

U.S. Department of Labor

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



BRB No. 19-0002

WILLIAM R. McCULLOUGH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FRED WAHL MARINE CONSTRUCTION)	
)	DATE ISSUED: 05/20/2019
and)	
)	
ALMA/FARA)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Striking Amended Declaration and Denying Petition for Attorney Fees and Costs of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

James M. Babcock (Babcock Holloway Caldwell & Stires), Lake Oswego, Oregon, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judges, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Striking Amended Declaration and Denying Petition for Attorney Fees and Costs (2013-LHC-01188) of Administrative Law Judge Christopher Larsen 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 will not be set aside unless it is shown by the challenging party 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, 41 BRBS 53(CRT) (9th Cir. 2007).

This case arises out of employer's motion for modification under 33 U.S.C. §922 that it withdrew on May 16, 2014 without prejudice. On May 21, 2014, Administrative Law Judge William Dorsey dismissed the case, which resulted in the continuation of claimant's award. He stated that if the parties could not reach an agreement on a fee for claimant's counsel, claimant's counsel must file a fee petition within 21 days. Employer was given 21 days to respond. Judge Dorsey directed the parties to thereafter meet in person or voice-to-voice within 14 days to attempt to resolve any differences over the fee petition. He directed claimant's counsel to file a report on the negotiations within seven days after the meeting identifying any resolutions or remaining disagreements.

Claimant's counsel filed a fee petition on June 24, 2014,¹ seeking a fee of \$19,638.75, and employer filed its objections on July 11, 2014. On July 24, 2014, counsel sent a letter to Judge Dorsey, stating he had conferred with employer's counsel and they were discussing a resolution. He requested until August 8 to notify Judge Dorsey of the settlement discussions. On August 12, 2014, claimant's counsel sent a second letter to Judge Dorsey, stating that settlement of the fee was still possible and he would provide an update on the status of the settlement discussions within 10 days. Counsel did not file another settlement report.

Judge Dorsey retired and the case was reassigned to Administrative Law Judge Christopher Larsen (the administrative law judge) on February 15, 2018. In July 2018, claimant's counsel filed an Amended Declaration of Attorney Fees and Costs, "due to the long delay of over four years in approval of my fees and costs," now requesting an attorney's fee of \$23,579.75, plus costs of \$1,280.63. On July 24, 2018, the administrative law judge issued an Order to Show Cause, requiring claimant's counsel to respond by August 24, 2018, either by filing the settlement report ordered by Judge Dorsey or showing cause why he should not strike the amended attorney's fee petition and dismiss the 2014 fee petition for failure to comply with Judge Dorsey's May 21, 2014 Order. Claimant's counsel did not respond to the Order to Show Cause by the deadline. The administrative

¹ Claimant's counsel had sought an extension on June 3, 2014 to which employer consented.

law judge therefore issued an Order striking the amended fee petition and denying the original June 24, 2014 fee petition in its entirety.²

Claimant appeals the administrative law judge's denial of all attorney's fees. Employer filed a response, urging affirmance. Claimant filed a reply brief. Employer filed supplemental authority, citing *Iopa v. Saltchuk-Young Bros.*, 916 F.3d 1298 (9th Cir. 2019), which we accept. 20 C.F.R. §802.215.

The administrative law judge's denial of the attorney's fee is based on counsel's failure to file any additional settlement reports following his August 12, 2014 letter and his failure to timely respond to the July 24, 2018 show cause order. The administrative law judge noted that if the reassignment of the case to him in February 2018 had not reminded counsel to file the settlement report, his show cause order explicitly addressed the requirement that counsel do so. After claimant failed to respond, the administrative law judge issued his order striking counsel's amended fee petition and denying the original fee petition in its entirety.

Claimant's counsel has failed to establish that the administrative law judge abused his discretion in this matter. *See generally Iopa*, 916 F.3d 1298.³ The administrative law judge struck the amended fee petition for counsel's failure to respond to the Order to Show Cause in a timely fashion. It was well within the administrative law judge's discretion to do so. *See Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45, 49 (1997) (affirming an

² According to the parties' pleadings, on August 30, 2018, claimant's counsel sent a letter to the administrative law judge requesting an extension until September 4, 2018, explaining that computer problems and short-staffing since the middle of June led to his missing the deadline. Cl. Br. at 2; Emp. Resp. Br. at 3-4.

³ In *Iopa*, claimant's counsel mistakenly filed a fee petition with the administrative law judge for work performed before the district director. After counsel was informed of the mistake, he filed a corrected fee petition well after the deadline set by the administrative law judge. The administrative law judge denied the fee petition in its entirety as untimely, finding that counsel failed to show excusable neglect for failing to timely file his corrected fee petition. The Board affirmed the administrative law judge's denial of the fee, stating that he had not abused his discretion and reasonably found that counsel failed to show excusable neglect. The Ninth Circuit affirmed the Board's decision, holding specifically that the excusable neglect standard applies to deadlines in claims before an administrative law judge, following the four-factor test set forth by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380 (1993). *Iopa*, 916 F.3d at 1301.

administrative law judge's rejection of an employer's fee objections for being untimely filed).

We also affirm the administrative law judge's denial of the 2014 fee petition in its entirety. Counsel has not provided any explanation for his failure to provide the settlement report to Judge Dorsey or take any action concerning his fee petition for more than three years after his second request for an extension to file the settlement report. The administrative law judge permissibly determined that the denial of an attorney's fee is justified in this case where counsel failed for several years to comply with Judge Dorsey's order to provide a settlement report and, once the case was transferred, failed to timely respond to the administrative law judge's show cause order. Therefore, we affirm the administrative law judge's denial of an attorney's fee as within his discretion. *Bankes v. Director, OWCP*, 765 F.2d 81 (6th Cir. 1985); *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994).

Accordingly, the administrative law judge's Order Striking Amended Declaration and Denying Petition for attorney Fees and Costs is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge