BRB Nos. 05-0626
and 05-0626A

RODULFO MANUEL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NORTH PACIFIC PROCESSORS	)	DATE ISSUED: 04/20/2006
d/b/a SITKA SOUND SEAFOODS	)	
	)	
and	)	
	)	
CHUBB INDEMNITY INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

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

David A. Graham, Sitka, Alaska, for claimant.

Matthew H. Ammerman and Nicholas W. Earles (Fitzhugh, Elliott & Ammerman, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Compensation Order Approval of Attorney Fee (No. 14-133111) 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 will not be set aside unless shown by the challenging party to

be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant was exposed to toxic levels of carbon monoxide while he was working in the hold of a ship on April 25, 2000. He and three other workers collapsed from exposure, were evacuated and were taken to the hospital. In May 2000, employer began paying claimant compensation in the amount of $284 per week.[1] *See* Emp. Exs. B-2, E-3.[2] On July 7, 2004, claimant and employer agreed to settle the case under Section 8(i), 33 U.S.C. §908(i); under the terms of this settlement, employer agreed to pay claimant a lump sum of $184,250 and to waive its lien against claimant's third-party recovery.[3] The settlement was approved by the district director on July 29, 2004.[4]

Subsequently, claimant's counsel filed a petition for an attorney's fee for work performed before the Office of Workers' Compensation Programs (OWCP) between June 12, 2000, and November 5, 2004, in the amount of $138,325, representing 541 hours at a rate of $250 per hour, plus 41 hours of paralegal work at a rate of $75 per hour. Additionally, claimant's counsel requested 10.75 hours for work performed in defending his fee petition. Employer filed objections, totaling over 250 pages, challenging the fee request on numerous grounds. The district director approved 110.175 hours at a rate of $195 per hour, plus 2.7 hours at a rate of $75 per hour, for a total fee of $21,686.63. Order at 24. Claimant appeals the award of a reduced attorney's fee.[5] Employer urges the Board to reject claimant's arguments. BRB No. 05-0626. In a cross-appeal, employer challenges its liability for any fee for the period between June 12, 2000, and February 15, 2002, and it also contends the hourly rate and number of hours awarded are excessive. Claimant responds, urging the Board to reject employer's contentions. BRB No. 05-0626A.

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[1]The parties agree that disability benefits payments totaled $63,048. Employer also paid approximately $80,000 in medical benefits.

[2]The exhibits are attached to employer's objections to the fee request.

[3]Claimant received a settlement of approximately $400,000 in the third-party cases. Counsel received an attorney's fee in the amount of $160,000 from the proceeds.

[4]The agreement indicates that claimant returned to part-time work for employer in 2003.

[5]We deny claimant's counsel's motion for oral argument. 20 C.F.R. §802.306.

Employer first argues in its cross-appeal that it is not liable for a fee for work performed prior to February 15, 2002, because it paid benefits continuously and there was no controversy prior to that date.[6] Employer argues that the district director erroneously presumed, due to a purported conflict between employer's LS-206 and LS-208 forms, that employer did not pay benefits for the period between the date of injury, April 25, 2000, and May 8, 2000, until a later date or when the settlement proceeds were paid. Employer, however, argues that all benefits for that period were made on May 11, 2000, that it paid all benefits owed to claimant before he retained an attorney, and that it continued to pay benefits at all relevant times. Therefore, employer contends it should not be liable for a fee for work performed between June 12, 2000, and February 15, 2002.

Section 28(a) of the Act provides that "if the employer declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation" and the claimant thereafter utilizes an attorney to obtain benefits, then the employer will be liable for an attorney's fee.[7] 33 U.S.C. §928(a). Section 28(b) provides that employer is not liable for a claimant's attorney's fee if it "pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title," unless a controversy develops thereafter and claimant utilizes the services of an attorney to obtain additional compensation. 33 U.S.C. §928(b). Pursuant to Section 14(b) of the Act, the first installment of compensation becomes due on the fourteenth day after employer has been notified of the injury under Section 12 of the Act, 33 U.S.C. §912(a), or has knowledge of the injury. 33 U.S.C. §914(b). The district director did not address these liability sections in her order.

In this case, employer has attached its LS-206 form, Notice of Payment of Compensation Without an Award, dated February 4, 2002, which states that compensation was paid from May 9, 2000, Emp. Exs. B, E-3, an LS-208 form, Notice of Final Payment, dated August 9, 2004, which states that compensation was paid from

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[6]Employer does not contest its liability for a fee for work during subsequent periods; therefore, we shall limit our discussion to employer's liability for an attorney's fee for the period prior to February 15, 2002.

[7]The pertinent period for determining whether an employer declined to pay begins when it received the notice of the claim from the district director and ends 30 days later. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). It is impossible to ascertain from the file before us when, if at all, the 30 days would begin to run, as it is unclear whether claimant ever filed a claim. In any event, some payments began within 30 days of the date of injury, and the notice of injury could not have been received any earlier than the date of the injury.

April 25, 2000, Emp. Ex. E-37, and a copy of the settlement agreement under the Alaska workers' compensation statute, dated July 2004, in which the parties agreed that claimant's injury arises under the Longshore Act and not the state statute. Emp. Ex. H. In the state agreement, the parties acknowledged that claimant had received the appropriate amount of benefits under the Longshore Act since the date of his injury. Emp. Ex. H at 5. Based on the February 2002 LS-206 form, as well as an earlier form she reported was filed in June 2000 which is not in the file before us, the district director concluded that employer did not timely pay claimant benefits for the period between April 25 and May 8, 2000. She found that all benefits due from May 9, 2000, through the date of the settlement were paid. However, the district director did not address these documents under the provisions of Section 28(a), (b) in determining whether employer is liable for an attorney's fee for claimant's counsel's services.[8] As employer cannot be held liable for a fee unless the provisions of Section 28(a) or (b) are satisfied, *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986); *Traschel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983), and there potentially is merit in employer's argument that there was no controversy prior to February 15, 2002, as all payments were timely made, we vacate the district director's finding that employer is liable for claimant's counsel's fee for the period between June 12, 2000, and February 15, 2002, and we remand the case for further consideration of employer's liability.[9]

Both parties challenge the hourly rate awarded. Claimant asserts that the district director erred in reducing the hourly rate and should have awarded his customary rate of $250 per hour. Employer argues that the rate awarded is excessive in light of the geographic area where the work occurred and counsel's lack of longshore experience. Additionally, claimant argues that the district director erred in denying an enhanced fee due to the delayed payment of the fee.

[8]Contrary to the district director's statements, employer's filing of notices of controversion alone does not shift fee liability to employer if, at all times, employer also made full payment to claimant. *See generally Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991); *Flowers v. Marine Concrete Structures, Inc.*, 19 BRBS 162 (1986).

[9]Employer contends on appeal that its carrier's records of payment to claimant demonstrate that it made full payment on May 11, 2000, back to the date of injury. The parties may submit such additional documentation in support of their contentions in this regard to the district director.

Contrary to the parties' assertions, the district director addressed the factors set out in the applicable regulation, 20 C.F.R. §702.132,[10] and other relevant factors in rendering her decision on the applicable hourly rate. She rejected claimant's argument that counsel's rate in other areas of practice or venues should control his hourly rate here, and she commented on the minimal level of necessary services while this case was before her, as employer had accepted the claim and paid benefits prior to counsel's being retained. Further, she noted the minimal contacts between counsel and the OWCP, and she determined that $195 is a reasonable hourly rate based on the facts of this case. Order at 18-19. Stating that she has broad discretion in awarding an attorney's fee under the Act, she declined to reduce the rate further based on the geographic region in which counsel practices, Alaska. *Id.* In this case, the district director considered the relevant factors for determining the applicable hourly rate, and neither party has demonstrated an abuse of discretion. *See generally Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). Consequently, we affirm the award of a fee based on the reasonable hourly rate of $195.

Claimant correctly contends, however, that the district director applied an inappropriate standard to the issue of his attorney's entitlement to an enhanced fee. Contrary to the district director's statement, whether fee enhancement is necessary is not determined by the length of the delay between the time counsel filed the fee petition in November 2004 and the time employer paid the fee award in April 2005, *see* Cross-Appeal Brief at Ex. A. Rather, it is the time between when the work was performed and when the fee is paid that is relevant. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). When a request for enhancement due to delay is timely raised, as here, the body awarding the fee must consider the issue. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997). As the issue of enhancement was timely raised, and as the district director applied an improper standard in addressing it, we vacate the denial of the request for an enhanced fee. On remand, the district director must consider whether the delay in this case warrants an augmentation to the fee awarded. *See Anderson*, 91 F.3d at 1325, 30 BRBS at 68-69(CRT). If an enhancement is warranted, then the district director may adjust the fee based on historical rates to reflect its present

[10]The regulation states that any approved fee shall be reasonably commensurate with the work performed and "shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded[.]" 20 C.F.R. §702.132(a).

value, apply current market rates, or employ any other reasonable means to compensate claimant's counsel for the delay.[11] *Allen*, 31 BRBS at 97.

Next, claimant makes general arguments related to the district director's rationale for approving reduced hours during various periods, and he makes specific arguments challenging the weight given to employer's "line-by-line audit," the denial of time spent on attempting to enforce a previous "settlement," whether employer's late-filed fee objections violated his right to due process, and the district director's failure to award a fee for certain unopposed entries. We reject all of counsel's arguments. The district director has broad discretion in awarding an attorney's fee. In this case, she thoroughly addressed the fee petition and the objections thereto, wading through the quagmire of longshore and non-longshore entries to determine which services are compensable, and she fully explained, in a 25-page decision, her reasons for reducing the requested fee. *See Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). We decline to further disturb her findings.

In its cross-appeal, in addition to the arguments we have already addressed, employer asserts that counsel's fee should be further reduced by 25 percent because he failed to maintain contemporaneous records to support his attorney's fee award. That is, employer argues that counsel reconstructed his time entries over a period of four years when he drafted his fee request and that this presents a special problem in this case because of counsel's simultaneous work on the third-party and state claims. The district director rejected this argument. She found that there is no requirement that attorneys keep contemporaneous billing records and that a fee petition is adequate if the attorney can produce a reasonably detailed and accurate reconstruction of the work performed. The district director found that the fee petition here was reasonably accurate and the work was performed on or about the times indicated. As employer did not identify any particular entry as not having been performed, the district director declined to make any across-the-board reductions. Order at 3. We affirm the district director's finding. Although she said a contemporaneous record would have been preferable, the district director correctly found that Section 702.132 does not mandate contemporaneous records. Rather, the request for a fee must be supported by a "complete *statement* of the extent and character of the necessary work done[.]" 20 C.F.R. §702.132 (emphasis added). Here, the district director rationally concluded that the fee petition as a whole was

[11]No enhancement may be recovered due to delays caused by the appeal of the fee award. *Anderson*, 91 F.3d at 1325, n.3, 30 BRBS at 69, n.3(CRT). Moreover, as employer has already paid counsel his fee, any enhancement the district director may award would be for a finite period, terminating as of the date the fee was paid in April 2005.

reasonably accurate, and her conclusion will not be disturbed.[12] *See generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

Accordingly, the district director's fee award for work performed before February 15, 2002, is vacated, and the case is remanded for further consideration consistent with this opinion. In addition, the case is remanded for the district director to address whether claimant's counsel is entitled to an enhanced fee. In all other respects, the district director's attorney's fee award is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[12]Employer argues that the Board has held that counsel should keep regular records of work performed in each case. *Sproull v. Stevedoring Services of America*, 28 BRBS 271, 277 (1994) (citing *Morris v. California Stevedore and Ballast Co.*, 10 BRBS 375, 383 (1979). The issue in *Sproull* was whether the time spent preparing a fee petition was compensable. At the time, the Board had held that it was not, and therefore, the Board stated that attorneys should keep regular records of the time they devote to each case because preparing a fee petition "should be, for the most part, a clerical function included in overhead expenses." *Sproull*, 28 BRBS at 277. *Sproull* and *Morris* predate *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996), wherein the court held that preparation of a fee application is compensable. The statement in *Sproull* is *dicta*, and it does not create an additional mandatory criterion for a valid fee petition.