BRB No. 98-1202

CHARLES F. PARKER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGISTEC OF CONNECTICUT, INCORPORATED	)	DATE ISSUED: May 18, 1999
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David A. Kelly (Monstream & May), Glastonbury, Connecticut, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar), Stamford, Connecticut, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fee of Administrative Law Judge David W. Di Nardi (97-LHC-2537, 97-LHC-2538) 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 shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

Claimant filed a claim for his work-related hearing loss in 1997, and employer

controverted the claim. At the hearing, the parties stipulated, *inter alia*, that claimant had not been paid compensation or medical benefits, and that the unresolved issues were whether claimant's hearing loss constitutes a work-related injury, the nature and extent of claimant's disability, the applicable average weekly wage, the applicability of Section 8(f), 33 U.S.C. §908(f), responsible employer, and claimant's entitlement to payment of unpaid medical bills. The administrative law judge determined that claimant is entitled to compensation for a work-related 6.8 percent monaural impairment to his right ear pursuant to Section 8(c)(13)(A), 33 U.S.C. §908(c)(13)(A), that employer is responsible for the payment of claimant's benefits, and that employer is not entitled to Section 8(f) relief. The administrative law judge computed claimant's average weekly wage pursuant to Section 10(a), 33 U.S.C. §910(a), rejecting employer's contention that Section 10(c), 33 U.S.C. §910(c), applies. The administrative law judge further found employer responsible for the payment of Dr. Russi's medical bills as a necessary litigation expense under Section 28(d), 33 U.S.C. §928(d), and for future medical benefits for claimant's hearing impairment pursuant to Section 7, 33 U.S.C. §907. In light of his award, the administrative law judge determined that employer also is liable for an attorney's fee.

Subsequently, claimant's counsel filed a petition requesting an attorney's fee of $11,445.62, representing 37.4 hours of services by lead counsel at $195 per hour, 22.5 hours of services by associate counsel at $140 per hour, and 4.2 hours of paralegal services at $45 per hour, plus $792.62 in expenses. Employer filed objections to this fee request. In a supplemental order, the administrative law judge agreed with employer that the $195 hourly rate requested for lead counsel is excessive, and, accordingly, reduced the hourly rate for lead counsel to $185. The administrative law judge rejected employer's contentions that the fee should be reduced, first, on the basis of the lack of complexity of the legal issues involved in this case and, secondly, to reflect the fact that claimant achieved limited success in the prosecution of his claim. Lastly, the administrative law judge rejected each of employer's specific objections to various entries in the fee petition, finding the tasks reasonable and necessary. Accordingly, he held employer liable for an attorney's fee in the amount of $11,071.62. Employer appeals the fee award, incorporating by reference the objections it raised below, and claimant responds, urging affirmance.

Employer initially argues that the lack of complexity of the instant case mandates a reduction in the amount of the fee awarded to claimant's counsel. 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). The administrative law judge in the instant case specifically recognized that while the complexity of the issues should be considered, it is

only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Const. Co.,* 21 BRBS 94 (1988). As employer's assertion that the complexity of the legal issues does not warrant the fee awarded is insufficient to satisfy employer's burden of establishing that the administrative law judge abused his discretion in his consideration of this factor, we reject employer's contention that the fee must be reduced on this basis.

Employer further asserts that the awarded hourly rate of $185 for lead counsel is excessive, suggesting that an hourly rate of $165 would be more appropriate. The administrative law judge determined that the $195 hourly rate sought by claimant's lead counsel was excessive, and awarded him an hourly rate of $185. We hold that employer's assertions are insufficient to meet its burden of establishing that the hourly rates awarded by the administrative law judge are unreasonable. *See Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989).

Employer additionally makes specific contentions regarding time allowed for certain entries. We note that the administrative law judge specifically considered and rejected the objections made below by employer to these entries. Because employer has failed to show an abuse of discretion by the administrative law judge in this regard, we reject these item-specific contentions.[1] *See Maddon,* 23 BRBS at 55.

We agree with employer, however, that the administrative law judge erred in not applying the holding of the United States Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 421 (1983), that the attorney's fee awarded should be commensurate with the degree of success obtained in a given case, when considering claimant's fee request. We hold, accordingly, that the administrative law judge's fee award must be vacated and the case remanded for further consideration of this issue.

[1]We note that, in challenging the number of hours approved for research, preparation and revision of claimant's trial brief from February 18, 1998 through February 23, 1998, employer erroneously states that the administrative law judge approved 18.2 hours for this work. *See* Emp. Reply Brief at 13-14. In actuality, the administrative law judge approved only the 15.7 hours itemized by claimant's attorney for this work, having noted that employer had mistakenly computed the total time expended on these tasks as 18.2 hours. *See* Supp. Decision and Order at 2.

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:

> 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 Const. 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. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. As the Supreme Court stated in *Hensley*, the most critical factor is the degree of success obtained. *Hensley*, 461 U.S. at 437. Under the Act, the second prong of the *Hensley* test requires the administrative law judge to award a reasonable fee after consideration of employer's objections and the regulatory criteria, 20 C.F.R. §702.132. *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).

In the present case, employer properly raised the applicability of *Hensley* before the administrative law judge, arguing that the attorney's fee awarded must be commensurate with the limited success achieved by claimant. Our review of the record reflects that the amount of compensation claimant received for his hearing loss was approximately 25 percent of the amount of compensation he sought at the hearing; claimant sought compensation for a 7.2 percent binaural impairment which would have entitled him to 14.4 weeks of compensation pursuant to Section 8(c)(13)(B), and was awarded compensation for a 6.8 percent monaural impairment, entitling him to 3.5 weeks of compensation pursuant to Section 8(c)(13)(A). In rejecting employer's objection regarding claimant's limited success, the administrative law judge, without addressing the applicability of *Hensley*, ruled that there is no requirement that the amount of the fee award be commensurate with claimant's award of benefits. *See* Supp. Decision and Order at 2. Thus, as the administrative law judge failed to address employer's

specific contention regarding claimant's limited success in accordance with the applicable legal standards as set forth in *Hensley,* we vacate the fee award and remand the case for consideration of the fee petition pursuant to *Hensley.*[2] *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *George Hyman Const. Co.*, 963 F.2d at 1532, 25 BRBS at 161 (CRT); *Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[2]We note, in this regard, that contrary to employer's assertion that the sole issue on which claimant prevailed was the determination of average weekly wage, *see* Emp. Reply Br. at 3, this was a contested claim in which employer refused to pay compensation or medical benefits. Unresolved issues presented at the hearing on which claimant prevailed included whether claimant's hearing loss constitutes a work-related injury and entitlement to the payment of unpaid medical bills, in addition to the calculation of claimant's average weekly wage. Thus, claimant, in fact, achieved success on all contested issues with the exception of the degree of his hearing loss.