

BRB Nos. 04-0198
and 04-0198A

BRET TARVER)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
BO-MAC CONTRACTORS, INCORPORATED)	DATE ISSUED: <u>Oct. 29, 2004</u>
)	
and)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
)	
Employer/Carrier- Respondents)	
Cross-Petitioners)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney's Fees and the Decision on Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price & McElroy), Orange, Texas, for claimant.

John C. Elliott (Fitzhugh, Elliott & Ammerman, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Supplemental Decision and Order Awarding Attorney's Fees and the Decision on Claimant's Motion for Reconsideration (2002-LHC-270) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor

Workers' Compensation Act, 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, who is a paraplegic as the result of an injury sustained while working for employer on July 14, 1998, filed a claim for benefits under the Act on August 7, 1998. Following the filing of pre-hearing statements by both parties indicating that the parties disputed, *inter alia*, coverage under the Act, the nature and extent of claimant's disability, and whether intoxication was the sole cause of claimant's accident, the case was referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. At the formal hearing, the parties were able to reach agreement on all of the previously disputed issues except coverage under the Act and employer's intoxication defense to the claim.¹ In his Decision and Order, the administrative law judge found that claimant is covered by the Act, *see* 33 U.S.C. §§902(3), 903(a), and that intoxication was not the sole cause of claimant's injury, 33 U.S.C. §§903(c), 920(c). Accordingly, the administrative law judge awarded claimant permanent total disability benefits. Employer appealed the administrative law judge's Decision and Order to the Board, challenging only the finding that the claim is covered by Sections 2(3) and 3(a) of the Act. On October 15, 2003, the Board issued a Decision and Order wherein it held that claimant's injury did not occur on a covered situs. The Board therefore reversed the administrative law judge's determination that claimant is covered by the Act and his consequent award of permanent total disability benefits under the Act. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003). The Board's decision that claimant was not injured on a covered situs has recently been affirmed by a panel of the United States Court of Appeals for the Fifth Circuit. *Tarver v. Bo-Mac Contractors, Inc.*, 2004 WL1959084 (5th Cir. Sept. 21, 2004).

While employer's appeal of the administrative law judge's Decision and Order awarding compensation under the Act was pending before the Board, claimant's attorneys submitted a fee petition to the administrative law judge, requesting \$55,718.75 for legal and secretarial services, and \$7,734.10 in costs, for a total fee in the amount of \$63,452.85.² Employer filed a response to counsel's fee petition in which it objected to

¹ Employer did not concede that claimant is permanently totally disabled until the formal hearing held in this case on May 23, 2002, had commenced. Employer's responses to claimant's discovery requests dated March 25, 2002 and its lists of witnesses and exhibits filed with the administrative law judge on May 9, 2002, reflect employer's intent to offer at the hearing the testimony and reports of its vocational rehabilitation experts with respect to the issue of the extent of claimant's disability.

² Claimant's fee request for legal services consists of 184.7 hours at \$250 per hour for work performed by Attorney Ed W. Barton, 20.75 hours at \$225 per hour for work performed by Attorney John D. McElroy, and 20.75 hours at \$225 per hour for work performed by Attorney Quentin D. Price. The fee request additionally itemizes 2.75 hours of secretarial services at \$75 per hour.

the requested hourly rates for attorney services; counsel's one-quarter hour minimum billing method; the time itemized for secretarial work; various entries which it averred were duplicative, excessive, or vague and incomplete; and certain items claimed as costs. Claimant thereafter filed a reply to employer's objections in which he reasserted his entitlement to the requested fee and, in addition, requested a supplemental fee of \$3,062.50, representing 12.25 hours at \$250 per hour, for Attorney Barton's preparation of claimant's reply to employer's objections to the fee petition. Employer then filed a reply in support of its previous objections to the fee request.

In a Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge first reduced the requested hourly rates for legal services to \$200 for Attorney Barton and \$175 for Attorneys McElroy and Price, on the basis that the requested rates were excessive. Next, the administrative law judge agreed with employer's objection that the charges claimed by each of the three attorneys for attendance at the hearing were duplicative and therefore disallowed the time itemized for attending the hearing by Attorneys McElroy and Price. Additionally, the administrative law judge reduced counsel's minimum charge from one-quarter hour to one-eighth hour and disallowed all the itemized secretarial services. The administrative law judge rejected employer's specific objections to various entries as either excessive or vague and incomplete, and allowed the full time requested for those itemized services. Lastly, the administrative law judge agreed with employer's objections to certain costs claimed by counsel; specifically, the administrative law judge disallowed the \$3,772.50 cost of claimant's vocational rehabilitation expert, finding that this expense was unnecessary on the basis that there was no contention that claimant is employable. Accordingly, the administrative law judge awarded claimant's counsel a fee of \$40,920 for legal services, plus an additional \$3,796.45 in costs.

Claimant thereafter filed a motion for reconsideration averring that the administrative law judge did not address the additional \$3,062.50 requested for claimant's reply to employer's objections and that the administrative law judge erroneously disallowed the cost of claimant's vocational rehabilitation expert. In addition, claimant filed a second supplemental fee request for \$625, representing 2.5 hours of services rendered at a rate of \$250 per hour, for Attorney Price's preparation of the motion for reconsideration. Employer filed a response, urging denial of the motion for reconsideration and the second supplemental fee petition. In a Decision on Claimant's Motion for Reconsideration, the administrative law judge found both the time itemized and hourly rate sought in claimant's first supplemental fee request to be excessive and, thus, he approved a fee for 2.5 hours at \$200 per hour. With respect to the second supplemental fee request, the administrative law judge approved the requested 2.5 hours but reduced the hourly rate to \$175. Lastly, the administrative law judge reaffirmed his previous disallowance of the cost of claimant's vocational expert on the basis that there was no contention that claimant is employable. Thus, the administrative law judge awarded claimant's counsel an additional fee of \$937.50.

On appeal, claimant challenges the administrative law judge's refusal to hold employer liable for the cost of claimant's vocational expert, as well as the administrative law judge's reduction in the number of hours allowed for the preparation of claimant's reply to employer's objections to the original fee petition.³ BRB No. 04-0198. In its cross-appeal, employer contends that the administrative law judge erred in awarding a fee for the services itemized in claimant's two supplemental fee petitions. BRB No. 04-0198A. In response to claimant's appeal, employer urges affirmance of the administrative law judge's disallowance of the cost of claimant's vocational expert.

Claimant's counsel is entitled to a fee under Section 28 of the Act, 33 U.S.C. §928, only upon the successful prosecution of a claim. Although an administrative law judge may issue a fee award during the pendency of an appeal on the merits of the claim, the fee award is not final and enforceable until all appeals are exhausted and claimant has satisfied the requirements of Section 28 of the Act. *See, e.g., Sullivan v. St. Johns Shipping Co., Inc.*, 36 BRBS 127, 130 (2002). In the instant case, the administrative law judge's award of benefits was reversed by the Board, and the Board's decision has been affirmed by the United States Court of Appeals for the Fifth Circuit. 2004 WL1959084 (5th Cir. Sept. 21, 2004). In the event that claimant should seek further appellate review of the decision that his injury is not covered under the Act and ultimately be found entitled to receive compensation under the Act, he would be entitled to attorney's fees. If, however, claimant does not ultimately prevail in his claim for compensation under the Act, his attorney would not be entitled to a fee for work performed before the administrative law judge. Since the appellate process regarding claimant's claim may yet continue, the Board will decide the parties' appeals of the administrative law judge's fee award, in order to further the goal of judicial efficiency. *See generally Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987).

First, we agree with claimant that the administrative law judge erred in disallowing the cost of claimant's vocational expert on the basis that there was no contention that claimant is employable. It is well-established that in a case in which an attorney's fee is awarded against employer, the reasonable and necessary costs incurred by counsel in litigating the case can also be assessed against employer. *See* 33 U.S.C. §928(d); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 31 (1999). The test for compensability concerns whether the attorney, at the time the litigation costs are incurred, could reasonably regard them as necessary, rather than whether the evidence was actually used at the hearing. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). In the instant case, contrary to the administrative law judge's finding, employer continued to

³ Claimant does not contest on appeal the administrative law judge's reduction of the hourly rates claimed for legal services. Moreover, claimant does not challenge the administrative law judge's decision to disallow the time sought for secretarial work, the reduction of counsel's minimum charge to one-eighth hour, the disallowance of time itemized by Attorneys McElroy and Price for attending the hearing, or the disallowance of Federal Express expenses.

contest the extent of claimant's disability until the hearing had commenced. *See infra* at 2. As employer indicated its intent to introduce into evidence vocational evidence regarding the extent of claimant's disability, it is incontrovertible that claimant's attorney could reasonably consider it necessary to retain his own vocational expert in order to establish that claimant is not employable. Thus, as the administrative law judge's reason for disallowing the cost of claimant's vocational expert has no support in the record, we conclude that this cost is reasonable and necessary.⁴ Accordingly, the administrative law judge's determination that claimant is not entitled to reimbursement for the expenses incurred in obtaining his vocational evidence is reversed, and his decision is modified to reflect employer's liability for the \$3,772.50 incurred in this regard, contingent upon claimant's ultimately being found to be entitled to benefits under the Act.

We further hold that neither party has demonstrated reversible error by the administrative law judge in his award of fees for the legal services itemized in claimant's two supplemental fee petitions. Specifically, claimant challenges the administrative law judge's decision to approve only 2.5 of the 12.25 hours of legal services itemized in claimant's first supplemental fee petition. Employer, in its cross-appeal, contends that the administrative law judge erred by awarding any fee for the services itemized in the two supplemental fee petitions.⁵ As the administrative law judge's reduction in the

⁴ Contrary to employer's contention, the fact that claimant's counsel did not submit its vocational expert's invoice with the original attorney's fee petition does not foreclose him from recovering those costs. The Board has held, in this regard, that counsel is not required "to forestall all challenges to a fee in advance by explaining the reasonableness, necessity and legality of every item contained therein." *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 379 (1979). Claimant's attorney subsequently provided the vocational expert's invoice in response to employer's objection to this expense. This invoice, in conjunction with claimant's original fee petition, clearly demonstrates that the expenses billed for the services of the vocational expert pertain to his evaluation of claimant's employability. Contrary to employer's assertion that the vocational expert was used to address the issue of claimant's life expectancy, it is clear that the two brief telephone discussions of this issue subsequent to counsel's receipt of the vocational expert's report were extraneous to the purpose for which the expert was retained.

⁵ We reject employer's contention that the administrative law judge's award of a fee for time itemized in claimant's first supplemental fee petition erroneously rewards claimant's counsel for his failure to provide a fully supported fee petition. As previously discussed, claimant's counsel is not required to accompany his fee petition with extensive documentation of his litigation expenses. *See Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 379 (1979). Moreover, in light of our reversal of the administrative law judge's disallowance of the expense of claimant's vocational expert, we reject employer's contention that the administrative law judge's award of a fee for services

number of hours itemized in the first supplemental fee request resulted in a fee award which is commensurate with the degree of success obtained by claimant's attorney in defending his original fee petition, we hold that the administrative law judge acted within his discretion in reducing the requested fee and we decline to disturb his award of fees for legal services itemized in the two supplemental fee petitions. *See Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003); *Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 120 U.S. 2215 (2000). We therefore affirm the administrative law judge's award of attorney's fees to claimant's counsel.

itemized in counsel's second supplemental fee request was not commensurate with the degree of success obtained. *See Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003).

Accordingly, contingent on claimant's ultimately being found to be entitled to benefits under the Act, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and his Decision on Claimant's Motion for Reconsideration are modified to reflect that claimant is entitled to the cost of his vocational expert, but are otherwise affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge