

BRB No. 98-1360

LUTHER FAGAN)
)
 Claimant-Respondent)
)
 v.)
)
 CERES GULF, INCORPORATED) DATE ISSUED:
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 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

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

William S. Vincent, Jr., New Orleans, Louisiana, for claimant.

Kathleen K. Charvet (McGlinchey Stafford), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (91-LHC-2896) 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). 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).

This is the second time this case is before the Board. Claimant was employed by Ceres Gulf as a longshoreman, winch operator, flagman, lift operator and signalman. On Friday, June 10, 1988, while loading cotton onto a vessel with the aid of winches and hooks, he was struck on the right side of his head by one of the hooks; the impact dislodged his hard hat. Although claimant continued to be paid for

that day, he felt dizzy and sat out the rest of the shift. On the following day, claimant worked for four hours, and then, feeling dizzy, again sat out the day. Claimant "blacked out" while at home on Monday, June 13. Later that evening, he was taken to the hospital, complaining of dizziness, blurred vision, headache and nausea, and was diagnosed with a cerebral hemorrhage.

On October 9, 1990, employer was given notice that a claim had been filed by claimant. Cl. Ex. 1 at 42. Employer controverted liability, and also applied for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In his Decision and Order, the administrative law judge first found that claimant's claim was timely filed under Section 13(a) of the Act, 33 U.S.C. §913(a). Having found a causal relationship between the work accident and claimant's cerebrovascular impairment, the administrative law judge awarded claimant temporary total disability compensation, permanent partial disability compensation and related medical benefits, along with interest. The administrative law judge also denied employer's application for relief under Section 8(f). The administrative law judge subsequently issued a Supplemental Decision and Order Awarding Attorney's Fee, awarding claimant's counsel a fee of \$14,695.50, plus \$2,370.14 in expenses. On appeal, the Board affirmed the administrative law judge's finding that claimant's claim was timely filed under Section 13(a) and his finding of a causal relationship between claimant's impairment and his employment. In addition, the Board affirmed the administrative law judge's finding that employer failed to establish entitlement to relief under Section 8(f). Lastly, the Board affirmed the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee. *Fagan v. Ceres Gulf, Inc.*, BRB No. 93-0435 (June 27, 1996)(unpublished).

Thereafter, employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. In a decision issued on April 10, 1997, the Fifth Circuit reversed the Board's decision, holding that since claimant presented evidence that he filled out a claim form LS-203 on March 21, 1989, claimant was aware of the causal connection between his work accident and his condition and that it impaired his capacity to work at that time, and therefore, his claim for disability benefits, filed in October 1990, was untimely pursuant to Section 13(a). *Ceres Gulf, Inc. v. Director, OWCP [Fagan]*, 111 F.3d 17, 31 BRBS 21 (CRT)(5th Cir. 1997). On June 26, 1997, the court denied claimant's motion for rehearing, noting that employer conceded that the court's decision did not bar any claim for medical benefits. Thereafter, claimant filed a motion for clarification with the court requesting, *inter alia*, that the court reinstate claimant's counsel's attorney's fee awarded by the administrative law judge. This motion was denied by the Fifth Circuit on July 14, 1997.

In a letter to the administrative law judge dated December 11, 1997, claimant urged that his counsel should be entitled to an attorney's fee, as counsel's efforts succeeded in obtaining medical benefits for claimant. Employer filed objections to this request on January 8, 1998. In his second Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge, after finding that counsel's fee must be reduced due to the limited success of claimant's claim, disallowed 50 percent of counsel's requested hours and 50 percent of the requested expenses. Thus, the administrative law judge awarded claimant's counsel an attorney's fee of \$7,296.88, and \$1,185.07 in costs.

On appeal, employer challenges the administrative law judge award of an attorney's fee to claimant's counsel. Specifically, employer contends that as the Fifth Circuit reversed the decision of the Board without a remand order and denied claimant's request that the administrative law judge's initial award of an attorney's fee be reinstated, the administrative law judge, pursuant to Rule 41 of the Federal Rules of Appellate Procedure, FED. R. APP. P. 41, lacked jurisdiction to award a fee to claimant's counsel. Employer further contends that the administrative law judge was without statutory authority to award an attorney's fee, as counsel's prosecution of claimant's claim was ultimately unsuccessful. Claimant responds, urging affirmance of the administrative law judge's award of an attorney's fee. For the reasons that follow, we affirm the administrative law judge's award of an attorney's fee.

In challenging the fee awarded by the administrative law judge, employer first argues that pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the Fifth Circuit's decision in the instant matter became final and therefore the administrative law judge lacked jurisdiction to award claimant's counsel an attorney's fee. We disagree. Rule 41 of the Federal Rules of Appellate Procedure, which provides for the issuance of a mandate by a United States Court of Appeals, establishes what is commonly referred to as the Mandate Rule. This rule states that a "decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority." *City of Cleveland v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977). The latter "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in light of the opinion of [the] court deciding the case" *Yablonski v. UMW*, 454 F.2d 1036, 1038 (1971), *cert. denied*, 406 U.S. 906 (1972), *quoting Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940). These principles apply to reviews of administrative agencies as well as within the hierarchy of judicial branches. *City of Cleveland*, 561 F.2d at 346.

In the instant case, however, we hold that the administrative law judge did not

violate the Mandate Rule. On appeal from the Board's decision, the issues of causation, medical benefits and an attorney's fee were not addressed by the Fifth Circuit in the case in chief.¹ In denying claimant's petition for rehearing, the Fifth Circuit specifically noted that employer had conceded that the court's decision did not bar any claim for medical benefits. Lastly, in denying claimant's petition for clarification, the court declined to reinstate the administrative law judge's former attorney's fee award. In our view, despite the absence of a formal remand, the Fifth Circuit's decision did not affect the administrative law judge's jurisdiction. While an administrative law judge may enter an attorney's fee award at the time of his initial decision, the award is not final and enforceable until all appeals are exhausted. See, e.g., *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982). Once an award of benefits is final, claimant may seek a fee for the successful prosecution of a case, including returning to the administrative law judge for a supplemental award enhancing an initial fee request due to the delay in payment resulting from employer's appeals. See *Kerns v. Consolidation Coal Co.*, ___ F.3d ___, No. 95-2502, 1999 WL 311457 (4th Cir. May 18, 1999); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998). Similarly, where claimant's award is reduced due to employer's appeals, the administrative law judge has jurisdiction to award a new fee consistent with claimant's ultimate degree of success once the award is final.

In his Supplemental Decision and Order Awarding Attorney's Fees subsequent to the Fifth Circuit's decision, the administrative law judge did not reinstate his initial award of an attorney's fee. Rather, the administrative law judge considered the fact that claimant had not succeeded in obtaining disability compensation, acknowledged that counsel had succeeded in obtaining medical benefits, and thereafter made a reduction to the initial fee award based on claimant's limited success in pursuing his claim. As will be discussed more fully below, this action was within the administrative law judge's statutory authority pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). The administrative law judge's reduction of his initial fee award did not contravene the decision of the Fifth Circuit in the instant case, and thus, was not contrary to the letter or spirit of the Fifth Circuit's decision. Accordingly, we hold that the administrative law judge did not violate the Mandate Rule in awarding claimant's counsel an attorney's fee.

¹While the issue of causation was raised by employer in its appeal to the Fifth Circuit, the court did not address this issue in its decision.

Next, employer contends that the administrative law judge was without statutory authority to award claimant's counsel a fee, as claimant's counsel's prosecution of the claim was ultimately unsuccessful. Employer asserts that this contention is supported by the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 421 (1983). We reject employer's assertion. 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, claimant is entitled to an attorney's fee payable by the employer. 33 U.S.C. §928(a). It is well-established that where an employer controverts the issue of causation, and claimant prevails on this issue thereby establishing entitlement to an award of medical benefits, claimant's counsel may be entitled to an attorney's fee under Section 28(a). See *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993)(Brown, J., dissenting), *aff'd on other grounds mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); see also *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (CRT), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT)(5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991)(claimant who succeeded in recovering award of prejudgment interest could be awarded attorney's fee as employer had denied interest on claim). In the instant case, the issue of causation was contested by employer before the administrative law judge and the Board and successfully litigated by claimant's counsel. Claimant's entitlement to medical benefits was not overturned by the Fifth Circuit. Inasmuch as employer controverted the issues of causation and medical benefits, and as claimant ultimately prevailed on these issues, we hold that claimant is entitled to a fee for necessary services performed in obtaining this successful result. See, e.g., *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989); *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990); *Powers v. General Dynamics Corp.*, 20 BRBS 119 (1987).

With regard to the amount of the attorney's fee awarded by the administrative law judge, the Supreme Court held in *Hensley* that an attorney's fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. In his second Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge specifically considered employer's *Hensley* argument and, in light of claimant's limited success, reduced claimant's counsel's attorney's fee request by 50 percent. As the administrative law judge's reduction was reasonable, and the Board has previously affirmed such across the board reductions where the administrative law judge determined that claimant achieved limited success, the administrative law judge's decision to reduce claimant's counsel's fee request by 50 percent is affirmed. See *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186, 192 (1998).

Accordingly, the Supplemental Decision and Order Awarding Attorney's Fees

of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge