are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge