U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0215

ANGEL GANDARILLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 06/21/2024
NATIONAL STEEL & SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of Order Approving Attorney Fee of Marco A. Adame II, District Director, United States Department of Labor.

Jeffrey M. Winter (Law Office of Jeffrey M. Winter), San Diego, California, for Claimant.

Barry W. Ponticello and Samuel A. Eggleton (England Ponticello & St. Clair), San Diego, California, for Self-Insured Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals District Director Marco A. Adame II's Order Approving Attorney Fee (OWCP Nos. 18-089892; 18-092621; 18-094492) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). The amount of an attorney's fee award is discretionary and will not be set aside unless the challenging party shows it to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9th Cir. 2007).

Claimant filed three claims seeking benefits under the Act for injuries to his upper and lower extremities (2006, OWCP No. 18-089892), left ankle and knee (2008, OWCP No. 18-092621), and lower back (2009, OWCP No. 18-094492), sustained as a result of three separate work incidents.[1] Employer eventually began paying medical and disability benefits[2] and at an informal conference on November 1, 2011, the parties agreed Employer would continue to provide disability and medical benefits until Claimant's conditions reached maximum medical improvement. At that time, the parties agreed they would continue to work on resolving the remaining issues of average weekly wage and compensation rate.

Subsequently, other issues arose regarding medical treatment and the nature and extent of Claimant's disability,[3] resulting in a second informal conference on October 2, 2018, and recommendations for Employer to continue authorizing medical treatment as per Claimant's treating physician's recommendation for Claimant to use an H wave machine for pain control and receive chiropractic treatment, and to pay permanent partial disability benefits from April 22, 2013. Claimant thereafter requested the case be transferred to the Office of Administrative Law Judges.

On May 18, 2022, Administrative Law Judge Evan H. Norby (the ALJ) issued an Order Approving Joint Stipulations, wherein the parties agreed, among other things, that Claimant is entitled to, and Employer is liable for, unscheduled ongoing permanent partial disability benefits from July 20, 2012, for his January 2009 work-related back injury.[4]

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant's injuries occurred in San Diego, California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] The record indicates Employer declined to pay any benefits within 30 days of receiving notice of the 2009 back injury claim. *Compare* Cl.'s LS-203 dated January 15, 2009, *with* Emp.'s LS-208 dated November 15, 2011 (noting a date of first payment of compensation on August 10, 2010).

[3] Claimant alleged he required additional medical treatment, and he has been permanently totally disabled from April 22, 2023, whereas Employer maintained it neither received nor denied any new requests for medical treatment, Claimant was permanently partially disabled as of that date, and it had been paying Claimant such benefits per its labor market survey.

[4] The parties also stipulated to the following: Claimant's scheduled bilateral upper and lower extremity injuries arose on September 12, 2006; he underwent surgery on his

Stipulations of Claimant and Respondent, dated May 18, 2022 (Parties' Stipulations). In particular, the parties agreed Claimant is entitled, as of July 20, 2012, to additional wage loss compensation for his back injury at $256 per week, plus a continuation of scheduled benefits of $320.53 per week, which the parties further agreed would be paid until the scheduled impairment expired, for a total weekly compensation rate of $576.53. *Id.*

On September 13, 2022, ALJ Nordby granted Employer's request for Section 8(f) relief, 33 U.S.C. §908(f), thereby limiting its liability for the January 2009 back injury to 104 weeks after July 20, 2012, at a weekly rate of $256. Supplemental D&O Awarding Section 8(f) Relief, dated September 13, 2022.

On October 5, 2022, Claimant's counsel submitted a fee petition seeking $33,927.08 for work performed before the Office of Workers' Compensation Programs (OWCP), representing $32,303.60 for 58.1 hours of attorney time at an hourly rate of $556, $1,185 for 7.9 hours of paralegal time at an hourly rate of $150, and $438.48 in costs. Cl. Fee Petition at 19-20. On November 23, 2022, Employer objected to the request, primarily asserting Claimant's counsel was not "successful" under Section 28(a), 33 U.S.C. §928(a), and therefore Employer is not liable for his fee. Emp. Objection to Cl. Fee Petition at 6-7. Alternatively, it asserted that if "for some reason" the district director were to find Claimant's counsel's efforts "benefit[ted]" Claimant, his fees should be reduced due to his limited success in seeking disability compensation, and because he did not assist Claimant in seeking medical benefits given that Employer voluntarily paid them. *Id.* at 3-9. Claimant replied to Employer's objections on November 28, 2022. Cl. Reply Brief.

In his March 3, 2023 Order Approving Attorney Fee, the district director granted the requested hourly rates, reduced the requested hours, approved the requested costs, and

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right knee and right wrist, the parties stipulated to a maximum medical improvement date of October 1, 2010, and 4% upper extremity and 8% right lower extremity impairments with a pre-injury average weekly wage of $776.80; Claimant's scheduled left foot and knee injuries arose on February 12, 2008; the parties agreed to a maximum medical improvement date of July 20, 2012, with a combined impairment of 28% to the left lower extremity with a pre-injury average weekly wage of $818.05; Claimant's unscheduled lower back injury on January 9, 2009, reached maximum medical improvement on August 17, 2009, with a pre-injury average weekly wage of $864.80 and a residual earning capacity of $480 per week as of August 17, 2009. Stipulations of Claimant and Respondent, dated May 18, 2022 (Parties' Stipulations); Supplemental D&O Awarding Section 8(f) Relief, dated September 13, 2022.

awarded Claimant's counsel a sum of $27,506.68,[5] payable by Employer, pursuant to Section 28(a). Fee Order at 13.

On appeal, Employer contends the district director "ignore[d] the degree" of Claimant's counsel's success and, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), he must reduce counsel's fee in view of the limited results achieved.[6] Claimant responds, urging rejection of Employer's arguments; in support, counsel points to his fee petition's explanation to the district director as to how he was successful with respect to both disability compensation and medical benefits.

Section 28(a) of the Act provides an employer is liable for a reasonable attorney's fee if there has been a "successful prosecution" of the claim. 33 U.S.C. §928(a); 20 C.F.R. §702.132; *A.M. v. Electric Boat Corp.*, 42 BRBS 30 (2008). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held a claimant "successfully prosecutes" his claim for purposes of Section 28(a) if he obtains "some actual relief that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106 (9th Cir. 2003). This standard requires only that the claimant gain something of "substance," *i.e.*, something "that causes the defendant's behavior to change for the benefit of the plaintiff." *Id.* at 1106.

Employer does not challenge the district director's consideration of counsel's fee request under Section 28(a),[7] or the ALJ's categorization of the parties' stipulations as

[5] The district director's approved award represented $26,243.20 for 47.2 hours of attorney work at $556 per hour and $825 for 5.5 hours of paralegal work at $150 per hour, plus $438.48 in costs.

[6] We affirm the district director's relevant community and hourly rate determinations as they are unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

[7] Although Employer cites Section 28(b) in its brief, it does not challenge the district director's use of Section 28(a) to award a fee based on his finding that it controverted the 2009 back injury claim, and the record indicates it did not pay any compensation within thirty days of the filing of that claim. *See* n.2 *supra*. Because Claimant successfully prosecuted his claim with the assistance of his counsel, we reject Employer's position that its subsequent discharge of some of its liability to the Special Fund under Section 8(f) somehow precludes its fee liability or otherwise constitutes a limit on Claimant's counsel's success on behalf of his client. *See generally Finch v. Newport News Shipbuilding & Dry*

agreeing to some degree of "success." In fact, Employer concedes Claimant's counsel achieved "a partial success in obtaining an increase in wage loss and scheduled impairment." Employer's Brief at 12. This success, Employer admits, resulted in a $256 per week permanent partial disability award for Claimant's unscheduled back injury that directly benefits him for life. *Richardson*, 336 F.3d at 1106; *Kinnes v. Gen. Dynamics Corp.*, 25 BRBS 311 (1992). Thus, we affirm the district director's finding that Claimant's counsel assisted in Claimant's successful prosecution of his claims, thereby entitling him to reasonable attorney's fees for work performed before the district director under Section 28(a) of the Act. *Richardson*, 336 F.3d at 1106; *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990).

Turning to whether a reduction in the attorney's fee is warranted pursuant to *Hensley* due to Claimant's allegedly limited success, we decline to address the merits of the parties' arguments but must remand the claim to the district director to consider the issue in the first instance.

In *Hensley*, a plurality of the Supreme Court of the United States defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. The Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley, 461 U.S. at 434. The Court stated the district court should focus on the significance of the overall relief the plaintiff obtained in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. *Id.* If the plaintiff achieved only partial or limited success, however, the product of hours expended on litigation, as a whole, multiplied by a reasonable hourly rate may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Id*. at 435-437.

Dock Co., 22 BRBS 196 (1989); *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

The district director acknowledged Employer's request for an "across-the-board reduction of fees per *Hensley*," Order Approving Attorney Fee at 2, and generally found Claimant obtained a "successful prosecution" of his claims for purposes of shifting fee liability to Employer under Section 28(a). However, he did not address the parties' arguments as to whether Claimant's success was partial or limited and should be reduced pursuant to *Hensley*.[8]

Because the district director's *Hensley* analysis is incomplete, we must vacate his fee award and remand the claim, as the district director is in the best position to determine whether Claimant achieved "a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434; *see Tahara*, 511 F.3d 950; *see also Barbera v. Director, OWCP*, 245 F.3d 282 (3d Cir. 2001); *Ahmed v. Washington Metro. Area Transit Auth.*, 27 BRBS 24 (1993).

Accordingly, we vacate the district director's fee award and remand this case for further consideration of the partial success issue consistent with this opinion. In all other respects, we affirm the district director's Order Approving Attorney Fee.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[8] Although the district director reduced Claimant's counsel's requested hours for attorney work by 15 hours and paralegal work by 4.9 hours, it appears he did so because those hours were "excessive, duplicative, and clerical in nature" and not in relation to the parties' arguments regarding Claimant's degree of success.