

BRB No. 98-0232

CAROLYN MEDINA)
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 Claimant-Respondent) DATE ISSUED:
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 v.)
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 THE DEPARTMENT OF THE ARMY)
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 and)
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 ALEXSIS)
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 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order on Petition for Reconsideration and Supplemental Award of Attorney's Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Thomas P. Fochs and David A. Tovrea, Denver, Colorado, for claimant.

Raymond H. Warns, Jr. (Holms, Weddle & Barcott), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Petition for Reconsideration and Supplemental Award of attorney's Fees (93-LHC-1050, 96-LHC-0220, 96-LHC-0221, and 96-LHC-0222) of Administrative Law Judge Alfred Lindeman 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 numerous injuries between July 1967 and August 1988 during the course of her employment with employer as a cook; the subject injury occurred on June 10, 1988, when claimant tripped and slid into a plastic trash can, resulting in injuries to her head, neck, and upper and lower extremities. In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation from January 1, 1990, to January 16, 1991, permanent partial disability compensation from January 17, 1991 to January 17, 1992, and permanent total disability compensation thereafter, based upon an average weekly wage of \$131.40. Additionally, employer was found to be entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Subsequent to this award, claimant's attorney sought a fee of \$46,750, representing 368.4 hours of services rendered at an hourly rate of \$125 prior to April 30, 1996, and \$150 per hour thereafter, plus costs of \$7,518.39. Employer filed objections to this fee request.

In his Decision and Order on Petition for Reconsideration and Supplemental Award of Attorney's Fees, the administrative law judge, *inter alia*,¹ considered employer's objections and thereafter awarded claimant's attorney a fee of \$21,413.75, representing 171.31 hours of services rendered subsequent to October 25, 1995, at a rate of \$125 per hour, plus costs of \$6,404.39.

Employer now appeals, contending that the administrative law judge erred in not reducing the hourly rate sought by counsel and in not further reducing the number of hours awarded; specifically, employer asserts that a more reasonable fee would be \$5,128.80, representing 64.11 hours of services rendered at a rate of \$80 per hour. Claimant responds, urging affirmance of the administrative law judge's fee award. After a thorough review of employer's contentions on appeal and the record in this case, we conclude that the administrative law judge's fee award must be upheld, as employer has failed to show the award to be unreasonable or an abuse of the administrative law judge's discretion.

¹The administrative law judge's modification of claimant's average weekly wage for compensation purposes to \$268.40 per week and his findings regarding claimant's TMJ problem and an alleged work-related aggravation of her right arm condition were not appealed and are hereby affirmed.

Employer initially challenges the hourly rate awarded to claimant's counsel by the administrative law judge. Specifically, employer asserts that the lack of complexity of the instant case and the quality of claimant's counsel mandates a reduction in the fee awarded to claimant's counsel to \$80 per hour; moreover, employer avers that the awarded hourly rate is excessive and that the administrative law judge erred in failing to specifically explain his rationale in awarding counsel a fee. 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 done, the complexity of the legal issues involved 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). While the complexity of the issues should be considered by the administrative law judge, it is but one of the relevant factors to be considered when awarding an attorney's fee. See *Thompson v. Lockheed Shipbuilding & Const. Co.*, 21 BRBS 94 (1988). In this case, the administrative law judge, specifically stated that he had taken into consideration the Act's implementing regulation regarding the awarding of attorney's fees, the quality of counsel's representation, the result achieved, and employer's objections. Further, finding the number of hours expended were not warranted by the facts or complexity of the issues, the administrative law judge also declined claimant's counsel's request for an enhanced hourly rate and awarded the usual rate of \$125 for services rendered to claimant by her counsel. Employer has not satisfied its burden of showing that the administrative law judge abused his discretion in awarding a fee based on counsel's usual hourly rate of \$125.² Thus we reject employer's argument on appeal that the fee must be reduced. See *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134 (CRT)(10th Cir. 1997); *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

Employer additionally challenges the number of hours requested by counsel

²Contrary to employer's contention that the awarded fee is excessive given the amount of benefits awarded to claimant, claimant herein was found to be entitled to a continuing award of permanent total disability compensation. The fact that employer was awarded relief pursuant to Section 8(f) of the Act does not detract from the fact that claimant's award is substantial.

and approved by the administrative law judge. The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. See, e.g., *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). In the instant case, claimant's counsel requested reimbursement for 368.4 hours of services rendered on behalf of claimant; in response to counsel's fee petition, employer filed numerous objections to specific time entries. The administrative law judge agreed with many of employer's objections and, consequently, reduced the requested fee by the 124.9 hours of services performed before the case was transferred to the Office of Administrative Law Judges, 27.57 hours for duplicative and excessive work relating to counsel's closing statement, and 44.62 hours for duplicative work performed on fifteen specific days; thus, the number of hours requested by counsel was reduced to 171.31, a reduction in excess of fifty percent. Because employer has failed to show an abuse of discretion by the administrative law judge in awarding a fee for the remaining services requested, having considered employer's objections, we reject employer's item-specific contentions and decline to reduce further the administrative law judge's award. See *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997); *Ross*, 29 BRBS at 42; *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Accordingly, the administrative law judge's Decision and Order on Petition for Reconsideration and Supplemental Award of Attorney's Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge