BRB No. 01-0286

JOSEPH LOMBARDO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN STEVEDORING, LIMITED	)	DATE ISSUED: Nov. 21, 2001
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James R. Campbell, Middle Island, New York, for claimant.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher, LLP), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (98-LHC-2898) of Administrative Law Judge Ralph A. Romano 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 suffered work-related injuries to his right ankle and left knee on June 13, 1996. Employer paid claimant temporary total and temporary partial disability benefits for periods between June 21, 1996, and July 24, 1999, at which time claimant filed a claim seeking an award for continued temporary total disability benefits. Employer controverted, arguing that claimant already reached maximum medical improvement, that it established suitable alternate employment, and thus,

that claimant was entitled only to scheduled awards for permanent partial disability benefits under 33 U.S.C. §908(c)(2) and (4).

In his Decision and Order, the administrative law judge determined that claimant reached maximum medical improvement as of July 24, 1999, and that employer established the availability of suitable alternate employment as of February 29, 2000. Consequently, the administrative law judge concluded that claimant is entitled to an award of permanent total disability benefits from July 25, 1999, through February 29, 2000, and scheduled awards of permanent partial disability benefits under 33 U.S.C. §908(c)(2),(4), (19), for a two percent loss of use of the left leg and a ten percent loss of use of right foot.

Claimant's counsel thereafter sought an attorney's fee of $18,436.75, representing 36.3 hours of attorney work at an hourly rate of $250, plus expenses of $9,361.75. Employer filed objections to this fee request.

In his Supplemental Decision and Order, the administrative law judge reduced the requested expenses by $4,750, the hourly rate to $150, and specific entries by 2.7 hours, and then determined that the remaining number of hours requested by counsel was excessive in light of the limited success achieved in this case. In accordance with *Hensley v. Eckerhart*, 461 U.S. 421 (1983), the administrative law judge reduced the number of hours requested by one-third, and thus awarded an attorney's fee of $3,360, plus $4,611.75 in expenses. Claimant appeals the reduction in the fee requested. Employer responds, urging affirmance.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, which provides that an awarded attorney's fee must be reasonable, and the applicable regulation, 20 C.F.R. §702.132, which provides that an awarded attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989).

In the present case, the administrative law judge, after considering the complexity of the issues involved in the case and relative skill of claimant's counsel, reasonably determined that an hourly rate of $150 is appropriate. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). The administrative law judge next acted within his discretion in reducing, as excessive, specific entries for work performed by claimant's counsel with regard to this case.[1] *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

[1]Specifically, the administrative law judge reduced the charge of .9 hours for preparation of an LS-18 to .3 hours, and reduced the total timed charged for preparation of

The administrative law judge then found, citing *Hensley,* 461 U.S. 421, that claimant achieved only partial success in the pursuit of his claim and thus reduced the remaining number of hours, 30.9, by one-third. In particular, claimant sought an award of continuing temporary total disability benefits from July 24, 1999. In his decision, the administrative law judge instead determined that claimant was entitled to an award of permanent total disability benefits from July 25, 1999, through February 29, 2000, and scheduled awards of permanent partial disability benefits for a two percent loss of use of the left leg and a ten percent loss of use of right foot. Thus, claimant's recovery is, in fact, limited in that the administrative law judge awarded total disability benefits for a short, fixed period of time rather than on a continuing basis, as was sought by claimant in this case.[2] As the reduction of hours in the instant case is reasonable, and the Board has previously affirmed such across the board reductions where the administrative law judge determined that claimant achieved limited success, the administrative law judge's decision to reduce the number of hours requested by one-third is affirmed. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999)(50 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999) (90 percent reduction in an attorney's fee is reasonable given claimant's limited success in establishing entitlement to medical benefits, but not temporary total disability benefits); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184 (CRT) (5th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (2000)(75 percent reduction in attorney's fees is reasonable given claimant's failure to succeed in the prosecution of his primary claim for permanent total and partial disability compensation); *see also George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir.1992).

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the final brief from 4.1 hours to 2 hours, finding that the reduced time allotments more appropriately reflected the nature and value of the work done.

[2]Claimant's counsel asserts that through his efforts claimant has obtained more than $130,000 in benefits and thus his success in this litigation is not, as the administrative law judge determined, limited. We do not agree with this assertion. The instant case represents the second claim filed by claimant with regard to the work-related injuries sustained on June 13, 1996, and as noted above the only issue in dispute was claimant's entitlement to a continuing award of total disability benefits from July 24, 1999. Counsel's work in the first claim, which is not before the Board and for which claimant's counsel has previously sought and obtained an attorney's fee, resulted in $89,992 in benefits, whereas counsel's work in the instant claim resulted in an award of $22,521.14 in total disability benefits, and $18,382 in scheduled permanent partial disability benefits. Throughout the proceedings, employer asserted that claimant's entitlement to benefits should be limited completely to the scheduled award. Hearing Transcript 7. Thus, claimant's success is based on the $22,521.14 he received in total disability benefits as a result of the administrative law judge's decision. Claimant's success is, as the administrative law judge determined, limited as the amount he actually received is less than he would have received had he been awarded a continuing award of total disability benefits.

With regard to the costs claimed in the fee petition, the administrative law judge determined that the $7,000 witness fee claimed by Dr. Rose for testifying is unreasonable in that the time spent for such purpose could not reasonably have exceeded 4.5 hours. Utilizing an hourly rate of $500, the administrative law judge concluded that a sum of $2,250 is appropriate for the witness fee attributed to Dr. Rose. Section 28(d) of the Act, 33 U.S.C. §928(d), the only statutory provision authorizing the administrative law judge to assess costs, provides that where an attorney's fee is awarded against an employer or carrier there may be a further assessment against such employer or carrier as costs, fees, and mileage for necessary witnesses attending the hearing at the instance of claimant. Section 28(d) requires an analysis of the reasonableness and necessity of the costs incurred by counsel in litigating the case. As the administrative law judge acted within his discretion in limiting Dr. Rose's witness fee to a rate of $500 per hour for a total of 4.5 hours, and this amount is reasonable, we affirm the administrative law judge's denial of any additional costs to claimant's counsel associated with Dr. Rose's testimony. 33 U.S.C. §928(d).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge