BRB No. 93-1149

OSCAR AGUILAR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	
	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Decision and Order Approving Settlement and Awarding Attorney Fees of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Diane L. Middleton (Diane L. Middleton, P.C.), San Pedro, California, for claimant.

Yvette A. Boehnke (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant's former counsel appeals the Decision and Order Approving Settlement and Awarding Attorney Fees (91-LHC-2202, 91-LHC-2203 and 92-LHC-1330) of Administrative Law Judge Daniel L. Stewart 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 the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

Claimant, with the assistance of counsel, filed a claim under the Act seeking compensation as a result of a work-related injury. In February 1992, employer offered to settle claimant's claim for $25,000, $7,000 of which was designated as counsel's fee. Claimant's counsel recommended that

claimant reject this settlement offer; thereafter, in August 1992, claimant's counsel withdrew as claimant's legal representative. On October 28, 1992, counsel informed the administrative law judge that she would be seeking a fee of $21,375, representing 142.5 hours of services performed at an hourly rate of $150, for services performed on behalf of claimant. A formal hearing was held on January 4, 1993, at which time claimant, who appeared without the benefit of counsel, and employer's counsel submitted to the administrative law judge a settlement agreement providing for an $18,000 lump sum payment to claimant for compensation and medical benefits, and $7,000 for an attorney's fee. Claimant's former counsel declined to attend this hearing. On January 7, 1993, the administrative law judge issued an Order to Show Cause directing claimant's former counsel to demonstrate why $7,000 is not an appropriate attorney fee in this case. Counsel, in response to this Order, submitted to the administrative law judge on January 14, 1993, hand-written time sheets and photocopied receipts in support of her prior fee request.

In his Decision and Order issued January 25, 1993, the administrative law judge approved the parties' settlement agreement. Next, the administrative law judge, after stating that he would construe counsel's response to his order as an attorney's fee petition, determined that $7,000 is more than adequate to compensate counsel for the services which she rendered in the prosecution of the instant claim; accordingly, the administrative law judge awarded counsel an attorney's fee of $7,000.

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

Counsel initially contends, citing *Carswell v. Wills Trucking Co.*, 13 BRBS 140 (1981), that the administrative law judge erred by failing to hold a separate hearing regarding her fee petition; thus, counsel asserts that the administrative law judge's fee award must be vacated and the case remanded for a formal hearing. We disagree. Initially, we note that counsel's reliance on *Carswell* is misplaced. In *Carswell*, the Board held that if the parties to a settlement agreement are unable to agree upon claimant's attorney's fee, they may settle the amount of compensation only and then submit the attorney's fee issue to the proper adjudicatory body for a separate resolution apart from the compensation agreement. Liability for the fee, and the amount of the fee, would then be determined by the presiding officer in the usual manner pursuant to 33 U.S.C. §928 and 20 C.F.R. §702.132. *See Carpenter v. Lockheed Shipbuilding & Constr. Co.*, 14 BRBS 282 (1981). Failure to hold a formal hearing regarding a request for an attorney's fee is not, however, a violation of due process when the fee request is to the judicial or administrative body before whom the work was performed. *See Carroll v. Hullinghorst Industries, Inc.*, 12 BRBS 401 (1980), *aff'd*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Moreover, it is well-established that an administrative law judge may render an attorney's fee determination when he issues his decision, in order to further the goal of administrative efficiency. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987).

In the instant case, it is uncontroverted that counsel was aware of the formal hearing scheduled before the administrative law judge and that counsel, in rejecting the proposed amount of her fee contained in the settlement agreement, submitted to the administrative law judge time-sheets

documenting her requested fee; counsel did not, however, request a hearing regarding her fee request. Thereafter, the administrative law judge issued a comprehensive decision in which he addressed in detail counsel's fee request. Based upon these undisputed facts, we hold that the administrative law judge committed no error in failing to hold a formal hearing regarding counsel's fee request and in rendering an attorney's fee determination contemporaneous with his Decision and Order.

Counsel next challenges the amount of the fee awarded by the administrative law judge. In rendering his fee determination in the instant case, the administrative law judge, after initially stating that the mechanical approach advocated by counsel, specifically a multiplication of hours expended by an hourly rate, in calculating an attorney's fee award would be inappropriate, proceeded to consider counsel's fee request under two alternate theories. First, the administrative law judge found that claimant could not have reasonably expected to receive more in compensation than that offered by employer, that counsel prolonged this case by pressing for a larger settlement, and that, therefore, counsel expended an unreasonable amount of time representing claimant.[1] Pursuant to these findings, the administrative law judge determined that counsel should reasonably have expended no more than 46.66 hours on these claims; thus, the administrative law judge reduced the 142.5 hours sought by counsel to 46.66 which, when multiplied by counsel's $150 hourly rate, resulted in a fee of $7,000. Alternatively, the administrative law judge considered counsel's fee request in light of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983). 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, it 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, 103 S.Ct. at 1940; *see also George Hyman Construction 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). Applying this test, the administrative law judge determined that claimant's receipt of a lump sum precluded an analysis of his success on particular issues in the three claims he filed pursuant to the first prong of the *Hensley* test. Regarding the second prong of the *Hensley* test, the administrative law judge found that claimant did not achieve a level of success that makes the hours reasonably expended by counsel a satisfactory basis for making a fee award; specifically, the administrative law judge determined that the product of the hours reasonably expended by counsel times a reasonable hourly rate would result in an excessive amount of a fee. *See* Decision and Order at 4. Thereafter, taking

[1]In addressing counsel's actions, the administrative law judge noted that counsel, after urging claimant to reject employer's settlement offers, subsequently withdrew from the case and demanded a fee larger than the sum claimant could reasonably expect to receive from employer for his injury.

into consideration the quality of counsel's representation, the complexity of the legal issues involved, and the amount of benefits received by claimant, as well as the implementing regulation contained at 20 C.F.R. §702.132, the administrative law judge concluded that $7,000 is more than adequate to compensate counsel for her services rendered on behalf of claimant. *Id.*

In challenging the fee awarded by the administrative law judge, counsel contends that the administrative law judge, in considering solely the result obtained by claimant, erred in failing to evaluate the success obtained on issues pre-settlement, as well as the nature, need and reasonableness of the services provided. It is well-settled that the party challenging the reasonableness of an attorney's fee award bears the burden of showing that the award was contrary to law or was arbitrary, capricious or an abuse of discretion. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980). In the instant case, counsel has failed to meet her burden. *See generally Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). The administrative law judge considered the overall relief obtained by claimant, as well as the quality of counsel's representation and the complexity of the legal issues involved, in determining that the number of hours requested by counsel was unreasonable and in subsequently concluding that $7,000 represented a reasonable fee. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). Thus, as the administrative law judge considered a number a factors in addressing counsel's fee request, we reject counsel's specific objections to the rationales employed by the administrative law judge. Accordingly, we affirm the administrative law judge's award of an attorney's fee to claimant's former counsel.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge