



BRB No. 15-0108

JOSE M. SANTIAGO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLOBAL INTEGRATED SECURITY USA,	)	
INCORPORATED	)	DATE ISSUED: <u>Sept. 21, 2015</u>
	)	
and	)	
	)	
CNA INSURANCE	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Compensation Order Approving Agreed Section 8(i) Settlement and Awarding Attorney Fees of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson, Charleston, South Carolina, for claimant.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Approving Agreed Section 8(i) Settlement and Awarding Attorney Fees (2014-LDA-00294) of Administrative Law Judge Kenneth A. Krantz 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in

accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant alleged he sustained work-related aggravation injuries to preexisting conditions of his left shoulder and right knee on October 28, 2013, while he was stationed in Afghanistan. He has since undergone left shoulder surgery and conservative therapy to his knee. Claimant and employer agreed to settle claimant's claim for benefits, and they submitted an application to the administrative law judge for approval of their settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). They agreed employer would pay claimant a lump sum of \$460,000, representing \$435,000 for disability benefits and \$25,000 for past and future medical expenses. The parties also agreed employer would pay claimant's counsel an attorney's fee of "up to \$20,000" for his services in this matter. Settlement App. at 3.

Along with the settlement agreement, claimant's counsel submitted a fee petition to the administrative law judge on October 9, 2014, requesting a total fee and costs of \$20,349.63,<sup>1</sup> representing, inter alia, 41.3 hours of Attorney Gibson's time at \$400 per hour (\$16,520) and \$281.38 in costs. Fee Petition at 13. The administrative law judge approved the parties' Section 8(i) settlement. However, as the parties agreed that employer would pay an attorney's fee of "up to \$20,000," the administrative law judge separately addressed the reasonableness of the fee requested. The administrative law judge found that the requested hourly rate of \$400 was not supported by any documentation and that the evidence submitted supported a rate of \$300 per hour for counsel's services.<sup>2</sup> Thus, the administrative law judge reduced the hourly rate for Mr. Gibson's services to \$300. The administrative law judge approved the remaining rates for assistant counsel and paralegal work, finding them to be reasonable and in line with prevailing rates. Finding that the preparation of the LS-18 form on January 16, 2014, marked the beginning of services rendered before him, the administrative law judge excluded all services billed prior to this date, as they were performed before the district director.<sup>3</sup> The administrative law judge awarded the requested costs, \$281.38, and, thus,

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<sup>1</sup> Counsel's fee petition contained a calculation error in which he represented that the time billed totaled \$20,068.25 for 64.55 combined hours of time for Attorney Gibson, an associate, and two paralegals. However, the services in the fee petition total \$20,105.75 and 64.35 combined hours. Thus, the corrected total for fees and costs requested is \$20,387.13.

<sup>2</sup> The evidence consisted of five longshore cases in which counsel was awarded an hourly rate of \$300 and one longshore case in which he was awarded an hourly rate of \$310. The administrative law judge found that the fee petition did not include any justification for a higher rate. Order at 4.

a total fee of \$14,357.13.<sup>4</sup> Order at 6. Claimant’s counsel appeals the reduction in the hourly rate, contending that the administrative law judge cannot reduce a stipulated fee sua sponte.<sup>5</sup> Employer did not file a response brief.

Section 8(i), 33 U.S.C. §908(i), provides for the settlement of “any claim for compensation under this chapter.” *See, e.g., Henson v. Arcwel*, 27 BRBS 212 (1993); 20 C.F.R. §§702.241-702.243. The parties may include a fee for the claimant’s attorney in their settlement agreement. *Losacano v. Electric Boat Corp.*, 48 BRBS 49 (2014); 20 C.F.R. §702.132(c). The administrative law judge “shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress[,]” 33 U.S.C. §908(i)(1), and any fee agreement in the settlement is deemed approved upon approval of the settlement. 20 C.F.R. §702.132(c).<sup>6</sup> Section 8(i) of the Act and its implementing regulations do not give an administrative law judge the authority to alter a complete Section 8(i) settlement submitted by the parties. 33 U.S.C. §908(i); 20 C.F.R. §§702.242, 702.243(a)-(c). Thus, if the administrative law judge disapproves any portion of a settlement, the entire settlement is disapproved unless the parties specifically stated in the settlement that portions could be severed and settled independently. 20 C.F.R. §702.243(e).

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<sup>3</sup> Specifically, the administrative law judge stated he was excluding the first 12 entries of the fee petition, which totaled \$2,402.50 for 6.8 hours of combined time; however, the record reflects that the 12 entries billed prior to January 16, 2014, total \$2,327.50 for 6.3 combined hours, 5.4 of which represent Mr. Gibson’s time.

<sup>4</sup> After correcting for calculation errors, *see* n. 1, 3, the fee award totals \$14,469.63. Specifically, \$20,387.13 – (\$100<sub>rate reduction</sub> × 35.9<sub>Gibson hours</sub>) - \$2,327.50 = \$14,469.63.

<sup>5</sup> Counsel concedes the administrative law judge properly excluded charges for work performed before the district director and states that he has since filed a fee petition with the district director for those services. In this respect, we observe that any fee awarded by the district director cannot result in employer’s liability for a total fee of more than \$20,000 per the approved settlement agreement.

<sup>6</sup> Section 702.132(c), emphasis added, provides:

Where fees are included in a settlement agreement submitted under §702.241, *et seq.*[,] approval of that agreement shall be deemed approval of attorney fees for purposes of this subsection for work performed before the Administrative Law Judge or district director approving the settlement.

In *Losacano*, the parties resolved the claimant's claim for benefits via a Section 8(i) settlement. Although the administrative law judge approved the parties' settlement, his order amended that settlement in three ways. Relevant to claimant's argument in this case, the administrative law judge in *Losacano* reduced the agreed-upon attorney's fee by rejecting the "requested" hourly rate and using an hourly rate he had previously set for the claimant's attorney. On appeal, the Board held that the administrative law judge's modification of the settlement terms was not permissible. *Losacano*, 48 BRBS at 51-52. Consequently, the Board modified the administrative law judge's order to comport with the parties' settlement agreement. With regard to the attorney's fee specifically, the Board modified the order to reflect the employer's liability for the agreed-upon fee. *Id.* at 53-54.

The facts in this case are materially distinct from those in *Losacano*. Whereas in *Losacano* the parties stipulated to a precise fee amount, here, employer agreed to pay "up to \$20,000 for attorney's fees and costs."<sup>7</sup> Contrary to counsel's assertion, this language does not reflect employer's agreement to pay a fee of \$20,000; rather, it is an agreement to pay an attorney's fee of \$20,000 or less. Thus, the administrative law judge did not err in reviewing the fee petition in order to ascertain the amount of employer's liability. Having rationally found that the documentation submitted with counsel's fee petition supports an hourly rate of only \$300, it was within his discretion to reduce the requested hourly rate. *Anderson v. Associated Naval Architects*, 40 BRBS 57 (2006). The resulting fee award, corrected for calculation errors, of \$14,469.63 is not inconsistent with the terms of the settlement agreement. *See* 20 C.F.R. §702.132(c); *see also* n.4, *supra*. As counsel has not established error in the administrative law judge's award of a reduced hourly rate and as he raises no further challenges to the administrative law judge's fee award, we affirm the award as modified herein.

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<sup>7</sup> The settlement in this case also is different than the one in *DeCruise-Williams v. Army & Air Force Exch. Serv.*, BRB No. 15-0109 (Aug. 31, 2015) (unpub.), wherein the parties' Section 8(i) settlement agreement stated that the employer would pay claimant's counsel a fee of \$8,000.

Accordingly, the administrative law judge's Compensation Order Approving Agreed Section 8(i) Settlement and Awarding Attorney Fees is affirmed as modified herein.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge