

BRB Nos. 97-303
and 97-321

EDWARD MICHAEL SONS)
)
 Claimant-Respondent)
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 v.)
)
 TRINITY MARINE) DATE ISSUED:
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 and)
)
 PLANET INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney's Fees of Lee J. Romero, Jr., Administrative Law Judge, and the Compensation Order Award of Attorney's Fees of Jeana F. Jackson, District Director, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

Donald P. Moore (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Supplemental Decision and Order Awarding Attorney's Fees (94-LHC-2192) of Administrative Law Judge Lee J. Romero, Jr., and the Compensation Order Award of Attorney's Fees (Case No. 6-157196) of District Director Jeana F. Jackson 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 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).

On November 5, 1993, claimant injured his back and shoulder while working as a

pipefitter for employer. Employer did not voluntarily pay claimant compensation, and claimant sought a continuing award of temporary total disability benefits. The administrative law judge awarded claimant temporary total disability benefits from November 5, 1993 through December 30, 1993. The administrative law judge found that as of this latter date, claimant was physically able to resume his previous occupation with no limitations. Decision and Order at 13. The administrative law judge also found employer liable to claimant for medical expenses incurred from November 6 through December 30, 1993, for services rendered by Drs. Bartlow, Rayner, Slater and Danielson. Decision and Order at 15-16. In the "Order" portion of his decision, the administrative law judge also stated that employer shall continue to provide reasonable and necessary medical benefits related to claimant's work injury.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, seeking a fee of \$15,806.82, representing 110.85 hours at \$125 per hour and \$1,950.57 in expenses. Employer filed objections to this fee petition to which claimant's counsel replied. The administrative law judge awarded claimant's counsel a fee of \$10,933.68, representing 79.075 hours at \$125 per hour and \$1,049.30 in expenses.

Claimant's counsel also submitted a fee petition to the district director, seeking an attorney's fee of \$2,566.49, representing 19.375 hours at \$125 per hour and expenses in the amount of \$144.62. Employer filed objections to the fee petition to which claimant's counsel replied. The district director awarded claimant's counsel a fee of \$2,278.99, of which claimant was to pay \$771.87, representing 17.075 hours at an hourly rate of \$125 and \$144.62 in expenses.

On appeal, employer challenges the awards of the attorney's fees by both the district director, BRB No. 97-303, and the administrative law judge, BRB No. 97-321.¹ Employer initially objects to the amount of the fee awards, contending that the administrative law judge and the district director failed to take into account the limited success involved in this case. Employer also incorporates by reference the remaining objections it made before the administrative law judge and the district director regarding claimant's counsel's fee petitions. Claimant responds, urging affirmance of both fee awards.

In awarding claimant's counsel his fee, the administrative law judge discussed in detail the decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), regarding an award of an attorney's fee where the plaintiff achieves only partial or limited success. As applied to the instant case, the administrative law judge noted that claimant's lack of credibility seriously

¹The Board consolidated employer's appeals of the district director's Compensation Order, BRB No. 97-303, and the administrative law judge's Supplemental Decision and Order, BRB No. 97-321, in an Order dated November 22, 1996.

limited the overall success of his claim which resulted in two months of temporary total disability and past medical benefits. The administrative law judge rejected employer's contention that this was the extent of claimant's success, noting that claimant also was awarded future medical benefits. The administrative law judge reduced the fee by approximately \$600 after disallowing 4.825 hours on certain dates to take into account the limited success obtained in this case. Supplemental Decision and Order at 7. In her fee award, the district director adopted the rationale of the administrative law judge on the limited success issue in response to employer's objection, but she did not reduce the fee on this basis. Compensation Order at 1.

We agree with employer that the administrative law judge did not adequately consider the degree of claimant's success in entering the attorney's fee award. Specifically, the administrative law judge relies on the apparent award of future medical benefits, but in fact his initial decision does not provide an evidentiary foundation for an award of future medical benefits since claimant was able to return to work in his previous occupation with no limitations and the administrative law judge relied on claimant's lack of credibility and the absence of any objective abnormalities with claimant's back and shoulder in terminating disability benefits after two months. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993)(medical foundation required for an award of future medical benefits); Decision and Order at 7-8, 13.

Since the administrative law judge relied on claimant's apparent success in obtaining an award of future medical benefits in discussing employer's objection and in awarding a fee, and since the district director adopted the administrative law judge's rationale on this issue, we vacate both the administrative law judge's Supplemental Decision and Order and the district director's Compensation Order awarding attorney's fees. On remand, the administrative law judge should reconsider claimant's success in pursuing his claims, and the amount of the attorney's fees to be awarded after taking into account the degree of success. In addition, the district director should independently analyze the fee request in light of claimant's success. See *Hensley*, 461 U.S. at 424; *Baker*, 991 F.2d at 163, 27 BRBS at 14 (CRT); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Employer also objects to .75 hours spent on January 9, 1995, and November 1, 1995, drafting letters to Dr. Danielson. In determining an attorney's fee to be awarded, the administrative law judge must determine whether, at the time the work was performed, the attorney could reasonably regard the work as necessary to establish entitlement. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). The administrative law judge erred in finding these charges to be reasonable and necessary on the basis that continuing medical benefits were awarded for the reasons discussed above. Supplemental Decision and Order at 6. Consequently, we vacate the administrative law judge's fee award on these dates for letters to Dr. Danielson and remand this case to the administrative law judge to determine whether these charges are reasonably commensurate with the necessary work done. See 20 C.F.R. §702.132.

Employer objects to the cost of \$200 for an examination and report by Dr. Danielson. Under Section 28(d) of the Act, 33 U.S.C. §928(d), the cost of an expert witness's

testimony or report offered in support of claimant's claim may be awarded where claimant prevails, and the administrative law judge finds the cost to be necessary and reasonable. See *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); 33 U.S.C. §928(d). The administrative law judge did not determine whether this cost was necessary and reasonable but awarded Dr. Danielson's charge because he found employer liable for future medical benefits. Supplemental Decision and Order at 7. As Dr. Danielson's charge is a "cost" and not a "medical benefit," and for the reasons stated above, we vacate the administrative law judge's award of the \$200 cost and remand this case to the administrative law judge for further consideration of the compensability of this charge. See *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 668 n. 7 (1982).

With regard to employer's remaining objections, we affirm the awards of the administrative law judge and the district director to the extent that they do not affect their orders on remand which take into account the degree of success obtained in this case.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and the district director's Compensation Order Award of Attorney's Fees are vacated, and this case is remanded to the administrative law judge and the district director for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge