

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 21-0328

ROBIN E. BETHANY)

Claimant-Petitioner)

v.)

OMNI AIR INTERNATIONAL,)
INCORPORATED)

and)

STAR INDEMNITY AND LIABILITY)
COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED: 02/28/2022

DECISION and ORDER

Appeal of the Order Approving Attorney Fee of David A. Duhon, District Director, and Attorney Fee Deny Reconsideration of Patricia Burke, Claims Examiner, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for Claimant.

Ian A. Massar (Flicker, Garelick & Associates, LLP), New York, New York, for Employer/Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals District Director David A. Duhon's Order Approving Attorney Fee and Claims Examiner Patricia Burke's (the district director's) Attorney Fee Deny Reconsideration (OWCP No. 08-308885) 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 Defense Base Act, 42 U.S.C. §1651 *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, based on an abuse of discretion or not in accordance with law. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a work-related injury on June 5, 2016, while working for Employer, who voluntarily began paying Claimant benefits on August 2, 2016.¹ In November 2016, Claimant suffered a seizure while working out, which she alleged was caused by medications prescribed for her work-related injury. On March 2, 2017, Employer filed an LS-208 indicating it made a final payment to Claimant on February 21, 2017, and terminated benefits effective January 10, 2017. On March 13, 2017, Claimant, then represented by the Barnes Law Firm in Houston, Texas, filed a claim seeking additional benefits. The district director notified Employer of the claim on March 22, 2017, and Employer filed its notice of controversion on May 1, 2017.

Following an informal conference on June 1, 2017, the district director recommended Employer reinstate Claimant's benefits and pay for any medical costs associated with her work-related injury. Employer declined to follow the recommendation, and the case was transferred to the Office of Administrative Law Judges (OALJ) for a formal hearing. Claimant dismissed the Barnes Law Firm in September 2018 and hired Jeffrey Winter (counsel) to represent her in April 2019, while the case was pending before

¹ Employer paid Claimant temporary partial disability benefits from August 2, 2016, through February 21, 2017.

the OALJ. On November 25, 2019, the OALJ remanded the case to the Office of Workers' Compensation Programs (OWCP) for settlement discussions. Following remand, the private parties executed a Section 8(i) settlement agreement, 33 U.S.C. §908(i), which the district director approved on January 22, 2020. The settlement included a provision whereby the parties agreed attorney's fees would be negotiated and awarded separately from the settlement proceeds, and payable by Employer, under 33 U.S.C. §928(a).

On December 15, 2020, counsel filed an "Attorney Fee Approval Request" and accompanying itemized fee petition with the district director seeking an attorney's fee under Section 28(a) totaling \$76,910 for the entirety of the work he performed in this case.² Counsel simultaneously requested an informal conference to address the only outstanding issue – attorney's fees; a request the OWCP deemed "not necessary." Employer filed objections to the fee petition. In his Order Approving Attorney Fee dated December 31, 2020, the district director awarded counsel an attorney's fee of \$1,350, representing 3 hours of counsel's work at an hourly rate of \$450, using Texas as the relevant community where counsel's services were performed. The district director disallowed the remaining time entries claimed because they related to services counsel performed during the time period when the case was before the Office of Administrative Law Judges (OALJ) and were not within the district director's jurisdiction. In a letter dated January 13, 2021, counsel sought reconsideration of the district director's fee order. At that time, he also stated he would be filing an amended fee and costs petition for work performed solely within the time frame noted in the district director's order (while the case was before the OWCP). On January 26, 2021, counsel submitted an amended fee petition and motion for reconsideration seeking an attorney's fee totaling \$4,005 for work performed before the district director.³ The district director denied counsel's motion for reconsideration.

On appeal, counsel challenges the district director's fee award under Section 28(b) of the Act, 33 U.S.C. §928(b), as well as his reductions in counsel's requested hourly rate and number of hours worked. Employer responds, urging affirmance of the district director's attorney's fee award. The Director, OWCP (Director), responds, stating the district director committed harmless error in awarding a fee under Section 28(b) rather than

² Counsel's fee request represents 94.2 hours of work by counsel at an hourly rate of \$515 (\$48,513), 36.5 hours of his associate Kim Ellis's work at an hourly rate of \$385 (\$14,052.50), 12.7 hours of paralegal work at an hourly rate of \$130 (\$1,651), plus costs of \$12,693. These figures add up to \$76,909.50, rather than the \$76,910 articulated in the fee request and subsequent order.

³ Counsel's amended fee petition sought 7.6 hours of his work at an hourly rate of \$515 (\$3,914) and .7 hours of paralegal work at an hourly rate of \$130 (\$91).

Section 28(a). Nevertheless, he urges the Benefits Review Board to remand the case to the district director for reconsideration of the question of the relevant community and the commensurate calculation of counsel's hourly rate based on that community.

Counsel first contends the district director erroneously awarded a fee pursuant to Section 28(b), instead of Section 28(a) as stipulated in the parties' Section 8(i) settlement. He states the error is not harmless because application of Section 28(b) "appears to be the only reason why the 7.6 hours pled were reduced to 3 hours without further explanation." CI's Br. at 8. Employer and the Director state the district director's error in awarding a fee under Section 28(b) rather than Section 28(a) is harmless because it had no impact on the ultimate fee awarded.

The parties do not dispute the Section 8(i) settlement agreement included the following provision pertaining to an attorney's fee:

The parties stipulate and agree that attorney fees will be negotiated and/or awarded separately from the amounts paid to Claimant under this settlement agreement. Such fees and costs ***will be assessed against Employer/Carrier pursuant to § 28(a) of the LHWCA*** and will cover any and all legal fees and disbursements incurred by and on behalf of Claimant for services rendered before the Office of Workers' Compensation, the Office of Administrative Law Judges, and any other federal, state, or commonwealth court or administrative agency relative to the pending claim for benefits under the DBA.

See Dir. Br. at 2 (emphasis added). The district director stated, however, "[a]fter review of the administrative file, I find that Section 28(b) of the Act applies to this case." Order Approving Attorney Fee at 2. Fee liability under Section 28(a) is predicated on whether the employer paid the disability and/or medical benefits claimed within 30 days of its receipt of the claim. *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017). Claimant filed a claim for benefits on March 13, 2017, Employer declined to pay any benefits within 30 days relating to that claim, and Claimant successfully obtained additional benefits. As such, Employer's liability for an attorney's fee in this case arises, as the parties' stipulated, under Section 28(a). *Id.* The district director, therefore, erred in finding Section 28(b), rather than Section 28(a), applicable. Nevertheless, under the circumstances of this case, there is no difference in the amount of an attorney's fee payable to counsel under either provision.⁴ We therefore hold the district director's application of Section 28(b) rather than 28(a) is harmless error. *See generally Conoco*, 194 F.3d 684, 33 BRBS 187(CRT).

⁴ The dispute here is not over Employer's liability for a fee for work counsel performed before the district director, but rather over the amount to be paid. The amount

Next, counsel challenges the hours the district director approved. The district director correctly stated, based on counsel's original fee petition, "[o]nly time between November 25, 2019 through January 30, 2020 will be addressed herein as any time prior to November 25, 2019 does not fall within the OWCP District Director's jurisdiction."⁵ Order Approving Attorney Fee at 2; *see generally* 33 U.S.C. §928(c); 20 C.F.R. §702.132(a).⁶ Addressing the fee petition within the confines of that time frame, the district director considered counsel's request for 4 hours of his time at an hourly rate of \$515. The district director reduced the 1.1 hours counsel requested on January 25, 2020, for preparing a fee petition to .1 hours, finding the entry "excessive" because only a small

of the fee under these facts is not dependent on whether it is awarded under Section 28(a) or (b). 33 U.S.C. §928(a), (b). Moreover, as the Director states, "application" of Section 28(b) is not the reason the district director denied part of the fee requested. He denied some time entries because the services claimed were performed when the case was not before the district director (counsel did not begin to represent Claimant until 2019, long after Employer's rejection of the informal conference recommendation in 2017 when the case was previously before the OWCP, and the services claimed were performed when the case was before the OALJ). For this reason, we reject counsel's assertion that the district director's use of Section 28(b) constitutes an improper reason for his denial of certain time entries.

⁵ It is a well-established principle that fees for work at each level of the proceedings must be approved by the body before which the work was performed. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977); *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (en banc); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.* 28 BRBS 27 (1994). The OALJ did not remand this case to the OWCP until November 25, 2019, which is when the district director regained jurisdiction.

⁶ Section 702.132(a) in pertinent part states:

Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed (*See* 33 U.S.C. §928(c)). The application shall be filed and serviced upon the other parties within the time limits specified by such district director, administrative law judge, Board, or court....

percentage of the total entries “are applicable to” the OWCP’s jurisdiction.⁷ Order Approving Attorney Fee at 3. He otherwise rejected Employer’s remaining objections and awarded counsel a fee for 3 hours of work. *Id.*

Counsel submitted his amended fee petition and motion for reconsideration to the district director on January 26, 2021, claiming to have removed time for work performed when the district director did not have jurisdiction. In it, he petitioned for 7.6 hours of his services at an hourly rate of \$515 (\$3,914) and .7 hours of paralegal services at an hourly rate of \$130 (\$91) for work performed before the district director. However, the amended fee petition still contained 25 entries, constituting 4.4 hours of services, for work performed between August 27 and November 22, 2019, when the case remained with the OALJ. Excluding this time, counsel’s amended petition actually reflects he sought a fee totaling \$1,739 for work he performed during the OWCP time frame: 3.2 hours of his time (19 entries between November 26, 2019, and January 30, 2020) and the aforementioned .7 hours⁸ of paralegal work at an hourly rate of \$130.

Based on his amended petition, counsel contends the district director failed to explain why he rejected “4.6 of the 7.6 hours of time pled.” Contrary to counsel’s argument, the district director clearly articulated in his fee order that he could award a fee only for “time between November 25, 2019, through January 30, 2020” as “any time prior to November 25, 2019 does not fall within” his jurisdiction. Order Approving Attorney Fee at 2. This constitutes an adequate explanation for why the district director denied the 4.4 hours listed in counsel’s amended fee petition and in his initial fee petition.⁹ *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990). Additionally, the district director adequately explained and acted within his discretion in reducing by 1 hour the time counsel requested for preparing his initial fee petition. *See generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996) (hours not “reasonably expended” on the fee petition may be excluded from the time claimed for preparation of the application).

⁷ The district director found only 15 of 182 entries in counsel’s original fee petition were applicable to work performed before the OWCP. Order Approving Attorney Fee at 3.

⁸ The .7 hours of paralegal work were for amending and updating counsel’s fee petition. The amended petition included .2 hours for work counsel performed reviewing and finalizing his fee petition.

⁹ Counsel’s initial fee petition, in fact, contains 19 entries within the appropriate time frame totaling only 4.1 hours for his work performed before the OWCP.

Counsel does not raise any specific challenge to this reduction.¹⁰ *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2004).

Counsel's contentions that the district director erroneously failed to fully consider his amended fee petition and motion for reconsideration, and that the denial of his motion for reconsideration is arbitrary and capricious, are likewise flawed. The February 23, 2021 denial of reconsideration, in conjunction with the March 10, 2021 addendum, adequately documents counsel's request, reflects review of the district director's original order, and sufficiently explains the underlying rationale. In this regard, it states, "[w]e find that the fees are appropriate and [no] creditable evidence to reconsider the fees."¹¹ We reject as meritless counsel's contentions regarding the district director's consideration of his fee petition, including the rejection of most of the time entries listed therein and the motion for reconsideration. We affirm the district director's approval of 3 hours of work that counsel performed.

Counsel further contends the hourly rate pled in his fee petition, \$515 per hour, is supported by substantial evidence. However, he argues the 2021 declaration of Ronald L. Burge and the evidence Employer submitted with its objections constitute substantial evidence to support an hourly rate in the Texas market of at least \$530 and perhaps as much as \$680,¹² rather than the district director's awarded hourly rate of \$450, for the "relevant community" of the State of Texas where counsel's services were performed. In the conclusion of his brief on appeal, counsel asserts he is entitled to \$4,028 for 7.6 hours of work at a rate of \$530 per hour.

We reject counsel's contention that he is entitled to an hourly rate of \$530 or more for work performed at the district director level because it is only now being raised for the first time on appeal. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000). The record establishes counsel explicitly stated

¹⁰ Counsel also does not challenge the district director's denial of all the time requested for work performed by Ms. Ellis and counsel's paralegal because "their times charged were for work performed at the OALJ level which is not within our jurisdiction." *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2004).

¹¹ The initial reconsideration order contained a typographical error, omitting the word "no" when describing "creditable evidence." This was rectified in the supplemental addendum correspondence dated March 10, 2021.

¹² Counsel states the 2018 Survey accompanying Employer's objections documents median hourly rates between \$566 and \$680 for the Houston, Texas, community.

in his sworn declaration to the district director that he is “currently billing at \$515 an hour,” and his fee petitions consistently reflect that figure as his requested hourly rate for work performed before the district director (and for that matter before the OALJ) in this case.

Counsel’s general contention that the administrative file contains support for his requested hourly rate of \$515, however, logically leads us to question how the district director arrived at his \$450 hourly rate determination for counsel. Although he has discretion in awarding a fee, *E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561 (4th Cir. 2013); *Muscella*, 12 BRBS 272, and he stated reasons for his conclusion, absent from his order is any reference to, or discussion of, the evidentiary support behind his arriving at \$450 as the hourly rate. Courts and the Board have long required full explanation when reducing a fee request. *Carter v. Caleb Brett, LLC*, 757 F.3d 866, 48 BRBS 21(CRT) (9th Cir. 2014); *Holiday v. Newport News Shipbuilding & Dry Dock Co.*, 44 BRBS 67 (2010); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Keith v. Gen. Dynamics Corp.*, 13 BRBS 404 (1981). In light of this, we vacate the awarded hourly rate. On remand, the district director must reconsider counsel’s hourly rate in terms of the parties’ contentions and provide a basis and evidentiary support to justify his determination, whether he arrives at the same or a different conclusion.¹³

Accordingly, we vacate the district director’s finding that counsel is entitled to an hourly rate of \$450 and remand the case for further consideration consistent with this

¹³ To the extent counsel identified any error in awarding \$450 per hour or raised the relevant community as an issue in conjunction with his assertion that he is entitled to a higher hourly rate, his arguments are inadequately briefed. *U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 807 F.3d 125, 131 (5th Cir. 2015); *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015); *Carnegie v. C & P Tel. Co.*, 19 BRBS 57 (1986). Nevertheless, because complete explanations for fee reductions are necessary, the district director may also reconsider the “relevant community” issue on remand, as the Director raised.

opinion. In all other regards, we affirm the district director's Order Approving Attorney Fee and corresponding denial of reconsideration.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge