

BRB No. 97-1773

TIMOTHY ALLEN)
)
 Claimant-Respondent) DATE ISSUED:
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 v.)
)
 BLUDWORTH BOND SHIPYARD,)
 INCORPORATED)
)
 and)
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Supplemental Compensation Order on Remand - Award of Attorney's Fee of Marilyn C. Felkner, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Sidney W. Degan III, Foster P. Nash III and Deborah A. Ellsworth (Degan, Blanchard & Nash), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Compensation Order on Remand - Award of Attorney's Fee (No. 8-081092) of District Director Marilyn C. Felkner 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).

This is the second time that this case has been appealed to the Board. The facts of this case are not in dispute. On April 12, 1985, claimant sustained a work-related back injury for which he ultimately underwent a lumbar fusion. On May 3, 1995, the district director approved a Section 8(i) Settlement Application submitted by the parties for \$111,707 plus a reasonable attorney's fee to be determined by the Department of Labor. 33 U.S.C. §908(i). Claimant's attorney thereafter filed a fee petition for work performed before the district director, and employer filed objections. On February 15, 1996, claimant requested that his requested fee be enhanced by fifteen percent to account for the long delay in his receiving payment of his fee. In subsequently awarding counsel a fee, the district director reduced both the hourly rate and the number of hours requested by claimant's attorney, allowing 45.125 of the 58.75 hours requested for non-attorney work at hourly rates between \$35 and \$65, and 57.875 hours of the 91 hours requested for attorney services at hourly rates between \$100 to \$175. The district director denied, however, claimant's request to augment his requested fee by 15 percent to account for the delay, finding that there was no law to support an enhancement of a fee by an arbitrary percentage.

Claimant appealed this fee award to the Board, contending that the district director erred in failing to enhance his attorney's fee either by awarding \$175 an hour for all the attorney services, as this was the amount awarded for the most recent time period, or by any other reasonable method. The Board, in its decision, agreed with claimant that the district director erred in denying the request to augment the requested fee. In support of its decision, the Board cited to the decisions of the United States Supreme Court in *Missouri v. Jenkins*, 491 U.S. 274 (1989) and *City of Burlington v. Dague*, 505 U.S. 557 (1992), and determined that consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. Accordingly, the Board held that when the question of delay is timely raised, the body awarding the fee must consider this factor. The Board noted that in the present case the delay had been 11 years between the date on which some of the services were performed and the date on which the district director's award of fees was issued, and that a delay of 11 years has been held sufficient to warrant enhancement of the fee for delay, citing *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT)(9th Cir. 1996) and *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). The Board thus vacated the district

director's determination on this issue and remanded the case for the district director to exercise her discretion in determining an appropriate method to compensate counsel for the delay in payment of the fee. *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997).

On remand, in accordance with the Board's decision, the district director awarded counsel an argued fee; specifically the district director determined that the appropriate method to compensate for the delay in payment of counsel's fee was to award a fee based on the current rates of \$175 per hour for attorney services and \$65 for non-attorney work. Therefore, the district director awarded counsel 57.875 hours at \$175 per hour for attorney services and 45.125 hours at \$65 per hour for non-attorney work, plus expenses of \$230.00, for a total of \$13,291.26.

On appeal, employer requests reversal of the district director fee order, asserting that the district director erred in considering claimant's counsel's untimely request for an enhancement his requested fee; alternatively, employer contends that the Board, and consequently the district director, erred in determining that a fee may be enhanced for delay.¹ Claimant responds, urging affirmance,² and employer filed a reply memorandum in support of its appeal.

¹Employer also contends that the district director's ultimate award was arbitrary, capricious, and an abuse of discretion. As employer's argument fails to meet the threshold criteria of containing "a statement indicating the specific contentions and describing with particularity the substantial questions of law or fact to be raised by the appeal," see 20 C.F.R. §802.210, we decline to address this issue. *Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214, 218 (1988).

²Claimant's cross-appeal in this case, BRB No. 97-1773A, was dismissed at claimant's request. *Allen v. Bludworth Bond Shipyard, Inc.*, BRB No. 97-1773A (Jan. 12, 1998).

Initially, without citation to statute or regulations, employer contends that the district director in the Seventh Compensation District has an informal policy which requires attorney fee applications to be submitted at the same time that the Section 8(i) Settlement Application is filed and that counsel's request for an enhanced fee was thus untimely. We need not address employer's assertion, however, since this issue has been raised for the first time on appeal. See *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991).

Next, employer challenges the Board's decision to allow claimant's counsel the opportunity to augment his fee for delay, and the district director's subsequent reliance on the Board's decision in enhancing counsel's fee. This issue, however, was fully addressed and decided in the Board's previous opinion, *Allen*, 31 BRBS at 95, and the Board's resolution of that issue constitutes the law of the case. Therefore, we decline to revisit this issue.³ See *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996); *Wayland v. Moore Dry Dock*, 25 BRBS 43 (1991).

³The rule of "law of the case" is a discretionary rule of practice based upon sound policy that when a case is on its second appeal, an appellate body will adhere to its original decision, unless there has been a change in the underlying factual situation, intervening, controlling authority demonstrates that the initial decision was erroneous, or the first decision was clearly erroneous and allowing it to stand would result in manifest injustice. See *Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge