BRB No. 99-233

BRIAN CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED: Nov. 12, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order -- Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Betty J. O'Shea, New York, New York, for claimant.

Matthew R. Lavery, Dallas, Texas, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order -- Award of Attorney's Fees (OWCP No. 02-111107) of District Director Richard V. Robilotti 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time this attorney's fee award has been before the Board, and the facts of this case are not in dispute. Claimant was injured during the course of his employment in 1993. In January 1997, the parties agreed at an informal conference that claimant is permanently totally disabled. After the informal conference, claimant's counsel filed a petition for an attorney's fee for work performed before the district director between November 16, 1996, and January 23, 1997. Counsel sought $28,066, representing 101.55 hours at a rate of $275 per hour, plus $139.75 in expenses. The district director, in a letter, awarded a fee of $20,845. Employer appealed the award. The Board vacated the fee award and granted the parties' motions to remand for re-submission of a proper fee petition in accordance with the regulation at 20 C.F.R. §702.132 and for full reconsideration by the district director of employer's objections to the petition. *Clark v. Army & Air Force Exchange Service*, BRB No. 97-856 (Feb. 25, 1998).

On remand, claimant's counsel submitted a revised fee petition, seeking $37,180, representing 135.2 hours at $275 per hour, plus $139.75 in expenses for services rendered between November 16, 1996, and April 14, 1998. The district director awarded counsel the requested hourly rate of $275, over employer's objections. He disallowed hours he deemed excessive and awarded counsel a total fee of $32,177.25, representing 116.5 hours at $275 per hour, plus $139.75 in expenses.

Employer challenges the fee awarded on many specific grounds, as well as on the general ground that the fee awarded is not commensurate with the necessary work performed in only a seven-week period. Counsel responds, urging the Board to affirm the fee in its entirety.

Initially, we agree with employer that the district director erred in awarding a fee for services performed before the Board during the period between March 14, 1997, and March 4, 1998. There appears to be over 11 hours requested which pertain to services performed during the initial appeal before the Board. As the district director does not have the authority to award a fee for services rendered before the Board, this portion of the fee award is reversed. 33 U.S.C. §928(c); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979); 20 C.F.R. §702.132.

Next, employer disputes both the hourly rate awarded and the award of time for services performed prior to the district director's receipt of the retainer form. Contrary to employer's contentions, the district director addressed and fully explained his reasons for awarding a fee based on an hourly rate of $275, and for awarding a fee for time prior to his receipt of the standard retainer form. Therefore, we affirm his decision that an hourly rate of $275 is appropriate for the New York area. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). We also affirm his conclusion that it is reasonable for an attorney to begin work when she is hired and not to

wait for the district director's receipt of the retainer form prior to serving her client's interests, and that such time is compensable. *See generally Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978); *Muscella*, 12 BRBS at 272.

Employer also challenges the district director's decision to award a fee for preparation of both the initial and the revised fee petitions. In her revised fee petition, it appears counsel requested over 17 hours for work performed related to the initial fee petition, including, *inter alia*, time for preparing the actual fee petition, corresponding with the district director, reviewing employer's response, researching cases, studying an affidavit, and reading the district director's order. Counsel then requested an additional five hours for preparation of the revised petition. The district director merely stated that the requests were excessive and reduced them by a combined total of four hours. Counsel is entitled to a reasonable fee for one properly prepared fee petition. *See generally Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998). As the Board vacated the original fee award and remanded the case for submission of a properly prepared fee petition which conforms to the requirements of Section 702.132, 20 C.F.R. §702.132, employer should not bear the burden of the cost of preparing both fee petitions. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999) (counsel not entitled to fee if fee petition does not conform to regulations). Therefore, we vacate the fee award, and we remand the case for further consideration.

Finally, employer contends the district director erred in failing to address all of its objections to the fee petition. While this is correct, it alone does not warrant remand, as the district director need not address each individual objection in his order, if he otherwise indicates they were all considered. However, as we have vacated the fee and remanded the case for reconsideration, we agree with employer that, on remand, the district director must also specifically consider employer's remaining contentions.[1] The obvious error in this case of awarding a fee for time spent for work before the Board leads us to the conclusion that counsel's revised fee petition and employer's objections thereto should be thoroughly reconsidered in their entireties. Thus, we reiterate what the Board previously stated:

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[1]For example, the district director must specifically consider whether counsel is entitled to a fee for work performed on the Section 8(f), 33 U.S.C. §908(f), issue, whether time has been awarded for clerical work, and whether it was inappropriate to award time for certain phone charges, charges related to another injury, charges related to the British tort case, *etc*.

> After consideration of the amended fee petition and any objections, the district director is instructed to issue an order regarding the attorney's fee request in which he fully considers the pleadings filed by both parties in conjunction with the criteria of Section 702.132, specifies any reductions, providing an adequate explanation thereof, and award an attorney's fee which is reasonably commensurate with the necessary work done and with the amount of benefits awarded.

Clark, slip op. at 4.

Accordingly, the district director's fee award is vacated, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge