

BRB No. 13-0342

YAQOOB YOUSIF KHUDHAIER)
SABRIYA ABDULLAH KHAMEES)
(Parents of ADBUL KHUDER YAQOOB)
YOUSIF, deceased))
)
Claimants-Respondents)
)
v.)
) DATE ISSUED: Feb. 7, 2014
SALLYPORT GLOBAL SERVICES)
)
and)
)
CONTINENTAL CASUALTY COMPANY)
)
Employer/Carrier-)
Petitioners) DECISION and ORDER

Appeal of the Supplemental Decision and Order Award of Attorney's Fees of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Agnieszka M. Fryszman and Thomas N. Saunders (Cohen Milstein Sellers & Toll PLLC), Washington, D.C., for claimants.

Gregory Sujack (Law Offices of Edward J. Kozel), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Award of Attorney's Fees (2010-LDA-00541) of Administrative Law Judge Daniel F. Solomon 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Abdul Khuder Yaqoob Yousif (decedent), along with eight of his co-workers, died on October 29, 2006, while in the course of his work as a translator for employer in Iraq.¹ Following these deaths, employer, through its carrier Continental Casualty Company (CCC), conducted an investigation into potential survivors who might be entitled to compensation under the Act. Based on employer's representations, the district director found, pursuant to Section 9 of the Act, 33 U.S.C. §909, that decedent did not leave any eligible survivors. The district director issued an Order on August 3, 2009, for employer to pay funeral expenses and \$5,000 into the Special Fund pursuant to Section 44(c)(1) of the Act, 33 U.S.C. §944(c)(1). Employer complied with the district director's Order and subsequently applied for and received reimbursement under the War Hazards Compensation Act, 42 U.S.C. §1701 *et seq.* Meanwhile, CCC's investigator had informed decedent's survivors that they would receive periodic compensation based on the wages decedent had earned in his work for employer. Nonetheless, as of 2009, no compensation had been paid, prompting claimants, decedent's parents, to file a claim for death benefits under the Act on November 19, 2009.

Employer filed a motion for summary decision with the Office of Administrative Law Judges (OALJ) on the grounds that the claim was time-barred under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and that the claimants did not seek modification of the district director's Order pursuant to Section 22 of the Act, 33 U.S.C. §922. In response, claimants argued that their claims were timely filed. Claimants also filed for summary decision on the ground that they had established dependency on the decedent and thus entitlement to death benefits under Section 9(d), 33 U.S.C. §909(d). In addition, claimants requested that the administrative law judge refer the case to the district director for an investigation into employer's alleged fraud or abuse, pursuant to Section 31(c) of the Act, 33 U.S.C. §931(c).

By Order dated May 12, 2011, the administrative law judge: 1) denied employer's motion for summary decision; 2) "enter[ed] partial summary decision for claimants," regarding the timeliness of the claim and claimants' status as decedent's dependents entitled to compensation under the Act; 3) retained jurisdiction "over all other matters not

¹Employer, a defense contractor, provided translation support for Coalition Police Training operations in and around Basra, Iraq. On October 29, 2006, a bus transporting decedent and his co-workers in the area of Basra was hijacked. The nine translators were forced off the bus, shot, and killed. Claims for death benefits were also filed, and appeals are pending before the Board, in cases involving decedent's co-workers.

ADJUDICATED;” 4) set May 25, 2011, as the date for a formal hearing on those remaining issues; and 5) ordered that claimants’ Section 31(c) claim be referred to the district director for further investigation. *See* Order Granting Partial Summary Decision at 11. Subsequently, employer withdrew its controversion of the claim, and the parties stipulated to decedent’s average weekly wage as \$103.80. In view of these actions, the administrative law judge canceled the formal hearing and remanded the case to the district director. *See* Orders dated May 25, 2011 and July 7, 2011; 20 C.F.R. §702.351. The administrative law judge specifically retained jurisdiction “to entertain a petition for attorney’s fees.”

On October 19, 2011, claimants’ counsel filed with the administrative law judge a petition seeking an attorney’s fee and costs totaling \$51,027.18, representing 28.04 hours at an hourly rate of \$435; 21.98 hours at an hourly rate of \$350; 18.47 hours at an hourly rate of \$285; 47.35 hours at an hourly rate of \$240; 39.34 hours at an hourly rate of \$140; and costs of \$9,001.33, pursuant to Section 28 of the Act, 33 U.S.C. §928, for services performed before the administrative law judge in this case. Despite requesting several extensions of time in order to file objections, employer did not submit a response to the fee petition.² After reducing the \$140 hourly rate to \$100 and denying itemized entries found to be clerical, the administrative law judge, in his Order dated March 15, 2013, awarded claimants’ counsel an attorney’s fee, payable by employer, of \$39,498.95, plus \$9,001.33 in expenses, for work performed in this case.

In the interim between the filing of the fee petition with the administrative law judge and the issuance of the administrative law judge’s fee award, the parties engaged in negotiations to settle the claim for death benefits, commutation thereof, *see* 33 U.S.C. §§908(i), 909(g), and claimants’ counsel’s attorney fee. On November 27, 2012, claimants’ counsel signed, on behalf of the claimants, an Application For Approval of Settlement Under 33 U.S.C. §908(i), and that document was jointly submitted to the district director for consideration on or around December 13, 2013.³ Under the proposed agreement, decedent’s mother was to receive a lump sum payment of \$14,914.04,

²Employer requested extensions on November 3 and 23, 2011, and on February 8, 2012, in which to file a response to the fee petition. Claimants did not oppose the two latter requests.

³At that time, the district director apparently informed the parties that the automatic approval provision of Section 8(i)(1), 33 U.S.C. §908(i)(1), would not commence until such time as the application was submitted to the national Office of Workers’ Compensation Programs (OWCP) for review of the commutation calculations. *See* 33 U.S.C. §909(g) (permitting commutation of death benefits to “non-resident aliens”).

decedent's father a lump sum payment of \$20,108.78,⁴ and their attorneys would receive a fee of \$29,098.66. Specifically, with regard to the attorney's fee, the application provided that "employer/carrier will pay claimants' counsel \$29,098.66, representing a compromise and full satisfaction of the attorneys' fees and costs in this case on behalf of [claimants]. This amount represents 1/14th of the total attorneys' fees and costs in the related cases"⁵ The settlement application also stated that, "[i]n light of this settlement, the parties request that claimants' counsel's petitions for fees and costs submitted on September 21, 2011 [to the district director], October 19, 2011 and November 17, 2011 [to the administrative law judge], be dismissed as moot." *See* Settlement Application at 4.

The district director, by letter dated March 25, 2013, after the administrative law judge had issued his fee award, determined that the settlement agreement was "never properly submitted" as the parties failed to provide claimants with a translated version of the settlement agreement or to obtain claimants' signatures. *See* 20 C.F.R. §§702.242-243. Therefore, he disapproved it. The district director stated he could not "believe the carelessness of the parties, especially in light of the Attorney's Fee" generated by this case. Specifically, he noted the disparity between the attorney's fee provided for by the settlement agreement, \$29,098.65, which he presumed covered the entirety of attorney work performed at both the OWCP and OALJ levels, and the attorney's fee awarded by the administrative law judge for OALJ work, \$39,498.95, and seemed particularly surprised at the latter award given that claimants had yet to receive any settlement proceeds. In closing, the district director urged the parties to "submit a proper Settlement."

On appeal, employer challenges the administrative law judge's award of an attorney's fee. Claimants respond, urging affirmance of the attorney's fee award. Employer has filed a reply brief.

Employer contends the administrative law judge's award of attorney's fees must be vacated because claimants' counsel previously agreed to accept a lower fee via the settlement application that was pending before the district director at the time of the issuance of the administrative law judge's order. Employer also avers it was not provided the opportunity to oppose the fee petition after the mutually-agreed upon settlement was rejected by the district director. Employer alternatively contends the

⁴According to the agreement, the lump sum payments represented "a compromise and commutation of the death benefits that would be payable under Section 9 of the Act."

⁵There are fourteen claimants pursuing claims as a result of the deaths of the nine employees. *See* Settlement Application at 3-4

administrative law judge's award of attorney's fees should be vacated since claimants' counsel failed to submit a properly detailed and itemized fee petition. In response, claimants' counsel asserts that employer's appeal must be rejected because employer did not raise any of its objections to the fee petition before the administrative law judge and, thus, may not now raise them for the first time on appeal. Counsel further contends the administrative law judge's "valid" award of an attorney's fee cannot be superseded or nullified by a proposed settlement application that was ultimately rejected by the district director. For the reasons that follow, we vacate the administrative law judge's award of an attorney's fee.

Section 28(a) of the Act, 33 U.S.C. §928(a), requires that a claimant successfully prosecute his claim as one of the prerequisites for the receipt of an attorney's fee. *See generally American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976), *aff'g* 2 BRBS 178 (1975); *see* 20 C.F.R. §702.134(a). From the facts in the record presently before the Board, it appears that claimants have satisfied all the elements for entitlement to death benefits. The administrative law judge found that claimants established the requisite familial relationship to, and that they were at the time of his death financially dependent upon, decedent. *See* 33 U.S.C. §909(d). Employer withdrew its controversion of the claim, 20 C.F.R. §702.351,⁶ and the administrative law judge accepted the parties' stipulation to an average weekly wage of \$103.80. Thus, an award of death benefits can be calculated. *See* 33 U.S.C. §§906, 909. Nonetheless, no compensation order awarding benefits has been issued by either the administrative law judge or district director, *see* 33 U.S.C. §919(e); 20 C.F.R. §§702.315, 702.348, nor has the parties' Section 8(i) settlement agreement been approved. Thus, on the facts of this case, the administrative law judge's award of an attorney's fee was premature, and therefore we vacate the award. *See Taylor v. Cactus, Int'l, Inc.*, 13 BRBS 458 (1981); *see generally Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997).

Moreover, there is no evidence that the administrative law judge acted on employer's motions for extensions of time in which to respond to counsel's fee petition.

⁶Section 702.351 of the regulations states:

Whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings upon receipt from said party of a signed statement to that effect and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315.

33 U.S.C. §702.351. Section 702.315 states that a district director may issue a compensation order only when the parties are in agreement. 20 C.F.R. §702.315; *see Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007); 20 C.F.R. §702.316.

Following counsel's filing of a fee petition in October 2011, employer filed three requests for extensions of time to respond as it was actively "negotiating with the attorneys for the Claimants" in an effort to amicably resolve the attorney's fee and commutation of benefits issues, a position claimants' counsel acknowledges. From the record presently before the Board, it does not appear that the administrative law judge acted upon any of these requests for extensions. *See* Supplemental Decision and Order at 1-2 (wherein the administrative law judge recites the motions filed, but does not reference any order filed in response thereto). Rather, the administrative law judge proceeded to address the fee petition on the merits in his Supplemental Decision dated March 15, 2013, which was issued 16 months after the petition had been filed. At that time, the administrative law judge merely observed that "employer has not submitted a response to the fee petition," and that no "stipulation regarding attorney's fees [has] been submitted." *Id.* at 2.

Based on employer's unanswered motions for an extension and the administrative law judge's awareness therefrom of the parties' settlement negotiations, we hold that the administrative law judge abused his discretion in entering a fee award without notice to the parties. Significantly, the administrative law judge's attorney's fee award was entered three months after the settlement application was submitted to the district director, while the settlement agreement was pending, and while the parties had a reasonable expectation that the settlement agreement would be approved. Moreover, in that agreement the parties stipulated to an attorney's fee lower than that sought in counsel's fee petition to the administrative law judge, and explicitly asked that the prior fee petitions submitted to the district director and the administrative law judge be dismissed as moot.⁷ *See generally Ballard v. General Dynamics Corp.*, 12 BRBS 966 (1980) (arm's length agreement on attorney's fee should be considered by the adjudicator). Had the administrative law judge acted on employer's motions for an extension and required the parties to provide to him updates on the settlement negotiations, the procedural posture of the case would have been clearer to all involved.⁸

For these reasons, we vacate the administrative law judge's award of an attorney's fee.⁹ The parties should apprise the administrative law judge of any proceedings pending

⁷Claimants' counsel signed the settlement agreement, in which they agreed to accept \$29,098.66 in "compromise and full satisfaction of the attorneys' fees and costs in this case."

⁸The parties are not blameless in creating the confusion as to the procedural posture, for it appears that they did not notify the administrative law judge of their submission of the settlement agreement to the district director.

⁹In light of this disposition, we need not consider employer's arguments regarding the substance of the administrative law judge's award of an attorney's fee.

before the district director as it pertains to claimants' counsel's fee petition before the administrative law judge. If, after a compensation order is issued awarding benefits to claimants, the parties have not settled the amount of an attorney's fee payable to claimants' counsel, the administrative law judge must afford employer the opportunity to file substantive objections to counsel's fee petition prior to addressing it.

Accordingly, the administrative law judge's Supplemental Decision and Order Award of Attorney's Fees is vacated, and the case is remanded for further action consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge