

BRB Nos. 98-0599
and 98-0599A

RICHARD J. BROWN)
)
 Claimant)
 Cross-Petitioner) DATE ISSUED:
)
 v.)
)
 BRADY-HAMILTON STEVEDORE)
)
 and)
)
 FIREMAN'S FUND INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Supplemental Order for Fees and Costs of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison, LLP), Portland, Oregon, for claimant.

Carol J. Molchior (Madden & Crockett), Seattle, Washington, for employer/ carrier.

Samuel J. Oshinsky, Counsel for Longshore (Henry L. Solano, Solicitor of

Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits and claimant appeals the Supplemental Order for Fees and Costs (97-LHC-152) of Administrative Law Judge Henry B. Lasky 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). 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).

To briefly recapitulate the lengthy procedural history of this case, claimant sustained a work-related injury to his back and hips on November 12, 1974, which aggravated his pre-existing arthritic condition. In a Decision and Order issued on June 25, 1981, claimant was awarded compensation for a permanent partial disability resulting in a 60 percent loss in wage-earning capacity, 33 U.S.C. §908(c)(21), and employer was awarded Section 8(f) relief, 33 U.S.C. §908(f); thus, the Special Fund assumed liability for the payment of compensation for claimant's permanent partial disability award commencing November 24, 1977.¹ On February 14, 1994, and January 11, 1995, claimant underwent bilateral hip replacement surgery. On April 23, 1996, claimant filed a claim for Section 22 modification, 33 U.S.C. §922, seeking temporary total disability compensation for the period during which he underwent hip surgery and permanent total disability compensation thereafter based on the deterioration of his medical condition. Subsequently, employer filed its own modification request pursuant to Section 22, seeking to be relieved of further compensation liability on the basis that claimant's current medical condition is unrelated to his work-related injuries.

¹Claimant previously had been awarded temporary total disability compensation commencing on November 14, 1974. 33 U.S.C. §908(b).

On December 15, 1997, claimant and employer filed a joint Stipulation in Support of Agreed Order in which the parties stipulated that claimant was temporarily totally disabled from February 14, 1994 to December 29, 1995, and that employer had paid for claimant's bilateral hip replacement surgeries. Employer agreed to pay the difference between the permanent partial disability compensation rate previously awarded to claimant and the rate for temporary total disability for the period from February 14, 1994 to December 29, 1995, and further agreed to pay reasonable attorney's fees to claimant's attorney. Included in the joint stipulation filed by claimant and employer was the statement "[P]ayment by the employer does not constitute a waiver of the employer's position that the surgery and temporary total disability were not injury-related." Lastly, employer and claimant agreed to withdraw their respective requests for Section 22 modification, with claimant remaining entitled to permanent partial disability compensation from the Special Fund.

In a Decision and Order Awarding Benefits issued on December 18, 1997, the administrative law judge expressly incorporated the joint stipulations filed by claimant and employer, and ordered employer to pay claimant compensation in the amount of \$7,028, representing the difference between claimant's permanent partial disability award and the rate for temporary total disability for the period from February 14, 1994 through December 29, 1995. The administrative law judge further ruled that the Section 22 modification requests by claimant and employer are deemed withdrawn. Finally, the administrative law judge ruled that the Special Fund shall continue to pay claimant permanent partial disability compensation.

Claimant's counsel thereafter submitted a fee petition dated December 18, 1997 for work performed at the administrative law judge level,² requesting a fee of \$5,267.70, representing 22 hours of attorney time billed at \$225 per hour, 2.625 hours of legal assistant and law clerk time billed at \$50 per hour, and \$186.45 in expenses. Employer filed objections to the fee petition. In his Supplemental Order for Fees and Costs, the administrative law judge, addressing employer's objections to the fee request, reduced the

²We note that claimant's attorney's fee application also included services performed at the district director level. The administrative law judge properly ruled that he lacked jurisdiction to award a fee for work performed before the district director, and this determination is not challenged on appeal by claimant. Our discussion of claimant's fee request, therefore, makes reference only to those hours itemized during the period in which the claim was before the administrative law judge. Our calculation of the number of hours itemized by counsel at the administrative law judge level also excludes the undated 3.5 hours listed as "anticipated time to bring claim to closure;" claimant, on appeal, does not contest the administrative law judge's exclusion of these hours.

hourly rate for attorney time to \$150, and disallowed 3.625 hours of the attorney time claimed for discovery-related work as unnecessary. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$3,073.95, representing 18.375 hours of attorney services at \$150 per hour, 2.625 hours of legal assistant/law clerk time at \$50 per hour, and \$186.45 in costs.

On appeal, the Director contends that the administrative law judge erred in requiring the Special Fund to pay benefits to claimant during claimant's period of temporary total disability inasmuch as Section 8(f) limits the Special Fund's liability to the payment of benefits for permanent disability. The Director avers that, pursuant to the Board's decision in *Sizemore v. Seal & Co.*, 23 BRBS 101 (1989), notwithstanding commencement of payments by the Special Fund of compensation to an employee following an employer's payment of 104 weeks of permanent disability compensation, employer remains fully liable for any subsequent periods of temporary disability. Employer responds that *Sizemore*, in which the causation of the claimant's temporary total disability was not at issue, is not controlling in the instant case in which employer expressly did not waive its position that claimant's temporary total disability was not related to his work injury. In his appeal of the administrative law judge's fee award, claimant challenges the administrative law judge's disallowance of 3.625 hours of discovery-related services and the administrative law judge's reduction of the hourly rate for attorney services. Employer responds, urging affirmance of the fee award.

We will first address the Director's argument that the administrative law judge's failure to find employer liable for the full amount of claimant's temporary total disability benefits is inconsistent with the Board's decision in *Sizemore*. In *Sizemore*, 23 BRBS at 101, the Board held that Section 8(f) does not exempt employers from liability for the payment of temporary total disability benefits due subsequent to the assumption of permanent partial disability liability by the Special Fund. *See* 23 BRBS at 103-104. Specifically, the Board interpreted Section 8(f) and its implementing regulation, 20 C.F.R. §702.145(b), to provide that employers are liable for permanent disability compensation for 104 weeks, and for no other *permanent* disability compensation, but that employers are also liable for all temporary disability payments *whenever the temporary disability arises*. *Id.* at 105. We agree with the Director that the administrative law judge's determination to hold employer in the instant case liable only for the difference between the claimant's permanent partial disability compensation rate and the rate for temporary total disability for the period from February 14, 1994 through December 29, 1995, is contrary to the Board's decision in *Sizemore*. Employer should have been held liable for the full amount of any work-related temporary total disability compensation to which claimant was entitled.

While the Director requests that the Board modify the administrative law judge's Decision and Order to reflect employer's liability in full for the period of claimant's temporary total disability, the posture of the case before the Board precludes us from so

doing. We note that, rather than making an independent determination as to whether claimant is entitled to compensation for a period of temporary total disability, the administrative law judge instead issued a Decision and Order incorporating the stipulations filed by claimant and employer and, thereafter, deemed their respective modification petitions withdrawn. While under certain circumstances it may be permissible for an administrative law judge to decide a case solely on the basis of the parties' stipulations, in the case at bar, the stipulations filed by claimant and employer could not properly serve as the basis for the administrative law judge's decision. First, the Director, as representative of the Special Fund, could not be bound by stipulations to which he was not a party. *See* 29 C.F.R. §18.51. Because the Special Fund had previously assumed liability for the payment of claimant's permanent partial disability benefits, its rights and liabilities were necessarily affected by resolution of the issues presented by the Section 22 modification requests. Thus, the modification petitions could not be decided on the basis of stipulations without the participation of the Director. Secondly, the stipulations filed by claimant and employer, while purporting to resolve all issues necessary to the withdrawal of the modification requests, in actuality left unresolved a factual issue critical to the determination of claimant's entitlement to a period of temporary total disability. The inclusion in the stipulations of the statement in which employer expressly declined to waive its position that claimant's hip replacement surgery and period of temporary total disability were unrelated to his work injury meant that causation remained a contested issue.

Accordingly, we conclude that the administrative law judge's Decision and Order incorporating the stipulations filed by claimant and employer and deeming the modification requests withdrawn cannot stand. We therefore vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case to the administrative law judge for consideration of the merits of the case.³ If, on remand, the administrative law judge finds claimant's surgery and period of temporary total disability to be causally related to his employment and, accordingly, awards claimant temporary total disability compensation, he must hold employer liable for the totality of the temporary total disability compensation. *See Sizemore*, 23 BRBS at 101.

Lastly, for purposes of adjudicative efficiency, we address claimant's appeal of the administrative law judge's attorney's fee award, noting that this issue is contingent on

³We note that, on remand, the parties may reach a settlement of this case with the participation of the Director and compliance with the regulations, as set forth in 20 C.F.R. §§702.241-243.

claimant's success on remand. *See generally Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253-54 (1987). We hold that claimant's assertions on appeal are insufficient to meet his burden of proving that the administrative law judge abused his discretion in disallowing 3.625 hours requested for discovery-related work. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). The administrative law judge fully set forth the rationale upon which he relied in concluding that this expenditure of time was unnecessary, and we decline to disturb his determination. Similarly, claimant's assertion that the administrative law judge erred in reducing the attorney hourly rate from \$225 to \$150 is rejected as claimant has not met his burden of showing that the \$150 rate awarded is unreasonable. *See Ferguson v. Southern States Cooperative*, 27 BRBS 16, 23 (1993); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Claimant's challenge to the administrative law judge's attorney's fee award is therefore rejected.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded to the administrative law judge for consideration of the merits of the case in accordance with this decision. The administrative law judge's Supplemental Order for Fees and Costs is affirmed contingent on claimant's success on remand.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge