BRB No. 93-0782

JOHN PAPAI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARBOR TUG & BARGE COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and Order Denying Motion for Reconsideration, of Paul A. Mapes Administrative Law Judge, United States Department of Labor.

Deborah Kochan (Law Offices of Lyle C. Cavin, Jr.), Oakland, California, for claimant.

B. James Finnegan and Katherine F. Theofel (Finnegan, Marks & Hampton), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Awarding Attorney's Fees and Order Denying Motion for Reconsideration (92-LHC-403) of Administrative Law Judge Paul A. Mapes 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant fell from a ladder and injured his left knee while working as a deck hand for employer on March 13, 1989. The parties stipulated that employer paid claimant weekly benefits of $238.46 per week from the date of injury through the date of the June 2, 1992, formal hearing. The administrative law judge found that claimant is an employee covered by the Longshore Act and is not excluded as a member of a crew. He found that employer had properly calculated claimant's average weekly wage, and rejected claimant's claim for a higher average weekly wage. He awarded claimant temporary total disability benefits from March 13, 1989 through February 2, 1990, and permanent total disability benefits from February 2, 1990 through November 12, 1990. Thereafter, claimant was to receive schedule awards for a seven percent impairment to the right leg and for a 30 percent impairment to the left leg.[1]

Claimant's counsel thereafter filed a fee petition, requesting a total of $13,802.50, representing 78.6 hours at a rate of $150 per hour, 11.5 hours at a rate of $175 per hour, plus $4,398.24 in litigation costs and expenses. Employer filed objections to the fee petition. In a Supplemental Decision and Order Awarding Attorney's Fees, after considering employer's objections, the administrative law judge awarded counsel a fee of $1500, $160 in litigation costs and reimbursement of $250 in expenses. The administrative law judge analyzed the fee request in light of claimant's success in pursuing his claim, under the criteria of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. 1992). The administrative law judge found that claimant was successful in establishing that his claim is covered by the Longshore Act and in establishing his entitlement to benefits for his right foot impairment. He found that claimant was unsuccessful in establishing a higher average weekly wage, in proving that he was totally disabled beyond November 12, 1990, in demonstrating greater impairment to the left leg than that alleged by employer, and in establishing impairment to the right hip and back. The administrative law judge concluded that the claims on which claimant prevailed were essentially unrelated to the claims on which he did not prevail, and that the issues are severable. Finding, however, that he could not attribute items in the fee petition to either the successful or unsuccessful issues, the administrative law judge undertook a "second step" *Hensley* analysis, and awarded counsel a fee he thought reasonable in view of the results obtained.[2]

[1]Claimant also brought a claim in district court against employer under the Jones Act, 46 U.S.C. §688. The district court granted partial summary judgment for employer, and claimant appealed to the United States Court of Appeals for the Ninth Circuit. In *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 29 BRBS 129 (CRT) (9th Cir. 1996), *pet. for cert. pending*, No. 95-1621, the Ninth Circuit held that receipt of benefits pursuant to an award under the Longshore Act does not bar claimant from seeking relief under the Jones Act. The court remanded the case to the district court for further proceedings. Employer has requested that the Board stay action in claimant's appeal pending resolution of the Jones Act claim. Employer's motion is denied in view of the provisions of Public Law 104-134 requiring the Board to administratively affirm any appeal more than one year old pending on September 12, 1996.

[2]The administrative law judge did so by estimating how many hours of work could reasonably have been spent on the successful issues, 10 in this case, and multiplying this number by a reasonable hourly rate ($150).

Claimant's counsel filed a motion for reconsideration, which was denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's attorney's fee award. Employer responds, urging affirmance of the award.

Claimant contends that the administrative law judge erred by relying on *Hensley* and *Brooks*, rather than on the Board's decision in *Cherry v. Newport News Shipbuilding & Dock Co.*, 8 BRBS 857 (1978), to reduce the requested fee.[3] The United States Court of Appeals for the District of Columbia Circuit held in *Brooks*, 963 F.2d at 1537, 25 BRBS at 166 (CRT), that the Board's decision in *Cherry* is invalid in light of the subsequent decision of the Supreme Court in *Hensley*. Moreover, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has recently held that *Hensley* and its progeny defining a "reasonable fee" under federal fee-shifting statutes applies to cases arising under the Act. *Anderson v. Brady-Hamilton Stevedore Co.*, ___ F.3d ___, No. 94-70750 (9th Cir. Aug. 5, 1996); *see also General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988).

In *Hensley*, the Supreme Court created a two-prong test for determining the amount of an attorney's fee where claimant is unsuccessful on some of the claims pursued:

> 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?

461 U.S. at 434. Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the lower 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,

[3]In *Cherry*, the Board held that it is improper to limit an attorney's fee to work on issues on which claimant prevailed, if claimant succeeded in obtaining greater compensation.

times a reasonable hourly rate, may result in an excessive award; the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

In the instant case, as discussed above, the administrative law judge separated the claims on which claimant was successful from those on which he was unsuccessful. The administrative law judge found that claimant's unsuccessful claim for continuing total disability required the preponderance of the legal work, and the issues on which he was successful, *i.e.*, the jurisdictional issue and the loss of use of the right foot, required the least legal work. The administrative law judge found, however, that the issues could not be separated on the basis of the fee petition, and that the best way to determine a reasonable fee was by estimating how many hours of legal work were necessary on the issues on which claimant was successful and multiplying said hours by an hourly rate. The administrative law judge properly applied the *Hensley* criteria, and claimant has not established that the administrative law judge abused his discretion in arriving at a fee of $1500 for the issues on which claimant succeeded.[4] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Claimant next contends that the administrative law judge erred in denying a fee for work performed in response to employer's procedural maneuvers and motions. Counsel itemizes 9.9 hours on these services, which include opposing employer's motion for a continuance and a motion to stay the proceedings pending resolution of claimant's Jones Act action. Counsel also itemizes 2.7 hours relating to the admission of Dr. Dye's deposition into the record. Claimant states that to deny a fee for these services could discourage counsel from pursuing the client's best interests. The administrative law judge stated in his order on reconsideration that it is true in many cases that actions of employer's counsel require claimant's attorney to expend additional time, but that this cannot be a basis for an award of fees in view of claimant's limited success in this case. We affirm the administrative law judge's denial of a fee for the 9.9 hours of services, as the administrative law judge's finding accords with the principles of *Hensley* and does not constitute an abuse of discretion. We agree with claimant, however, that the administrative law judge arbitrarily denied a fee for the 2.7 hours spent in having Dr. Dye's deposition admitted into the record. Claimant deposed Dr. Dye and employer's counsel was present at the deposition and cross-examined Dr. Dye. When claimant sought to have the deposition admitted into the record in lieu of live testimony, employer opposed claimant's motion on the ground that there was no showing that Dr. Dye was unavailable to testify at the hearing and thus the deposition could not be admitted under Federal Rule of Civil Procedure 32. The administrative law judge requested briefing on this issue, and thereafter issued on January 19, 1992, a separate order admitting Dr. Dye's deposition into evidence under 29 C.F.R. §18.23(a)(2). Under these

[4]We also note that the parties stipulated that employer paid claimant total disability benefits from the time of the injury through the date of the formal hearing.

circumstances, where the administrative law judge requested additional briefing, and then ruled in claimant's favor, we hold that counsel is entitled to the 2.7 hours expended at employer's expense.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and Order Denying Motion for Reconsideration are modified to reflect counsel's entitlement to an additional fee for 2.7 hours at $150 per hour to be paid by employer. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge