BRB No. 01-0811

GLEN RUBIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZACHARY PARSONS-SUNDT	)	DATE ISSUED: July 15, 2002
	)	
and	)	
	)	
ACE USA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order and the Amended Supplemental Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Richard Mark Baker, Long Beach California, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order and the Amended Supplemental Decision and Order (99-LHC-2176) of Administrative Law Judge John C. Holmes 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts underlying this appeal are not in dispute. Claimant, a laborer/carpenter

working on the demolition of the United States Embassy in Moscow, suffered an injury to his back on July 30, 1997, underwent treatment in the United States and returned to his usual job duties despite recurrent back pain. Upon completion of the job, claimant was diagnosed as suffering from lumbar radiculopathy as a result of two herniated discs and underwent double fusion surgery on January 24, 2000.[1]

Claimant filed a claim for benefits under the Act and a hearing was thereafter scheduled in Tucson, Arizona, before Administrative Law Judge Burch. Although the parties appeared to reach a settlement at this initial hearing, claimant subsequently declined to execute the settlement proposed by employer, arguing that it was not an accurate reflection of the parties' agreement. A second hearing was then scheduled on November 15, 2000, in Tucson, Arizona, before Administrative Law Judge Holmes (the administrative law judge); it is agreed that at this hearing the parties arrived at a settlement of all issues.[2] Subsequent to this agreement, claimant's attorney filed a petition for attorney fees, requesting $35,750 for 143 hours of services rendered at $250 per hour, plus $11,460.52 in costs.[3] Employer filed

[1]Claimant underwent surgery and was deemed able to return to work as of May 18, 2000; following vocational rehabilitation training, claimant obtained employment as an air conditioning mechanic.

[2]The administrative law judge thereafter approved a settlement pursuant to Section 8(i), 33 U.S.C. §908(i), wherein the parties agreed that claimant would receive an immediate payment of $85,000, an additional payment of $10,000 upon his completition of a vocational rehabilitation program, and future medical expenses.

[3]In his first fee petition, dated April 10, 2001, claimant's attorney requested a fee of $60,710.52, representing 197 hours at $250 per hour plus expenses of $11,460.52. Claimant later conceded to the administrative law judge that he had inadvertently miscalculated the number of hours in his Statement of Services and that the number of hours requested should have been 143.

objections to this fee petition.

In his decision, the administrative law judge awarded claimant an attorney's fee of $21,750, representing 87 hours of services at a rate of $250 per hour, plus expenses of $4,725.35. *See* Supplemental Decision and Order. Claimant thereafter filed a motion for reconsideration with the administrative law judge, arguing that he had not had time to respond to employer's objections to his fee petition. After consideration of claimant's arguments on reconsideration, the administrative law judge further reduced the requested fee by an additional four hours and reduced the requested expenses; he thus awarded claimant's attorney a fee of $20,750, plus $4,381.60 in expenses. *See* Amended Supplemental Decision and Order.

Claimant appeals, arguing that the administrative law judge's reduction in the number of hours requested is arbitrary, capricious and an abuse of his discretion. Employer responds, urging affirmance.

Although it is well established that an administrative law judge's fee award is discretionary, *see generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988), we agree with claimant that the administrative law judge's fee award in the instant case does not comport with law and must be vacated. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); *see generally Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). In this regard, it is the administrative law judge's responsibility to review the fee petition submitted by counsel and to determine whether the fee requested is reasonably commensurate with the necessary work done. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001). However, where an administrative law judge has not set forth a sufficient explanation for the reductions made, the Board is prevented from reviewing the award and will remand the case to the administrative law judge for an explanation. *Devine*, 23 BRBS at 288; *Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983).

In the instant case, the administrative law judge in his initial decision found that counsel had requested an "inordinate amount" of time for "routine matters such as receipt of and reviewing correspondence and/or fax, and telephone calls." *See* Supplemental Decision at 2. Next, the administrative law judge stated that "when longer hours were charged, they appeared [sic] excessive . . . . Nor do I believe all travel time should be compensated at the hourly rate charged."[4] *Id.* Based upon these two statements, and without discussion of the regulatory criteria contained at 20 C.F.R. §702.132, the administrative law judge stated his

[4]Employer does not challenge the administrative law judge's award of a rate of $250 per hour for counsel's services, nor has it appealed the finding of 87 compensable hours. Accordingly, these findings are affirmed.

belief that "a reduction in hours charged of 60 is appropriate and not at all niggardly," and he accordingly awarded counsel a fee for 87 hours of services rendered on claimant's behalf. *Id.* Thereafter, in addressing claimant's motion for reconsideration, the administrative law judge found that he had "underestimated the size of reduction of claimant's counsel's fee," specifically for the review of documents, and he thereafter

determined that a further reduction of four hours was reasonable.[5] *See* Amended Supplemental Decision at 4.

Initially, we reverse the administrative law judge's reduction, in his amended decision, of four hours, based on his conclusion that the time spent was excessive, since no party on reconsideration challenged these previously awarded services and the administrative law judge failed to specify which services he was in fact reducing. Thus, the administrative law judge's reduction is arbitrary and capricious. Moreover, given the cursory nature of the administrative law judge's initial decision awarding counsel a fee, in particular his failures to state which specific hours were being reduced or to discuss the applicable regulatory criteria, we must vacate the administrative law judge's reductions of claimant's fee request in his Supplemental Decision and Order and remand this case for further consideration. On remand, the administrative law judge is instructed to reconsider his reductions, fully discussing claimant's counsel's fee petition and employer's objections to the services set forth therein. The administrative law judge must provide a full and thorough discussion, as well as an adequate rationale, for any reductions in counsel's requested fee, pursuant to the regulatory criteria, which require that he base his determinations upon findings as to whether the hours requested are reasonably commensurate with the necessary work performed, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. *See* 20 C.F.R. §702.132; *Muscella*, 12 BRBS 272.

Claimant also contends that the administrative law judge erred in reducing the amount of expenses and costs sought by counsel. Section 28(d) of the Act, 33 U.S.C. §928(d),

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[5]The administrative law judge wrote

> I thought that my approval of fees made it reasonably clear to Claimant's counsel that in my opinion, I was being rather generous. Lest he not get the message again let me say bluntly, that a further request for reconsideration on the record as it now stands will elicit an even stronger negative response.

Amended Supplemental Decision at 4.

provides that the costs, fees and mileage for necessary witnesses can be assessed against employer when an attorney's fee is awarded against employer, but only if they are reasonable and necessary. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); 20 C.F.R. §702.135. The test for compensability concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether the evidence was actually used. *Bazor,* 35 BRBS 121. In addition to expenses, fees for travel time may be awarded where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. *Ferguson v. Southern States Cooperative,* 27 BRBS 16 (1993).

In addressing counsel's documented expenses, the administrative law judge initially determined that he did "not find serious fault with any one of these costs if isolated, [however] taken together they demonstrate excessive costs and a disregard for economy in expenses." *See* Supplemental Decision at 2. Thereafter, the administrative law judge considered the travel and witness expenses requested for Dr. Capen, $10,671, to be excessive, and he reduced that requested amount to $3,000. Next, the administrative law judge awarded $1,200 for all travel and hotel costs incurred, and $525.35 for mail and reporting services. All of claimant's remaining expenses were denied. *Id.* On claimant's request for reconsideration, the administrative law judge, after stating that claimant could have requested a hearing in Los Angeles in order to minimize the hours of travel for his counsel and Dr. Capen,[6] found that "[m]any people . . . including orthopedic surgeons, would consider a day in Phoenix in November to be a vacation and not a hardship; surgery schedules could have been aligned so that, in fact, rather than theory, Dr. Capen would experience **no** loss of earnings because of his possible testimony." *See* Amended Supplemental Decision at 4 (emphasis in original). The administrative law judge then reduced Dr. Capen's costs by an additional $500. *Id.* at 5.

While claimant generally objects to all deductions made by the administrative law judge in his request for expenses associated with claimant's claim for benefits, he specifically addresses the reductions associated with the witness expenses of Dr. Capen which were reduced from $10,671 to $3,000 and then to $2,500, and the expenses associated with the deposition of Dr. Ladin, for which the administrative law judge reduced associated travel expenses, contending that claimant could have arranged for Dr. Ladin's deposition to be taken by local counsel in Phoenix.[7] For the reasons that follow, we agree with claimant that

[6]It is uncontested that claimant's counsel and Dr. Capen, claimant's treating orthopedic surgeon, both practice in California and that Dr. Capen accompanied counsel to Arizona for both scheduled hearings.

[7]In making reductions in travel expenses associated with the deposition of Dr. Ladin, the administrative law judge found excessive the air fare, car rental, and overnight stay at a resort hotel which he found demonstrated a disregard for "economy in expenses." *See*

the administrative law judge's reductions in these costs cannot be affirmed.

Initially, we reverse the additional $500 reduction in Dr. Capen's expenses, as the administrative law judge lacked any basis to reduce this expense on claimant's request for reconsideration. Moreover, we hold that the administrative law judge's explanation for any reductions in the expenses associated with Dr. Capen does not comport with law. Specifically, the administrative law judge's unsubstantiated statement on reconsideration that Dr. Capen could have "in fact, rather than theory" experienced no loss of earnings because of his attendance at the hearing is plainly inadequate. Both the Act and its implementing regulations provide for the reimbursement by employer of costs, fees and mileage for necessary witnesses to attend the hearing, 33 U.S.C. §928(d); 20 C.F.R. §702.135, and such reimbursement does not require that witnesses demonstrate a loss of earnings. That some people might regard a trip to Phoenix as a vacation also is irrelevant. Moreover, the administrative law judge's specific reference to counsel's failure to minimize the hours of travel in this case by requesting a hearing in Los Angeles, California, is belied by the record, which unequivocally establishes that claimant's counsel, before both Judge Burch and the present administrative law judge, sought to have the hearings scheduled in California. In both instances, employer's counsel objected to counsel's request in this regard and claimant's requests for hearings in California were thereafter denied by the administrative law judges. Accordingly, reasonable travel expenses for necessary witnesses cannot be denied on this basis. Finally, whether claimant could have used local counsel to depose Dr. Laden is purely speculative, and this finding is not based on the proper test. Claimant's counsel is entitled to be reimbursed for reasonable expenses for work which was reasonably necessary at the time it was performed. Specifically, claimant's attorney is entitled to reimbursement of reasonable travel expenses and a fee for his travel time which may be awarded where the travel is necessary, reasonable and in excess of that normally considered to be part of the overhead. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Ferguson*, 27 BRBS 16. Accordingly, due to the administrative law judge's failure to consider counsel's entitlement to costs pursuant to the Act and its regulations, we vacate his reductions of claimant's costs and remand this issue for further consideration. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.* 202 F.3d 259 (4th Cir. 1999)(table).

Accordingly, the administrative law judge's Amended Supplemental Decision and Order disallowing an additional four hours of unidentified services and reducing Dr. Capen's costs by an additional $500 are reversed. The administrative law judge's award of an hourly rate of $250 and of 87 compensable hours are affirmed. In all other respects, the administrative law judge's Supplemental Decision and Order and Amended Supplemental

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Supplemental Decision at 2.

Decision and Order are vacated insofar as they reduce claimant's fee and costs without adequate explanation, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge