

STEVEN GRIFFIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS,	)	DATE ISSUED: 08/10/2012
INCORPORATED aka NORTHROP	)	
GRUMMAN SHIPBUILDING	)	
	)	
Self-Insured Employer	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Order on Fees of David A. Duhon, District Director, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Compensation Order on Fees of District Director David A. Duhon 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. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On April 25, 2011, claimant filed a claim for a work-related hearing loss. The district director issued formal notice of the claim to employer on April 28, 2011. Employer controverted the claim on May 10, 2011, but ultimately accepted the claim on June 27, 2011, and began paying claimant compensation for a 15.6 percent binaural hearing loss on that date.

Claimant's counsel subsequently filed a fee petition with the district director for work performed between March 28 and July 19, 2011. He requested an attorney's fee in the amount of \$1,925, representing 5.5 hours of work at an hourly rate of \$350. Employer filed objections, arguing that it is not liable for a fee for any work performed before the date of the district director's notice of the claim, and that the rate of \$350 per hour is too high. The district director found that claimant's counsel is entitled to an employer-paid fee under Section 28(a) of the Act, 33 U.S.C. §928(a), for the successful prosecution of his claim. However, he disallowed all services rendered prior to employer's controversion of the claim.<sup>1</sup> The district director reduced counsel's requested hourly rate from \$350 to \$250 and approved 2.25 hours of services. Accordingly, the district director awarded claimant's counsel an attorney's fee of \$562.50. Claimant appeals the district director's fee award, and employer responds, urging affirmance.

Claimant first contends the district director erred in denying counsel a fee for services rendered prior to employer's controversion of the claim. Section 28(a), which applies in this case, provides that an employer is liable for an attorney's fee if, within 30 days of its receipt of the notice of a claim from the district director's office, it declines to pay any compensation. 33 U.S.C. §928(a). Section 28(a) states:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. §928(a). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that an employer is not liable for services performed before it receives notice of the claim from the district director. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5<sup>th</sup> Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5<sup>th</sup> Cir. 1993)

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<sup>1</sup>The district director stated that employer controverted the claim on May 13, 2011. As it pertains to the fee petition submitted and the result herein, the discrepancy is harmless because there was no work performed between May 10 and May 13.

(table). In *Weaver*, the court also held that once an employer receives the requisite notice of the claim from the district director, the employer is not liable for a fee for work incurred before it controverts the claim or before 30 days after receiving the written notice of the claim, whichever event occurs first. *See also Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6<sup>th</sup> Cir. 2008); *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5<sup>th</sup> Cir. 2003); *Kemp v. Newport News Shipbuilding & Dry Dock Co.*, 805 F.2d 1152, 19 BRBS 50(CRT) (4<sup>th</sup> Cir. 1986). As this case arises in the Fifth Circuit, we reject claimant's assertion that the Ninth Circuit's decision in *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 43 BRBS 32(CRT) (9<sup>th</sup> Cir. 2008), applies to allow an award of pre-controversion fees. Accordingly, we affirm the district director's finding that employer's liability for a fee commenced on the date it controverted the claim, as the district director properly applied the controlling law of the circuit. *Weaver*, 282 F.3d 357, 36 BRBS 12(CRT).

Next, claimant's counsel contends that the district director erred in reducing his requested rate of \$350 per hour to \$250 per hour. The fee applicant has the burden of establishing entitlement to a reasonable fee, commensurate with the necessary work done. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4<sup>th</sup> Cir. 2009); *Jeffboat, L.L.C. v. Director, OWCP*, 553 F.3d 487, 42 BRBS 65(CRT) (7<sup>th</sup> Cir. 2009); *B & G Mining, Inc. v. Director, OWCP*, 522 F.2d 657, 42 BRBS 25(CRT) (6<sup>th</sup> Cir. 2008). In this case, counsel did not provide any evidence to the district director to support his requested hourly rate. The district director therefore acted within his discretion in awarding a rate he deemed reasonable for the geographic area, in view of the regulatory criteria at 20 C.F.R. §702.132. *See generally Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004). Claimant has not demonstrated that the district director abused his discretion in reducing the requested hourly rate from \$350 to \$250 per hour. Therefore, we affirm it, as well as the fee award of \$562.50. *Id.*

Accordingly, we affirm the district director's award of an attorney's fee.<sup>2</sup>

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>2</sup>As counsel has not succeeded in his appeal of the district director's fee award, we deny his request for a fee for work performed before the Board in this matter. 20 C.F.R. §802.203.