BRB No. 97-0202

ANDREW J. HAYDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TEMPORARY EMPLOYMENT ADVISORS, INCORPORATED, d/b/a INDUSTRIAL LABOR SERVICES	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order, Supplemental Decision and Order, and Order denying reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Harry C. Arthur, Houston, Texas, for claimant.

Joe R. Blackburn (Blackburn & Henderson), Houston, Texas, for employer.

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order - Awarding Benefits, Supplemental Decision and Order Awarding Attorney's Fees, and Order denying reconsideration of the fee award (95-LHC-1632) of Administrative Law Judge Alfred Lindeman 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). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). An attorney's fee determination is discretionary and may be set aside only if 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, a temporary day laborer for employer, sustained a work-related back injury on February 29, 1992, while loading bags of rice into the hold of a ship. Claimant, who was 35 years old at the time of his injury, had received Social Security Disability benefits since 1980 due to a severe congenital vision impairment. Claimant's Social Security earnings statement reflects several attempts at gainful employment notwithstanding claimant's disability.[1] *See* CX 9. Claimant's compensation claim forms indicate that he worked three

[1]Claimant's highest earnings, approximately $12,000 in 1989 and $10,000 in 1990,

days per week for employer, earning $200 per week. *See* CXS 8, 21.

In his Decision and Order - Awarding Benefits, the administrative law judge initially found claimant entitled to permanent total disability compensation. 33 U.S.C. §908(a). Next, the administrative law judge determined claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c); specifically, the administrative law judge found that claimant would have earned $1,600 per year, based on a three-day work week earning $200 per week for two months of temporary employment per year. Thus, the administrative law judge calculated claimant's average weekly wage at the time of injury as $30.77. *See* Decision and Order at 4-5. Lastly, the administrative law judge found claimant's attorney entitled to payment by employer of his reasonable attorney's fees and costs, and set forth procedures for the filing of a fee petition and objections thereto.[2]

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge requesting an attorney's fee of $17,862.50, representing 61.45 hours of attorney's services rendered at $250 per hour, 20 hours of paralegal services rendered at $125 per hour, and costs of $2,985.23. Employer filed objections to the requested fee; specifically, employer objected to the hourly rates charged for both attorney and paralegal time and to various entries on the basis that they were not reasonable or necessary. Employer contended that a reasonable fee would be based on no more than 25 hours of services at an hourly rate of $175 for counsel and $25 for a paralegal, for a total fee not to exceed $4,375. Claimant's counsel did not reply to these objections.

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were from employment as a merchant seaman; claimant discontinued this employment after suffering breathing problems caused by a chemical leak on a ship.

[2]The administrative law judge instructed claimant's attorney to serve a copy of his fee petition on employer's counsel, who was to file any objections within 10 days. The administrative law judge noted that employer would be deemed to acquiesce to any item to which it did not object. The administrative law judge further provided that claimant's attorney was to reply to employer's objections within 10 days, and that claimant would be deemed to acquiesce to any objection to which he did not reply within such time.

In his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge noted that claimant's attorney did not file a timely reply to employer's objections and thus was deemed to have acquiesced to those objections. The administrative law judge further noted that, although claimant prevailed in his claim for compensation, the amount of compensation awarded is substantially less than that sought by claimant and claimant did not prevail on his claims for relief under Sections 7 and 49.[3] Accordingly, the administrative law judge found claimant's attorney entitled to an attorney's fee and costs of $7,860.23, representing 25 hours of attorney time at $175 per hour, 20 hours of paralegal time at $25 per hour, and $2,985.23 in costs.[4] Claimant's motion for reconsideration of his fee petition was denied by the administrative law judge in an Order dated December 30, 1996.

On appeal, claimant challenges the administrative law judge's average weekly wage determination, contending that the administrative law judge erred in failing to calculate his average weekly wage under Section 10(b) of the Act, in finding that claimant was a three-day per week worker, and in finding that claimant's average weekly wage is $30.77. Employer responds, urging affirmance of the administrative law judge's average weekly wage calculation. Claimant additionally challenges the administrative law judge's award of an attorney's fee, contending that the administrative law judge erred in reducing the attorney's fee on the basis of claimant's limited recovery and in failing to make specific findings to justify the fee reduction.

Claimant initially contends that the administrative law judge erred in calculating his

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[3]In his Decision and Order - Awarding Benefits, the administrative law judge denied claimant's claim for relief based on discrimination under Section 49 of the Act, 33 U.S.C. §948a, and denied claimant's claim for payment of self-procured medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907.

[4]The administrative law judge deemed employer to have acquiesced to the requested costs as employer did not specifically object to the itemized request for costs.

average weekly wage pursuant to Section 10(c).[5] Specifically, claimant asserts that the administrative law judge was required to use the evidence of record which pertained to the earnings of an employee of the same class as claimant, pursuant to Section 10(b), 33 U.S.C. §910(b), which is applicable to injured workers who have not been employed for substantially the whole year preceding the injury. *See Harrison v. Todd Pacific Shipyards Corp.,* 21 BRBS 339 (1988).

Section 10(b) applies where the employee was not employed for substantially the whole of the year; calculation of average weekly wage under subsection (b) is based on the wages of an employee of the same class who worked substantially the whole year in the same or similar employment. Claimant contends that, contrary to the administrative law judge's statement that there is no evidence of the earnings of a worker in similar employment, the testimony of employer's office manager Jerry Bowdler provides sufficient evidence as to the earnings of employees who worked substantially the whole year preceding claimant's injury in similar employment. We agree with claimant that Mr. Bowdler's testimony, if credited by the administrative law judge, could constitute probative evidence for purposes of application of Section 10(b) to the calculation of claimant's average weekly wage. Because there is no indication in the administrative law judge's Decision and Order that Mr. Bowdler's testimony was considered by the administrative law judge, we must vacate the administrative law judge's average weekly wage determination and remand for the administrative law judge to reconsider the potential applicability of Section 10(b). *See generally McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981).

Should the administrative law judge, on remand, determine that there is insufficient record evidence to calculate claimant's average weekly wage pursuant to Section 10(b), we hold that he must reconsider his average weekly wage calculation pursuant to Section 10(c). The administrative law judge computed claimant's average annual earnings as $1,600, based on a finding that, had he not been injured, claimant would have worked in temporary employment for two months per year, earning $200 per week on a three-work day per week basis. *See* Decision and Order at 4-5. The administrative law judge provides no explanation for his conclusion that claimant would have worked for only two months per year, and our review of the record reveals no evidence to support such a finding. In the absence of any explanation for the administrative law judge's determination that, absent his

[5]Section 10 sets forth three alternative methods for determining claimant's average annual wage, 33 U.S.C. §910(a), (b), (c); the average annual wage is then divided by 52, pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. We note that, as claimant does not aver that Section 10(a) governs the calculation of his average weekly wage, we need not address the applicability of that subsection.

injury, claimant would have been able to work only two months out of a year, we must conclude that the administrative law judge's calculation of average annual earnings based on only two months of earnings irrationally distorts claimant's earning capacity at the time of injury. *See generally Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

Accordingly, if, on remand, the administrative law judge utilizes Section 10(c) to calculate claimant's average weekly wage, he must arrive at a sum which reasonably represents claimant's earning capacity at the time of his injury, and provide a sufficient explanation of his calculation. *See generally Richardson v. Safeway Stores, Inc.,* 14 BRBS 855 (1982).[6]

[6]We note that, in addressing claimant's earning capacity under Section 10(c), the administrative law judge found that claimant had begun employment with employer a few weeks prior to his injury. The administrative law judge failed to address the affidavit of employer's general manager, Bernie Solon, that employer's records reflect that claimant was placed at various jobs beginning in August 1991 through March 1, 1992. *See* CX 23; *see also* CX 8 at 32.

Lastly, claimant challenges the reduction of his requested attorney's fee by the administrative law judge. The administrative law judge, noting that claimant had prevailed in his claim for compensation, found claimant entitled to attorney's fees payable by employer. *See* 33 U.S.C. §928. The administrative law judge, however, based his reduction of the requested fee, in part, on his finding that claimant's average weekly wage was only $30.77, resulting in a compensation rate considerably lower than that sought by claimant. In light of our decision herein vacating the administrative law judge's average weekly wage determination and remanding the case for reconsideration of claimant's average weekly wage, the administrative law judge's reliance, in part, on the low average weekly wage to support a reduction in the attorney's fee cannot be affirmed. We therefore vacate the administrative law judge's attorney's fee award; on remand, the administrative law judge must award claimant's counsel a fee that is reasonable in relation to the results obtained by claimant on remand. *See Hensley v. Eckerhart*, 461 U.S. 424, 434-436 (1983); *see also Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc,* 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995); *Ahmed v. Washington Metropolitan Area Transit Authority,* 27 BRBS 24 (1993).[7]

Accordingly, the administrative law judge's average weekly wage calculation is vacated, and the case is remanded for reconsideration of that issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and Order denying reconsideration of the fee are also vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL

[7]Additionally, we note that, in summarily accepting employer's objections to the number of hours requested, the administrative law judge failed to state the specific hours which were disallowed. If, on remand, the administrative law judge finds the hours itemized for various services to be excessive, he must provide a sufficient explanation for the specific reductions made. *See Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 279 (1990).

Chief Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., concurring:

I join fully in the majority's decision on the merits. I cannot concur in the majority's reference to *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc,* 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs],* 46 F.3d 66 (5th Cir. 1995), as sound guidance to the administrative law judge in determining a reasonable attorney fee. In *Bullock*, the majority approved an attorney fee award of $2,000, where claimant's total compensation was $272.39. This decision contravenes the Supreme Court's directive in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to consider as the "most critical factor ... [in awarding an attorney's fee] the degree of success obtained." *Hensley*, 461 U.S. at 463. The Supreme Court explained in *Farrar v. Hobby,* 506 U.S. 103 (1992), that fee-shifting statutes were not intended to "produce windfalls to attorneys." *Farrar*, 506 U.S. at 115, quoting *Riverside v. Rivera*, 477 U.S. 561, 580 (1986), quoting S. Rep. No. 94-1011 p.6 (1976). Thus, the Court held that although claimant had been the prevailing party in a civil rights case his lawyers were not entitled to any fee, where claimant had received the nominal award of one dollar. The High Court reversed the district court's fee award of $280,000.

Unfortunately, *Bullock* reflects the reluctance of the Board's majority at that time to follow *Hensley*, conduct for which the Board has been sternly chastized. *See George Hyman Construction Co. v. Brooks,* 963 F.2d 1532, 1540, 25 BRBS 161, 172 (CRT) (D.C. Cir. 1992). Rather than citing a Board decision, it would have been more helpful to the administrative law judge if the majority had advised the administrative law judge, in the words of the United States Court of Appeals for the Fifth Circuit within whose jurisdiction this case arises: that a fee award should be "tailored to [claimant's] limited success." *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker],* 991 F.2d 163, 166, 27 BRBS 14, 16 (CRT)(5th Cir. 1993).

REGINA C. MCGRANERY
Administrative Appeals Judge