

JAMES VAN OSDOL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

David A. Hytowitz (Pozzi Wilson Atchison), Portland, Oregon, for claimant.

Dennis R. VavRosky (VavRosky, MacColl, Olson & Miller, P.C.), Portland, Oregon, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Approval of Attorney Fee Application (Case No. 14-112205) of District Director Karen P. Staats 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 be set aside only if the challenging party shows it 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).

Claimant sought benefits under the Act for injuries to his left shoulder and back sustained as a result of a work-related accident on December 31, 1992. After the case was referred to the Office of Administrative Law Judges, but prior to the hearing, the parties entered into a proposed settlement agreement pursuant to Section 8(i), 33 U.S.C. §908(i), in which employer agreed to pay claimant \$50,000 in disability compensation, and

employer agreed to pay a reasonable attorney's fee plus reasonable costs. In exchange, claimant agreed that the payment of the aforementioned amounts would discharge employer of liability for any disability due to claimant's work-related injury of December 31, 1992. The parties agreed that claimant retains his rights to future medical benefits under Section 7 of the Act, 33 U.S.C. §907. In an Order dated July 23, 1996, Administrative Law Judge Alexander Karst, incorporating the parties' agreement by reference, approved the proposed settlement, indicating that it appeared to be neither inadequate nor procured by duress. 33 U.S.C. §908(i). Thereafter, claimant's counsel submitted an attorney's fee application to the district director.<sup>1</sup> The district director awarded claimant an attorney's fee totaling \$1,378.13 plus costs of \$30.80, for work performed in this case before the Office of Workers' Compensation Programs. The district director, in accordance with employer's objections, determined that as no controversy existed between the parties prior to August 25, 1994, claimant is responsible for the portion of the fee accrued prior to that date, totaling \$896.88, and employer is liable for the remainder of the fee.

On appeal, claimant asserts that the district director's assessment of part of the attorney's fee against him violates the settlement agreement reached by the parties and approved by Judge Karst. Claimant argues that the district director is constrained to follow the terms negotiated by the parties, specifically, employer's agreement to pay a reasonable attorney's fee. In addition, claimant maintains that the settlement agreement clearly provides him with net compensation of \$50,000, and therefore an attorney's fee cannot be assessed against claimant as a lien on that compensation. In the alternative, claimant requests that the case be remanded to the Office of Administrative Law Judges for a formal hearing to determine the scope of the original agreement between the parties. In response, employer avers that pursuant to the parties' agreement, it is not responsible for "all" fees, but only those reasonable fees which are found to be properly assessed against employer.

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<sup>1</sup>In his Supplemental Decision and Order Awarding Attorney Fee dated August 26, 1996, Judge Karst awarded claimant an attorney's fee of \$12,337.50 and costs of \$5,618.03. In response to claimant's motion for reconsideration of that decision, Judge Karst awarded an additional \$343.75 in costs.

With regard to the effect of settlement agreements on attorney's fees, the Board has generally held that an award of attorney's fees should not adversely affect or diminish the amount claimant understood he would receive as compensation when he signed the settlement papers.<sup>2</sup> See *Carswell v. Wills Trucking*, 13 BRBS 340 (1981). If, however, the parties are unable to agree to a fee, they may settle the compensation claim and then submit the fee issue to the proper adjudicatory body for separate resolution of the fee. *Id.* "Liability for the fee, and the amount of the fee, would then be determined by the presiding officer in the usual manner pursuant to 33 U.S.C. §928 and 20 C.F.R. §702.132." *Carpenter v. Lockheed Shipbuilding & Construction Co.*, 14 BRBS 382, 386 (1981).

The settlement agreement in the instant case does not explicitly set out the amount of attorney's fees and/or the liability for attorney's fees with exception to the general statement that employer agrees to pay claimant's counsel "a reasonable attorney fee plus reasonable costs." The settlement document acknowledges the attachment of claimant's petition for an attorney's fee for services performed before the administrative law judge and states that employer may file objections to the fee petition within the specified time. In contrast, there is no evidence that claimant's petition for an attorney's fee for work before the district director was attached to the settlement agreement. Thus, from the face of the document, it appears that the parties agreed only that employer would be liable for a reasonable fee for work performed before the administrative law judge. Therefore, the fee petition for work performed before the district director was properly submitted to her for separate resolution consistent with law. See *Carpenter*, 14 BRBS at 386; *Carswell*, 13 BRBS at 340.

Moreover, we note that if the settlement was meant to encompass employer's agreement to pay a reasonable fee for work performed before the district director, employer reserved the right to object to the fee request. The settlement document does not state that the right to object is limited to the amount of the fee request, as opposed to employer's liability therefor. The district director thus rationally considered the fee petition and employer's objections in conjunction with the statutory and regulatory framework, and nothing in the settlement precludes the result obtained.

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<sup>2</sup>The Board specifically held in *Carswell v. Wills Trucking*, 13 BRBS 340 (1981), that at the time claimant signs the settlement agreement, he should be cognizant of the amount, or the minimum amount, he is to receive from the total settlement proceeds. *Carswell* involved the situation where there was an attempt to settle the fee also, but out of the total lump sum agreed to by the parties.

Accordingly, the district director's Compensation Order Award of Attorney's Fee is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge