BRB Nos. 91-0116 and
91-0116A

KATHRYN STATON (Widow of CLYDE S. STATON)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	DATE ISSUED:
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	DECISION and ORDER

Appeals of the Order-Award of Attorney's Fee of B.E. Voultsides, District Director, United States Department of Labor.

Burt M. Morewitz, Newport News, Virginia, for the claimant.

Lawrence P. Postal (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for the self-insured employer.

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

Employer appeals and claimant, the widow of the deceased employee (the decedent), cross-appeals the Order-Award of Attorney's Fee (5-37953) of District Director B.E. Voultsides entered pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). An attorney's fee determination is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, and abuse of discretion, or not in accordance with law. *See e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

These appeals involve the district director's attorney's fee award to claimant's counsel for work performed in this case. The deceased employee was employed by Newport News Shipbuilding and Dry Dock Company from 1941 until September 1970, during which time he was exposed to asbestos dust and fibers. On September 28, 1981, decedent filed a claim for benefits for asbestosis under the Act. Following decedent's death on May 3, 1983, his widow filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909.

In a Decision and Order dated December 27, 1983, the administrative law judge awarded permanent total disability benefits on behalf of decedent at a weekly rate of $151.20 from October 1, 1970 to May 3, 1983, and held employer liable for decedent's funeral expenses. He also awarded employer Section 8(f), 33 U.S.C. §908(f), relief and instructed the Special Fund to commence disability benefits 104 weeks after October 1, 1970, and to pay death benefits pursuant to Section 9 of the Act at a rate of $131.75 per week from May 3, 1983, and continuing. In an Order on Motion for Reconsideration, the administrative law judge modified the award of permanent total disability benefits to $70 per week. In a Supplemental Decision and Order-Granting Attorney Fees, the administrative law judge awarded claimant's counsel a fee of $1,435, payable by employer for services rendered before him. The Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's decision and employer cross-appealed. In *Staton v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 84-586/A (April 29, 1988) (unpublished), the Board modified the administrative law judge's decision to increase the disability and death benefits in accordance with Section 10(f) and (h), 33 U.S.C. §910(f),(h), and affirmed the award of funeral expenses. Claimant's attorney thereafter filed a fee petition for work performed before the district director subsequent to May 3, 1983, in connection with the claim for death benefits.[1] Claimant's attorney noted that the Board's decision had become final, that claimant obtained an increase in death benefits from $36.75 a week to $131.75 a week, and that the administrative law judge granted an attorney's fee based on claimant's obtaining that increase. Employer raised various objections to claimant's attorney's fee petition. By letter dated August 24, 1988, the district director summarily denied claimant's counsel's fee request without explanation.

Claimant appealed the district director's denial of the requested fee to the Board, contending that since she was ultimately successful in obtaining additional compensation she was entitled to a fee for work performed at all adjudicatory levels. In an unpublished decision, *Staton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 88-2979 (June 29, 1990), the Board held that inasmuch as employer actively participated in the case, claimant ultimately obtained compensation which exceeded that agreed to by employer, and claimant successfully defended employer's appeal of the administrative law judge's finding that it was liable for claimant's funeral expenses, employer was liable to claimant's counsel for reasonable and necessary services pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Accordingly, the Board remanded the case to the district director for reconsideration of claimant's attorney's fee petition and employer's objections consistent with 20 C.F.R. §702.132(a).

In the fee petition originally filed with the district director, claimant's counsel requested $2,518.75 for 20.15 hours at $125 per hour. Employer contested liability for the fee, but alternatively argued that no fee should be allowed for the first 30 days from the date of the claim and that various itemized entries should be reduced or disallowed. Claimant thereafter amended his fee request to deduct 7.85 hours of entries which were not related to or necessary to the contested issue, requesting a total fee of $1,537.50. for 12.3 hours of services at $125 per hour.

[1]Claimant's counsel was awarded a fee of $4,500 for work performed before the district director in connection with the disability claim in an Order dated February 4, 1982.

Thereafter, the district director found that employer was liable for claimant's attorney's fee inasmuch as the Board had previously held that Section 28(b) applied. He reduced the hourly rate requested to $100 and disallowed or reduced several itemized entries. Counsel was awarded a fee of $820, representing 8.2 hours at $100 per hour. Employer appeals and claimant cross-appeals this Order.

While recognizing that the Board's prior determination of fee liability is the law of the case, employer reiterates on appeal that it is not liable for claimant's attorney's fee. Employer avers that the Board erred in stating that it contested claimant's entitlement to funeral benefits, asserting that it had only argued that the Special Fund should be held liable. Similarly, employer asserts that it did not contest the benefit rate issue before the district director and that no fee can be awarded pursuant to Section 28(b) because it followed the district director's recommendation. We reject employer's assertions. The issue of fee liability was fully considered by the Board, and its prior decision is the law of the case. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157, 159 (1991).

Employer also challenges the amount of the district director's fee award. Employer initially contends that the district director erred in holding it liable for two hours on May 31, 1983, for preparing the brief, reiterating the argument made below that it may not be held liable for any time requested before June 9, 1983, 30 days from the filing of the claim, because it followed the district director's recommendation at the informal conference. Citing *Neeley v. Newport News Shipbuilding & Dry Dock*, 19 BRBS 138 (1986), employer further contends that the district director erred in allowing a fee for time spent traveling from Newport News to Norfolk for the informal conference on August 9, 1983. Finally, employer contends that the district director's fee award contains a mathematical error.

Claimant responds that the district director properly held employer liable for the entries contested by employer and that his calculation of the fee award is proper. Claimant cross-appeals, challenging the district director's reduction in the requested hourly rate and his refusal to allow the full 4 hours requested for the 68 mile round trip from Newport News to Norfolk and time spent attending the informal conference on August 9, 1983. Claimant, in addition, contends that the district director erred in allowing only 2 of 4.10 hours requested for legal research and brief writing on May 31, 1983, and a letter transmitting the brief on June 1, 1983. Employer responds that the district director acted within his discretion in reducing the requested hourly rate and that the two hours allowed for travel time to the informal conference and for legal research and preparation of the brief are more than generous. Both claimant and employer filed reply briefs.

Initially, we reject employer's assertion that the district director erred in holding it liable for two hours on May 31, 1983,[2] for writing a brief. Employer contends that it may not be held liable for any time claimed before June 9, 1983, 30 days from the filing of the claim. We reject this

[2]The 2 hours awarded by the district director included the May 31, 1983 and June 1, 1983 entries.

argument, as it is relevant to Section 28(a), and this case falls under Section 28(b). 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). As was noted in our prior decision in this case, claimant filed the claim for death benefits on May 3, 1983, and on May 10, 1983, employer agreed to pay death benefits based on a rate of $36.75 per week. Claimant, however, believed that she was entitled to $135.75 per week and requested an informal conference, which was held on August 3, 1983. Although employer maintains that it is not liable for fees at this time because it followed the district director's recommendation at the informal conference, this argument has previously been rejected. *See Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 ((1981); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). As claimant was successful in obtaining compensation greater than that which employer voluntarily paid and the controversy between the parties arose as of May 10, 1983, we conclude that employer's liability under Section 28(b) commenced as of that date. Accordingly, the district director's finding that employer is liable for the disputed May 31, 1983, entry is affirmed.

Claimant's argument that the district director erred in reducing the time requested for the May 31, 1983 and June 1, 1983 entries is rejected. The district director determined that the 4 hours requested on May 31, 1983 for research and drafting the brief were excessive as the contested issue was not complex. It was within his discretionary authority to allow only two hours for this work and that performed on June 2, 1983. Inasmuch as the complexity of the case is relevant under Section 702.132 of the regulations and the district director's explanation for allowing only 2 of the 4.10 hours requested is rational, we affirm his determination. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

Claimant's argument that the district director erred in reducing the $125 hourly rate requested to $100 is also rejected. Claimant avers the district director relied on the administrative law judge's $100 hourly rate without considering subsequent cases in which he awarded a $125 hourly rate. The district director, however, specifically agreed with the administrative law judge's finding that an hourly rate of $100 was appropriate for work performed in 1983. As claimant's assertions are insufficient to meet her burden of proving that the $100 hourly rate awarded is unreasonable, the district director's hourly rate determination is affirmed. *See generally Welch v. Pennzoil Co.* , 23 BRBS 395 (1985).

We reject both parties' contentions with regard to the two hours allowed for travel time on August 9, 1983, the date of the informal conference. While employer asserts that no travel time should have been awarded, the Board has previously recognized that fees for travel time may be awarded where the travel is necessary, reasonable, and in excess of that considered to be a part of normal overhead. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 666 (1982). Claimant's assertion that the district director erred in failing to award the full 4 hours requested for this entry is similarly without merit; travel time is only compensable to the extent that it is in excess of that

normally considered overhead for the relevant geographic area. In the present case, the district director allowed 2 of the 4 hours requested, noting the "varied" Board decisions concerning travel.[3] In addition, as claimant notes, the 4 hours requested on August 9, 1983, included travel time as well as time spent at the informal conference. As time spent in connection with the informal conference itself is compensable, *see Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592, 593 (1981), and the district director's award of two hours for this and counsel's travel-related services is reasonable, it is affirmed.

Employer's final argument is that the district director's fee award contains a mathematical error in that he allowed 7.05 hours at $100 per hour but entered a fee award of $820. Claimant responds that the district director's calculation of the award was proper. The district director subtracted the 4.1 hours he stated he had disallowed and the 7.85 hours which claimant eliminated from consideration in the amended fee petition from the 20.15 hours requested in the initial fee petition. He thus awarded claimant's counsel a fee of $820 representing 8.2 hours at $100 per hour. Our review of the fee award, however, reveals that, in fact, the district director disallowed 4.6 hours, resulting in 7.7 compensable hours. The district director's Order is therefore modified to correct this mathematical error and to provide for a fee of $770.

[3]The district director is apparently referring to the fact that in *Neeley v. Newport News Shipbuilding & Dry Dock*, 19 BRBS 138 (1986), the Board affirmed the administrative law judge's denial of travel time from Newport News to Hampton (round trip of 16 miles) but vacated a denial of time requested for traveling from Norfolk to Hampton (round trip 25 miles) in *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 592, 593 (1981).

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director is modified to award a fee of $770 but is, in all other respects, affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge