

BRB No. 97-1761

RAY D. HYDE

Claimant-Respondent

v.

HEALY TIBBITTS BUILDERS,
INCORPORATED

Self-Insured
Employer-Petitioner

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DATE ISSUED:

DECISION and ORDER

Appeal of the Compensation Order Awarding Attorney Fees of Joyce L. Terry,
District Director, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City,
New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order Awarding Attorney Fees (Case Nos. 15-37715 and 15-38733) of District Director Joyce L. Terry 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).

This is the second time employer has appealed the district director's award of attorney's fees to the Board in the instant case. To reiterate briefly the facts of this case, claimant was awarded compensation under the Act for work-related knee injuries.¹ Claimant's counsel subsequently submitted a fee petition to District Director Don M. Sodergren on May 20, 1996, seeking an attorney's fee of \$6,760, representing 38.4 hours at \$150 per hour and 10 hours at \$100 per hour. Employer filed objections to the fee petition to which claimant's counsel replied. After summarily finding that employer's objections lacked merit, District Director Sodergren disallowed the hours sought for work performed while the case was pending before the administrative law judge and awarded claimant's counsel a fee of \$6,100, representing 34 hours at an hourly rate of \$150 and 10 hours at an hourly rate of \$100.

Employer appealed District Director Sodergren's award of attorney's fees to the Board. In a Decision and Order issued May 27, 1997, the Board vacated this award and remanded the case for the district director to reconsider the fee, addressing employer's specific objections to the hourly rate, compensable hours and overall fee. *See Hyde v. Healy Tibbits Builders, Inc.*, BRB No. 96-1358 (May 27, 1997).

On remand, claimant's counsel's fee petition and employer's objections to the fee petition were considered by District Director Joyce L. Terry (the district director). In a Compensation Order Awarding Attorney Fees filed on July 29, 1997, the district director approved the hourly rates sought by claimant's counsel, reduced the number of compensable hours to 35.2 hours of attorney time and 5.1 hours of paralegal time, and awarded a total fee of \$5,790 payable by employer.

Employer now appeals the district director's attorney's fee award, contending that the fee award must be vacated and remanded for proper consideration by the district director.

¹In a Decision and Order Awarding Benefits issued on April 5, 1996, Administrative Law Judge Paul A. Mapes (the administrative law judge) ordered employer to pay claimant temporary total disability benefits from July 21, 1993 through October 19, 1994, except for March 25, 1994, permanent partial disability benefits from October 20, 1994, interest, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, except those charges incurred on March 28, 1994, March 30, 1994, and October 12, 1994.

Claimant responds, urging affirmance of the fee award.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). After a thorough review of employer's contentions on appeal and the record in this case, we conclude that the district director's fee award must be upheld, as employer has failed to show the award to be unreasonable or an abuse of the district director's discretion.

Initially, we disagree with employer's contention that the district director's findings regarding the reasonableness of the time spent in preparing and reviewing certain documents are arbitrary and capricious.² After considering the fee petition and employer's objections to these particular itemized services, the district director specifically determined that the time itemized for these services was reasonable. Employer's assertions on appeal are insufficient to meet its burden of establishing that the district director abused her discretion in determining that the itemized services were reasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55, 62 (1989).

Employer next contends that the district director's failure to discuss on remand whether the attorney's fee should be reduced due to claimant's lack of success in establishing employer's liability for certain medical expenses requires that the case again be remanded to the district director for consideration of this issue. Based upon our review of the record in this case, and in the interest of adjudicatory efficiency, we hold harmless any error committed by the district director in failing to explicitly consider employer's argument that the fee should be reduced on the basis of claimant's lack of success in establishing employer's liability for medical expenses in the amount of \$489.48. In the instant case, it is uncontroverted that claimant prevailed on five of the six issues that were contested at the hearing before the administrative law judge; specifically, claimant was successful in establishing the adequacy of his notice to employer, the occurrence of work-related injuries, the length of employer's liability for temporary total disability compensation, the extent of claimant's permanent partial disability, and the amount of his average weekly wage. We note that the single issue on which claimant failed to prevail involved the question of employer's liability for \$489.48 in medical expenses, whereas claimant's attorney's aforementioned success with respect to the other five contested issues resulted in claimant's

²Specifically, employer objects to the time itemized for services rendered on August 1, 1994 and January 3, 1995, as excessive.

entitlement to compensation benefits in excess of \$35,000. In light of claimant's overall success in establishing entitlement to a substantial compensation award, claimant's failure to establish employer's liability for an amount which is *de minimis* in relation to the overall award is an insufficient basis alone for reduction of the attorney's fee. *Hensley v. Eckerhart*,

461 U.S. 424 (1983). As the attorney's fee award is reasonably commensurate with the necessary work done, the complexity of the legal issues, and the amount of benefits awarded, *see* 20 C.F.R. §702.132, it is affirmed.

Accordingly, the district director's Compensation Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge