BRB No. 99-0441

ROBERT A. BOURGEOIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Compensation Order - Award of Attorney's Fees of Chris John Gleasman, District Director, United States Department of Labor.

Iddo Pittman, Jr., Hammond, Louisiana, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Compensation Order - Award of Attorney's Fees (07-024532) of District Director Chris John Gleasman 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).

Claimant broke his left wrist during the course of his employment on May 13, 1973, but did not suffer a disability resulting from this injury until ten years after his work accident. On May 17, 1983, claimant underwent the surgical removal of a cyst that had developed on his wrist at the site where it had been broken in 1973. During this surgery, claimant's surgeon severed claimant's left lateral femoral nerve, causing a disabling injury. From May 17, 1983 until March 15, 1988, employer voluntarily paid claimant temporary total disability compensation at the rate of $153.27, based on claimant's average weekly wage of $229.90 at the time of his original 1973 work injury. Throughout the period during which compensation

was voluntarily paid by employer, claimant maintained that his compensation rate should have been based on his average weekly wage as of the date of disability, May 1983. Claimant filed a claim under the Act on February 9, 1988, seeking compensation at a higher rate based on his 1983 earnings. Following claimant's receipt in 1990 of a net recovery of $533,051, awarded in a medical malpractice suit against claimant's surgeon, employer contended that because of its entitlement to a credit for the third-party judgment under Section 33(f) of the Act, 33 U.S.C. §933(f), no further compensation under the Act was due. The case was referred to the Office of the Administrative Law Judges on January 5, 1993.[1]

In his Decision and Order, the administrative law judge first considered the average weekly wage issue, finding that claimant's May 1983 average weekly wage should be used to determine claimant's compensation rate; the administrative law judge thereafter found claimant's average weekly wage for compensation purposes to be $615.77. Next, the

[1]The unresolved issues, as listed by employer on August 25, 1993, were: the nature and extent of claimant's disability; whether claimant's disability, if any, is related to his employment; the applicable average weekly wage; the amount of the Section 33(f) credit due employer; and employer's entitlement to costs under Section 26 of the Act, 33 U.S.C. §926. Not until the filing of employer's post-hearing brief did employer concede the correctness of claimant's position that his compensation rate should be based on his average weekly wage at the time of his disability in 1983, rather than on his lower 1973 average weekly wage.

administrative law judge rejected claimant's contention that penalties should be assessed under Section 14(e) or (f) of the Act, 33 U.S.C. §914(e), (f). The administrative law judge additionally rejected claimant's contention that employer is not entitled to a credit for the full amount of claimant's net third-party recovery. Lastly, the administrative law judge rejected employer's request for Section 26 costs, noting claimant's success in establishing that his compensation rate should be based on his 1983 average weekly wage and awarded claimant's counsel a reduced attorney's fee.[2]

Thereafter, claimant's counsel filed a fee petition with the district director, requesting a fee of $8,646, representing 67.7 hours of work performed at an hourly rate of $125, and $183.50 in expenses. Employer filed objections to claimant's fee petition. The district director, noting claimant's limited success in this case, awarded claimant's attorney a fee in the amount of $500 payable by employer.

[2]Although the administrative law judge's Decision and Order contains a lengthy summary of the evidence relevant to the contested issues of the nature and extent of claimant's disability and the causal relationship between claimant's disability and his employment, the administrative law judge ultimately declined to render findings on these issues in view of employer's position that employer's entitlement to a Section 33(f) credit rendered these issues moot as of the time of the hearing. On appeal, the administrative law judge's decision was affirmed by the Board on September 12, 1996, pursuant to Public Law No. 104-134, 110 Stat. 1321 (1996), and thereafter by the United States Court of Appeals for the Fifth Circuit. *Bourgeois v. Avondale Shipyards, Inc.*, 121 F.3d 219, 31 BRBS 137 (CRT)(5th Cir. 1997), *cert. denied*, 118 S.Ct. 1305 (1998). The court noted that employer's credit would not amortize until 2008 based on a compensation rate of $410.53, a figure which assumes total disability.

On appeal, claimant contends that the district director erred by arbitrarily reducing the requested fee without adequate explanation; thus, clamant asserts that the fee award must be vacated and remanded for proper consideration by the district director. Employer has not responded to claimant's appeal.[3]

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work performed and shall take into account the quality of the representation, the complexity of the issues, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n.*, 22 BRBS 434 (1989). After a through review of claimant's contentions on appeal and the district director's decision in this case, we conclude that the district director's fee award must be upheld, as claimant has failed to show the award to be unreasonable or an abuse of the district director's discretion.

Initially, we note that our review of the district director's Compensation Order reveals that he took into consideration the time required by claimant's counsel to perform the necessary services, the complexity of the issues, the quality of the representation, and the benefit to claimant. Thus, the district director, at a minimum, considered the applicable regulation when awarding counsel a fee. *See* 20 C.F.R. §702.132. In addition, the district director considered employer's objections, noting their acceptance would reduce the fee to $331.25.

Next, we conclude that the district director's fee award is in compliance with the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, a plurality of the Supreme Court 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. Specifically, the Court created a two-prong test focusing on the following questions:

[3]In view of employer's failure to challenge on appeal the district director's determination that claimant's attorney is entitled to a fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), this determination is affirmed. Thus, the sole issue before the Board is the amount of the fee to which counsel is entitled.

> 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; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff 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. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Moreover, while the most critical factor is the degree of success obtained, the Court stated that there is no precise rule or formula for making the determination as to what fee is reasonable under the particular circumstances of a case; rather, the body awarding the fee has the discretionary authority to attempt to identify the specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. Whatever the method utilized, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-437. *See 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).

In the present case, the district director found that claimant's success was very limited. In rendering this determination, the district director referred to the prior attorney's fee award issued by the administrative law judge in this case wherein the administrative law judge stated that while claimant's counsel succeeded in increasing the amount of the applicable average weekly wage, he was unsuccessful in his attempts to establish entitlement to penalties under the Act or to decrease the amount of the Section 33(f) credit available to employer. Additionally, in this regard, we note that the administrative law judge did not render findings regarding the cause of claimant's present disability, or its extent, *see* Decision and Order Awarding Benefits at 15; moreover, as stated by the Fifth Circuit, employer's credit in the instant case will continue until at least 2008 despite the increased average weekly wage. Under these circumstances, claimant has not shown that the district director's fee is unreasonable given the results obtained in this case. We therefore

affirm the district director's consequent award of an attorney's fee totaling $500 in this case, as that amount is reasonable and comports with the Supreme Court's decision in *Hensley*.

Accordingly, the district director's Compensation Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge