BRB No. 90-1032

MARY L. MOODY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order - Awarding Attorney Fees of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order-Awarding Attorney Fees (88-LHC-3791) of Administrative Law Judge James W. Kerr, Jr., 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). An award of an attorney's fee 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 was exposed to noise while working for employer from 1974 to 1979. On February 20, 1987, claimant underwent an audiometric evaluation at the University of South Alabama which revealed a 5.6 percent hearing loss in her right ear, a zero percent impairment in her left ear, and a binaural loss of 0.9 percent. A subsequent audiometric evaluation conducted by Dr. Lamppin on December 5, 1988, revealed a zero percent noise-induced hearing loss. On March 19, 1987, claimant filed a hearing loss claim and notified employer of her injury. Employer filed notices of controversion on April 16, 1987 and July 22, 1987. On May 11 and 14, 1987, Assistant District Director Robert H. Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, or controversions, and from making payments in regard to these claims, until 28 days

following the service on employer of a claim by the district director's office.[1] On September 22, 1988, the case was referred to the Office of Administrative Law Judges for a formal hearing.

In his Decision and Order, the administrative law judge awarded claimant compensation pursuant to Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A)(1988), for a 2.8 percent monaural hearing impairment, based on the average of the two audiometric evaluations of record. The administrative law judge further determined that the "excuse" granted to employer by the district director was invalid and that, as employer did not timely pay benefits or controvert the claim, employer was liable for a Section 14(e), 33 U.S.C. §914(e), assessment on all late payments owed claimant, the exact amount to be determined by the district director. The administrative law judge also awarded claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907. Finally, the administrative law judge found that claimant's counsel was entitled to an attorney's fee.

Claimant's counsel subsequently filed a fee petition for work performed before the administrative law judge, requesting $3,075 representing 20.50 hours of services rendered at $150 per hour, plus $66.80 in expenses. Employer thereafter submitted objections to counsel's fee request and claimant responded to employer's objections. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, addressing employer's objections to the fee request and claimant's response, reduced the hourly rate sought by claimant's counsel to $100, but otherwise allowed the fee requested, awarding claimant's counsel $2050, representing 20.50 hours of legal services at $100 per hour, plus $66.80 in expenses.

On appeal, employer contends that the amount of the fee is exorbitant in relation to the benefits awarded. Employer also incorporates its objections filed with the administrative law judge, wherein it asserted it should not be held liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), because it voluntarily accepted the compensability of the claim and completed payment of compensation on March 19, 1990. In the alternative, employer argues that if it is liable for a fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), the fee should be far less than that awarded and should be limited to the difference between the amount employer voluntarily paid to claimant and the amount ultimately awarded by the administrative law judge. Employer finally asserts that the hourly rate should be $65 to $70 per hour and that certain hours should have been disallowed.

[1]The title "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

Initially, we need not address employer's arguments with respect to liability under Section 28(b). As no voluntary payments of compensation or medical benefits were made, the present case is governed by Section 28(a). Although claimant was paid compensation by employer on March 19, 1990, this payment was not voluntary; it was made pursuant to the administrative law judge's February 20, 1990 Decision and Order awarding benefits.[2] In the present case, employer contested causation, the nature and extent of claimant's disability, and claimant's entitlement to a Section 14(e) assessment. Claimant ultimately prevailed on all of these issues. As claimant's counsel's services resulted in the successful prosecution of claimant's claim, we hold that employer is liable for claimant's attorney's fee pursuant to Section 28(a). *See Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd sub nom. Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49 (CRT) (9th Cir. 1990).

Employer argues that the lack of complexity of the case mandates a reduction or disallowance of the amount of the fee awarded to claimant's counsel. We disagree. 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 any attorney's fee approved 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). Thus, while the complexity of issues should be considered by the administrative law judge, it is only one of the relevant factors. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). As the administrative law judge specifically accounted for the lack of complexity of the case in reducing the $150 hourly rate sought to $100, employer's assertion that the complexity of the case does not warrant the fee awarded is rejected.

Similarly, we reject employer's contention that the fee award should be limited by the amount of compensation obtained by claimant. Although the amount of benefits awarded to the claimant is a valid consideration in granting an attorney's fee, *see, e.g., Muscella*, 12 BRBS at 272, the amount of an attorney's fee is not limited to the amount of compensation gained, since to do so would drive competent counsel from the field. *See Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346

[2]The parties, in fact, stipulated that as of the date of the hearing, no compensation had been paid. CT. 1; Tr. at 6.

(1992)(Brown, J. dissenting on other grounds). After reducing the hourly rate sought from $150 to $100 per hour and considering employer's objections, the administrative law judge entered an award for the 20.5 hours of work claimed at the reduced rate. Employer asserts that the fee should be further reduced due to the size of the recovery. Our dissenting colleague also advocates this result, despite the total success of counsel in prosecuting this claim. In this case, employer made no voluntary payments of compensation and counsel was fully successful in establishing claimant's right to compensation, medical benefits, and a Section 14(e) assessment, issues which had been controverted by employer up through the time of the hearing.[3] Under these circumstances we hold that the administrative law judge's award is not inconsistent with *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. Cir. 1992).

The Board has recently considered the impact of the United States Supreme Court's decision in *Hensley,* on awards of attorney's fees under the Act when the amount of benefits is characterized as small. *See Bullock v. Ingalls Shipbuilding, Inc.*, __ BRBS __, BRB Nos. 90-194/A (July 16, 1993)(*en banc)*(Brown and McGranery, JJ., concurring and dissenting). 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

[3]Contrary to the statement of our dissenting colleague that there is no evidence which indicates that any medical treatment is needed, we note that Dr. Lamppin specifically stated that claimant should have annual evaluations of her hearing. Whether claimant could also obtain monitoring pursuant to the Federal Occupational Safety and Health Act, 29 C.F.R. §1910.95(c)(1),(d), and (g)(2), does not in any way affect her success in establishing entitlement to such benefits under the Longshore Act.

We further note that this case is distinguishable from the recent decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP, [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993). In that case, two claimants who had no measurable hearing impairment were denied disability benefits but were awarded medical benefits and a fee. The court rejected employer's argument that the claimants were not entitled to medical benefits because they had no measurable impairment. Nonetheless, the court reversed claimant Buckley's award of medical benefits, noting that there was no evidence of past expenses or of a need for future treatment. As the fee award was dependent on this award, it was also reversed. With regard to claimant Baker, the court remanded for findings regarding the necessity of medical treatment, noting the conflicting nature of the medical evidence presented. The administrative law judge was also directed on remand to consider the amount of the fee in terms of claimant's limited success. In contrast, in the present case, claimant has a rateable disability, and employer does not contest the award of medical benefits. Moreover, the only doctor to address the need for medical treatment, Dr. Lamppin, recommended that claimant undergo annual hearing evaluations.

> 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. *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). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district 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, 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.

Applying the *Hensley* criteria, it is apparent that claimant did not fail to prevail on any claims; he was wholly successful. Under the second prong, the issue is whether the level of success is such that the hours reasonably expended are a satisfactory basis for the fee award. In view of claimant's success on all issues, we hold that the administrative law judge did not err in awarding a fee based on the hours expended. We note that the administrative law judge reduced the hourly rate sought by one-third, from $150 to $100. We disagree with our dissenting colleague that *Hensley* mandates a further reduction in the attorney's fee simply because claimant's monetary recovery is small. We do not believe that a further reduction in the fee in this case is compelled by *Hensley* and its progeny.

The decision in *Hensley* does not define the "success" of an action in monetary terms,[4] but rather, in terms of how successful the plaintiff was in achieving the claims asserted. As we previously recognized in *Bullock* and *Rogers v. Ingalls Shipbuilding, Inc.* ___ BRBS __, BRB No. 89-3716 (August 19, 1993)(Brown, J., dissenting), the merits in *Hensley* did not concern monetary damages at all, but the constitutionality of treatment and conditions at a state hospital.[5] In cases

[4]Although our dissenting colleague makes much ado about the fact that the administrative law judge did not specifically calculate the amount of compensation claimant was entitled to receive in making the fee award, an administrative law judge would obviously be aware that an award of compensation based on a 2.8 percent monaural hearing loss and an average weekly wage of $302.66 would result in a small recovery. Our calculations indicate that compensation awarded for claimant's occupational hearing loss amounted to approximately $295. Claimant also established entitlement to a Section 14(e) assessment of approximately $29.50 and reasonable and necessary medical expenses.

[5]A subsequent Supreme Court case relying on a *Hensley* analysis did involve a claim for monetary damages, but the Court in that case held that the plaintiff was not entitled to an attorney's fee because the degree of success was nil. *Farrar v. Hobbs*, ___ U.S. ___, 113 S.Ct. 566, 574 (1992).

arising under the Longshore Act, moreover, claimant's success must be measured against the claims asserted and the amount of benefits voluntarily paid by employer. *Bullock*, slip op at 7.

In the present case, as employer paid no benefits voluntarily, and claimant prevailed on every issue presented to the administrative law judge, she was totally successful in prosecuting her claim. *Cf. Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993) (fee award vacated and case remanded where claimant unsuccessful in obtaining disability benefits and successful only on medicals). The statutory scheme, particularly the schedule at Section 8(c)(1)-(20), clearly contemplate that some awards will be "small," as it provides for compensation for the proportional loss or loss of use of a member based on a medical evaluation. Moreover, in providing for attorney's fees, the statutory scheme also recognizes that injured employees will generally require effective representation by counsel to aid them in obtaining the compensation they are entitled to receive under Act, be it large or small. A certain amount of work must be performed by counsel regardless of the amount of potential recovery. As counsel's ethical obligation to fully represent his client's interests is unaltered by the amount of compensation being claimed, it is unconscionable to suggest that attorneys who represent claimants with claims that are known to be small from the outset should be penalized for successfully prosecuting a controverted claim. *See Bullock,* slip op. at 9. In such a case, the administrative law judge's obligation is to exercise his discretion to award a reasonable fee for the necessary work performed. The administrative law judge here did so.

While our colleague would, in effect, order the administrative law judge to further reduce the fee award based on the small recovery under the guise of billing judgment, there is nothing in the plurality opinion in *Hensley* which requires such a reduction in this case. In *Hensley*, the Court emphasized the discretion of the district court in determining the amount of a fee award, remanding the case on the basis that the district court had not adequately considered the relevant criteria in entering the fee award. The *Hensley* Court did not, however, order a reduction in the fee. In contrast, the administrative law judge in the present case properly evaluated the fee petition consistent with the factors enumerated in 20 C.F.R. §702.132 and determined that while the $150 hourly rate sought was excessive, the time spent in pursuit of the claim was reasonable. In finding that the total amount of time claimed was reasonable, the administrative law judge, in effect, found no error in counsel's billing judgment. It is not the function of the Board to review the fee petition *de novo*, or to order the administrative law judge to take action which is within his discretionary authority. Rather, our role is to review the administrative law judge's fee award for work performed before him to ascertain whether he abused his discretion. This statutorily mandated respect for the administrative law judge's discretion is fully consistent with *Hensley*.

In the present case, the administrative law judge considered employer's objections to the fee, reduced the $150 hourly rate sought to $100 and found the total time claimed appropriate for the necessary work done.[6] The dissent does not point to any hours that should be reduced or disallowed,

[6]Although the dissent criticizes the importance which the majority places on the "necessary work done," we note that this determination is integrally related to the second prong of the *Hensley* test which requires consideration of the overall relief obtained in relation to the "hours reasonably

and does not otherwise identify any abuse of discretion made by the administrative law judge. For the aforementioned reasons, we decline to hold that the amount of the fee awarded to claimant's counsel should be reduced based solely on the amount of benefits awarded.[7]

Employer also contended below that the $150 hourly rate sought by counsel was in excess of reasonable and customary charges in counsel's geographical area and urged that an hourly rate of $65 to $70 would be more appropriate. The administrative law judge specifically determined that the requested hourly rate of $150 was excessive, and that a $100 hourly rate was reasonable and appropriate in the geographic locality involved. As employer provides no support for its allegation that this reduced rate is excessive, we hold that employer has not met its burden of showing that the hourly rate awarded is unreasonable. *See Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); Maddon v. Western Asbestos Co., 23 BRBS 55 (1989).

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expended." *Hensley*, 461 U.S. at 434. It is also integrally related to the much touted notion of "billing judgment."

[7]Employer cites *Cuevas v. Ingalls Shipbuilding, Inc.*, BRB No. 90-1451 (Sept. 27, 1991)(unpublished) in support of its assertion that the fee awarded is excessive. In *Cuevas,* the Board reduced an attorney's fee award to $1,000, holding that the administrative law judge abused his discretion in awarding $2,150 for 23.5 hours of legal time, where it was obvious prior to the time the claim was filed that the most that claimant could obtain was a *de minimis* award of $90 for his occupational hearing loss. The Board has held that unpublished cases should not be cited or relied on by the parties as they lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990). The Board's decision in *Cuevas*, moreover, was based on the facts of that case in determining that the administrative law judge abused his discretion in awarding a fee and has no bearing on the fee award herein.

Employer also contends that the .50 hours charged on February 16, 1989, for writing a letter to U.S.A. Speech and Hearing Center regarding a hearing examination is excessive. We note, however, this itemized entry included time spent in reviewing the file in addition to the aforementioned letter. The administrative law judge considered employer's objections and found all the services claimed to be reasonable. We decline to disturb this rational determination. *Maddon*, 23 BRBS at 55. Finally, for the reasons set forth in *Snowden*, 25 BRBS at 245, we conclude that the administrative law judge acted within his discretion in viewing counsel's quarter-hour minimum billing method as permissible.[8] *See also Neeley v. Newport News Shipbuilding and Dry Dock Co.*, 19 BRBS 138 (1986). We thus reject employer's contentions on appeal and affirm the administrative law judge's attorney's fee award.

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

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

I respectfully dissent for the reasons stated generally in my opinions in *Bullock v. Ingalls Shipbuilding, Inc.*, __ BRBS __, BRB Nos. 90-194/A (July 16, 1993)(Brown and McGranery, JJ., concurring and dissenting), and *Rogers v. Ingalls Shipbuilding, Inc.* __ BRBS __, BRB No. 89-3716 (August 19, 1993)(Brown, J., dissenting).

In its opinion, the majority points out that, "After reducing the hourly rate sought, the administrative law judge entered an award which he deemed appropriate for the necessary work

[8]We reject employer's contention that the fee order of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, No. 89-4459 (5th Cir. July 25, 1990)(unpublished), mandates a different result in this case. The determination of the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

done." The factor suggested as of importance was "*the necessary work done."* In its opinion, the majority states that since claimant was successful in obtaining compensation, medical benefits and a Section 14(e) assessment, all of which had been controverted, the fee awarded is not inconsistent with *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *George Hyman Construction Co. v. Brooks*, 936 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992). There is nothing in the administrative law judge's decision that points out what the amount of compensation awarded actually was. Based on the average weekly wage of $302.66 times two-thirds (the factor to determine the compensation rate) times 2.8 (the percent monaural loss), times 52 (the total number of weeks for a 100 percent monaural loss), the award amounted to $295.25.[9] For this counsel submitted a fee petition for $3,075, plus $66.80 in expenses. This was reduced by the administrative law judge to $2,050, plus the expenses. As for the penalty, it would be 10 percent of the compensation award, or $29.52.

As to the medicals, there is nothing on the record to indicate that there was any treatment or that any would be needed. The majority, in footnote 3, interprets Dr. Lamppin's recommendation that claimant undergo an annual hearing evaluation as medical treatment. Section 7 of the Longshore Act refers to "treatment . . . as the nature of the injury . . . may require." 33 U.S.C. §907. What is odd, however, is that Dr. Lamppin did not find any occupational hearing loss. Decision and Order at 2. Despite this, he simply checked a box on his form referring to an annual evaluation. EX-7. He also checked a box recommending wearing HPD's (presumably hearing protection devices) in all noise. Both recommendations are meaningless, and conclusory, since claimant had no occupational loss, according to Dr. Lamppin, and had been exposed to noise allegedly from 1974 to 1979, but no longer worked for employer and apparently is no longer in an environment where she is exposed to noise. In this regard, the regulations under the Federal Occupational Safety and Health Act, 29 C.F.R. §1910.95(c)(1), (d), and (g)(2), require monitoring by employers only of employees exposed to noise equal to or over 85 decibels for an 8 hour day. With this federal standard as a guide, it is questionable whether an annual evaluation is medical treatment or treatment that is required by Section 7 of the Act.

Despite the assertion of the majority that its opinion is not inconsistent with *Hensley*, there is no concern about limited success being the most critical factor in determining a fee, as mandated in *Hensley*, no concern about "billing judgment" as pointed out in *Hensley* and *Riverside v. Rivera*, 477 U.S. 561 (1986), and no concern about "windfall for attorneys," as mentioned in *Riverside* and *Farrar v. Hobby*, __ U.S. __, 113 S. Ct. 566 (1992).

In footnote 9 the majority states that the determination of the amount of an attorney's fee is within the discretion of the body awarding the fee, citing 20 C.F.R. §702.132. This may be so, but, here again, the Supreme Court in *Hensley* places limits on the extent of discretion. In *Hensley* it is

[9]To put this case in perspective, if claimant had filed a claim under the Mississippi Workers' Compensation Law, based on joint jurisdiction pursuant to *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 12 BRBS 890, *reh'g denied*, 448 U.S. 916 (1980), resulting from employer's places of operation at Gulfport and Pascagoula, Mississippi, an award of $295.25 would have entitled claimant's attorney to a maximum of 20 percent of the award, or $59.05, to be paid by claimant, leaving claimant $236.20. *See* Mississippi Code, 1972 Annotated, §71-3-63, reenacted 1982, reenacted 1990.

stated:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court, necessarily has discretion in making this equitable judgment. *This discretion, however, must be exercised in light of the considerations we have identified.*

461 U.S. at 436 (emphasis added). The discretion, therefore, is limited by the principles of *Hensley*. As stated above, the majority is of the belief that the fee awarded is not inconsistent with *Hensley* and *Brooks*. They apparently recognize the hourly rate as being reasonable and that the administrative law judge applied it to "the necessary work done." This is consistent with the first step in *Hensley*. But as the court in *Brooks*, 936 F.2d at 1540, 25 BRBS at 171 (CRT), clearly pointed out, the hours of work done is limited by an examination of whether the level of success achieved makes the hours reasonably expended a satisfactory basis for making a fee award. In these circumstances, the *Brooks* court rejected the Board's test that services are compensable if at the time counsel performed the services, he reasonably regarded the work as necessary. The *Brooks* court flatly held that this test was not relevant to a *Hensley* analysis. *Id.* The Board ignores the second steps in *Hensley*.

Accordingly, I would vacate the fee award and remand the case to the administrative law judge to reconsider the fee application in accord with the principles laid down in *Hensley*.

JAMES F. BROWN
Administrative Appeals Judge