

BRIAN CLARK)

Claimant-Respondent)

v.)

ARMY & AIR FORCE)
EXCHANGE SERVICE)

and)

CONTRACT CLAIMS SERVICES,)
INCORPORATED)

Employer/Carrier-)
Petitioners)

DATE ISSUED:

DECISION and ORDER

Appeal of the Letter of Richard V. Robilotti, District Director, United States Department of Labor.

Betty J. O'Shea, New York, New York, for claimant.

Matthew R. Lavery (Headquarters Army and Air Force Exchange Service), Dallas, Texas, for employer.

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

PER CURIAM:

Employer appeals the Letter (Case No. 2-111107) of District Director Richard V. Robilotti awarding an attorney's fee for work performed 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

Claimant sought benefits under the Act for injuries sustained as a result of a work-

related accident which occurred on May 5, 1993. At the informal conference before the district director on January 23, 1997, the parties agreed that claimant is entitled to permanent total disability benefits. Employer's Exhibit 13. Thereafter, claimant's counsel requested an attorney's fee of \$28,066, representing 101.55 hours at an hourly rate of \$275, plus \$139.75 in expenses, for services performed from November 16, 1996, through January 23, 1997.¹ In his letter dated March 10, 1997, the district director awarded counsel an attorney's fee of \$20,845, representing 75.8 hours at the requested hourly rate of \$275.

On appeal, employer challenges the district director's award of an attorney's fee. In particular, employer requests that the case be remanded because the district director did not award a fee in an order and because counsel's fee application is insufficiently documented and thus not in accordance with the requirements of Section 702.132, 20 C.F.R. §702.132. Alternatively, employer requests that the Board substantially reduce the hourly rate and the number of hours awarded, alleging that district director's award is excessive and arbitrary, as his determinations are unexplained. Employer avers that a fee of \$10,000 is reasonable in this case. In her response brief, claimant's counsel joins in employer's request for a remand so that she may have the opportunity to resubmit her fee petition in order to have it better conform with Section 702.132.

For the reasons addressed below, we grant the parties' request and therefore remand this case to the district director for further consideration. As employer notes, the district director's award of an attorney's fee and the fee petition are flawed, requiring remand.

¹In the last paragraph of her fee petition, claimant's counsel states that she has expended a total of 99.8 hours representing claimant in the instant case and asks for a total fee to be awarded in the sum of \$25,089.75, representing \$24,950 for services plus \$139.75 for expenses. However, as employer correctly notes, the total number of hours listed by the fee petition is 101.55, which at the hourly rate of \$275, plus total costs of \$139.75, equates to a requested fee of \$28,066.

Initially, we agree with employer that counsel's fee petition in this case lacks the specificity required by the regulations. Section 702.132(a), 20 C.F.R. §702.132(a), provides that a fee application shall be supported by a complete statement of the extent and character of the necessary work done, the professional status and billing rate of each person performing the work, and the number of hours each person devoted to work. In the instant case, the fee petition lists only the total amount of time expended each day and, thus, fails to separately identify each specific item of work performed along with the corresponding number of hours. *National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). Moreover, while claimant's counsel explicitly noted that she has no partners or paralegals and that she did all of the work herself, it is not possible to discern from the fee petition whether counsel is billing for traditional clerical work which is not separately compensable.² *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895 (1980).

Next, we note that while the district director did take into account claimant's success in obtaining permanent total disability benefits, he did not consider or apply the regulatory criteria of 20 C.F.R. §702.132 to the fee petition in this case. See *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting). Specifically, employer objected that the services rendered were not "reasonably commensurate with the necessary work done" in that counsel billed over 100 hours in only six or seven weeks and was not required to accumulate any new evidence for the informal conference. Employer also contended that the large number of hours billed belies counsel's claimed expertise as evidenced by her billing rate of \$275.

In addressing employer's objections, the district director merely reduced the fee by several hours for each two or three week time frame. Furthermore, the district director failed to adequately explain his rationale for reducing certain hours relative to employer's objections. *Roach*, 16 BRBS at 115. The district director has also perpetuated claimant's counsel's calculation error in the fee petition of 99.8 hours, see n.1, *supra*, by reducing that incorrect total number of hours by 24 hours to arrive at his figure of 75.8 permitted hours.³

²We note that employer attempted to rectify the inadequacy of counsel's fee petition by objecting to its nonspecificity before the district director and requesting that counsel be directed to submit a supplemental fee petition, amended in accordance with Section 702.132. The district director however summarily rejected employer's objection and "strongly suggested" that employer "submit specific objections based on dates of service to [counsel's] fee." Employer's Exhibit 8.

³We reject employer's contention that counsel may not bill in minimum increments of one-quarter hour. The Board has held that use of the quarter-hour minimum billing method is permissible, as this method is reasonable and complies with the applicable regulation, 20 C.F.R. §702.132. *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); cf. *Bullock v. Ingalls Shipbuilding, Inc.*, 29 BRBS 131 (1995) (quarter-hour minimum billing is not permissible in cases arising in the Fifth Circuit, based on the law of

the circuit). It is within the district director's discretion to address whether specific charges are reasonable.

We reject employer's contention that the district director erred in awarding an hourly rate of \$275 based on his determination that such is within the prevailing rate in the New York metropolitan area routinely awarded for similar work.⁴ See generally *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT), *cert. denied*, 511 U.S. 1031 (1994); *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986). Consequently, we hold that employer has not met its burden of showing that the \$275 hourly rate awarded in the instant case is *per se* unreasonable. See *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Nevertheless, the district director may reconsider the hourly rate on remand in determining a reasonable fee.

In sum, on remand, claimant's counsel may resubmit before the district director a properly itemized fee petition which is in accordance with the regulatory requirements of Section 702.132. Employer, in turn, is to be given a reasonable time to file objections to counsel's amended fee petition. See generally *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). After consideration of the amended fee petition and any objections, the district director is instructed to issue an order regarding the attorney's fee request in which he fully considers the pleadings filed by both parties in conjunction with the criteria of Section 702.132, specifies any reductions, providing an adequate explanation thereof, and award an attorney's fee which is reasonably commensurate with the necessary work done and with the amount of benefits awarded. As employer notes, the Board has held that it is insufficient for the district director to award an attorney's fee by letter. *Thornton v. Beltway Carpet Service, Inc.*, 16 BRBS 29 (1983). Rather, the district director is required to award an attorney's fee through the issuance of a proper order. *Id.*; *Lopes v. New Bedford Stevedoring Corp.*, 12 BRBS 170 (1979).

⁴In his "Certification" of awarded hourly rates prepared for an administrative law judge, the district director stated that he has awarded fees between \$250 and \$350 per hour to experienced counsel in the New York metropolitan area.

Accordingly, we hereby grant the parties' motion to remand, vacate the district director's Letter awarding an attorney's fee, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge