

BRB No. 92-1749

OWEN E. MILLER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	
INCORPORATED)	DATE ISSUED:
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Compensation Order-Award of Attorney's Fees and Order Denying Reconsideration of N. Sandra Ramsey, District Director, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

Traci M. Castille (Franke, Rainey, & Salloum), Gulfport, Mississippi, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Order-Award of Attorney's Fees and Order Denying Reconsideration (6-116209) of District Director¹ N. Sandra Ramsey 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 may only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sought compensation under the Act for an occupational hearing loss. Prior to the April 19, 1990, hearing before the administrative law judge, claimant and employer stipulated that claimant sustained an 11 percent binaural hearing loss in the course and scope of his employment,

¹Pursuant to 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

for which he was entitled to compensation based on an average weekly wage of \$308.48. In addition, employer accepted liability for claimant's medical benefits. The only issue pending for adjudication before the administrative law judge concerned whether claimant's occupational hearing loss benefits should be calculated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. § 908(c)(13), or pursuant to Section 8(c)(23), 33 U.S.C. § 908(c)(23)(1988). After conducting a hearing, the administrative law judge awarded claimant compensation for a 4 percent whole person impairment pursuant to Section 8(c)(23) in a Decision and Order which was filed in the office of the district director on June 21, 1991. On June 25, 1991, employer paid the disability compensation owed to date consistent with the administrative law judge's award of benefits. On July 23, 1991, employer advised claimant's counsel that authorization for claimant's hearing aids had been granted.

Subsequently on September 13, 1991, claimant's counsel filed a fee petition with the district director, requesting \$825 representing 8.125 hours of legal services at \$100 per hour plus \$8 in expenses. In a Compensation Order Award of Attorney Fees dated March 18, 1992, the district director found that the time claimed prior to July 20, 1988, the date the district director provided employer with formal notice of the claim, was chargeable against claimant as a lien upon his compensation award. *See* 33 U.S.C. § 928(c). The district director also disallowed the 1.5 hours claimed after February 24, 1989, the date of referral to the Office of Administrative Law Judges. Accordingly, the district director awarded claimant's counsel a fee of \$662.50 representing 6.625 hours of services at \$100 per hour, holding employer liable for \$150 of the fee and claimant liable for the remaining \$512.50 as a lien upon his compensation award.

On March 18, 1992, claimant's counsel requested reconsideration of the district director's fee award, arguing that the district director erred in denying a fee payable by employer for the services claimed subsequent to the date of referral. Counsel argued that because the services in question were performed between June 28, 1991 and August 5, 1991, *i.e.*, subsequent to the district director's filing of the administrative law judge's Decision and Order on June 21, 1991, and involved time spent in securing the benefits awarded, these services are compensable and properly claimed from the district director.

On May 21, 1992, the district director denied counsel's request. The district director noted that the 1.5 hours of services in question were rendered between June 28, 1991, and August 5, 1991, after entry of the administrative law judge's decision. Inasmuch as employer had paid claimant compensation in accordance with that award, the district director found that the fee in question would ordinarily be assessed against claimant as a lien upon his compensation award. Inasmuch as claimant's recovery had been minimal, however, the district director found that it would be inequitable to assess this additional fee against him. Counsel appeals the district director's denial of the fee payable by employer for the 1.5 hours claimed after the filing of the administrative law judge's decision. Employer responds, urging affirmance.

On appeal, counsel contends that the district director erred in not holding employer liable for the 1.5 hours of services performed subsequent to the filing of the administrative law judge's Decision and Order, reiterating the argument made below that these services were properly claimed

from the district director as the administrative law judge no longer had jurisdiction of the claim once his decision was filed with the district director. Counsel further maintains that the disallowed entries involved services rendered in obtaining employer's authorization for claimant to be fitted with hearing aids pursuant to the administrative law judge's award and asserts that although employer agreed to accept liability for claimant's medical benefits at the April 19, 1990, hearing, authorization for hearing aids was not ultimately obtained until more than a year later. Counsel further maintains that the district director erred in concluding that the fees in question would ordinarily have been assessed against claimant because benefits had been paid in accordance with the administrative law judge's Decision and Order. Counsel asserts that in a disputed claim such as the present one, employer remains liable for the fee until the benefits are actually paid inasmuch as claimant's counsel has an obligation to insure that employer fully complies with the compensation award. Counsel avers that the effect of the district director's denial of a fee for these services payable by employer is to penalize claimant's counsel for continuing to oversee the claim post-decision to insure that the correct amount of compensation is paid and that medical benefits are authorized.

Employer responds that as Section 28(c) of the Act, 33 U.S.C. §928(c), and Section 702.132 of the regulations, 20 C.F.R. §702.132, state that an attorney's fee must be approved by the administrative body before whom the services were performed, and as it is well recognized that the letter of referral is the best indication of the termination of informal proceedings, the district director properly denied the services in question because they were performed subsequent to referral. Employer further asserts that as it had accepted liability for claimant's medical benefits at the hearing and advised claimant's counsel that authorization for claimant's hearing aids had been granted by letter dated July 23, 1991, the fees in question were also properly denied because the work in question was not necessary to the successful prosecution of the claim and did not result in claimant's obtaining additional compensation.

We agree with claimant's counsel that the district director erred in denying him a fee for the disputed services. While it is well-recognized that the date of referral marks the date on which informal proceedings terminate, *see Fitzgerald v. RCA International Service Corp.*, 15 BRBS 345 (1983), it is equally well-established that the administrative law judge can only award a fee for services incurred between the close of the informal proceedings and the issuance of the administrative law judge's Decision and Order. *See Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). Inasmuch as the services in question in this case were performed subsequent to the filing of the administrative law judge's Decision and Order and the case was not appealed, we agree that these services were properly claimed from the district director. Moreover, the district director erred in concluding that claimant would ordinarily be liable for the services in question because they did not result in his obtaining additional compensation. The disputed 1.5 hours of services appear to have been in the nature of "wind-up" services, *i.e.*, letters to claimant and counsel regarding the compensation checks and correspondence necessary to obtain authorization for hearing aids, which were performed by counsel to secure payment of the benefits awarded. Inasmuch as employer paid no compensation voluntarily, and claimant's counsel succeeded in establishing claimant's right to disability compensation and medical benefits for his occupational hearing loss while the case was before the administrative law judge, employer is liable for reasonable and necessary wind-up

services performed in securing the payment of these benefits. *See generally Spencer v. Director, OWCP*, 6 BLR 1-971 (1984).

Accordingly, the district director's finding in his Compensation Order and Order Denying Reconsideration that claimant is not entitled to a fee payable by employer for the services performed after the filing of the administrative law judge's Decision is reversed, and the case is remanded to the district director for consideration of a reasonable fee consistent with the requirements of 20 C.F.R. §702.132.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge