

BRB Nos. 06-0485
and 06-0587

ANTHONY DIBLASE)
)
 Claimant-Respondent)
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 v.)
)
 LOGISTEC OF CONNECTICUT,) DATE ISSUED: 01/31/2007
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney's Fees and Supplemental Decision and Order Denying Motion for Reconsideration of Award of Attorney's Fees of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney Fee of David B. Groeneveld, District Director, United States Department of Labor.

David A. Kelly (Montstream & May L.L.P.), Glastonbury, Connecticut, for claimant.

Neil J. Ambrose (Letizia, Ambrose & Falls, P.C.), New Haven, Connecticut, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees and Supplemental Decision and Order Denying Motion for Reconsideration of Award of Attorney's Fees (2005-LHC-0932, 2005-LHC-0933) of Administrative Law Judge Colleen A. Geraghty (BRB No. 06-0485), and the Compensation Order Award of Attorney Fee (Case Nos. 01-0148806, 01-0150967) of David B. Groeneveld (BRB No. 06-0587), 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained injuries to his shoulders while working for employer on December 28, 1999, and August 26, 2000, for which employer voluntarily paid periods of temporary total disability from December 28, 1999, through March 27, 2000, and from November 14, 2000, through January 2, 2001, and temporary partial disability benefits from August 29, 2000, to November 13, 2000. Claimant thereafter sought an ongoing award of medical benefits under the Act. Having determined that claimant's current bilateral shoulder condition is work-related, the administrative law judge awarded medical benefits for the ongoing treatment of those conditions, but denied claimant's request for benefits related to a formal physical therapy program.

In light of the successful prosecution of the claim, both the district director and the administrative law judge awarded claimant's counsel an attorney's fee and costs for legal work performed before those tribunals. The district director assessed an attorney's fee and expenses of \$7,488.57 against employer. The administrative law judge, after noting that employer did not file any objections to the fee petition, awarded the requested attorney's fee of \$11,749.25, representing 26.3 hours of attorney time at an hourly rate of \$225, 30.8 hours of attorney work at an hourly rate of \$175, and 2.5 hours of paralegal work at an hourly rate of \$50, plus \$316.75 in costs to be paid by employer. Upon employer's motion for reconsideration, the administrative law judge addressed, but rejected employer's objections to claimant's counsel's fee petition, and upheld her prior award of an attorney's fee.

On appeal, employer challenges both the administrative law judge's and district director's awards of an attorney's fee. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred by awarding attorney's fees for work performed on claimant's state workers' compensation claim. In particular, employer contends that claimant's counsel's fee award should be reduced by \$1,135,¹ as these entries pertain to work performed before the Connecticut Workers' Compensation Board. Employer alternatively maintains that the administrative law judge should have adequately explained why these entries are awardable under the Act.

¹ Employer contends that this amount represents 4.5 hours of attorney work at an hourly rate of \$225, and .7 hours at an hourly rate of \$185. We note that the administrative law judge awarded the .7 hours in question at an hourly rate of \$175. Consequently, the requested reduction is \$1,135, and not \$1,142.

In addressing employer's objection, the administrative law judge reviewed the fee petition submitted by claimant's counsel and stated that "it did not request fees for work not performed before the Office of Administrative Law Judges." Supplemental Decision and Order on Reconsideration at 2. The administrative law judge found that claimant's counsel requested fees for services related only to his claim under the Act that were performed at the Office of Administrative Law Judges (OALJ) level. In this regard, the administrative law judge found that claimant's counsel attached two separate itemized fee petitions, one for work done before the OALJ and one for work done before the Connecticut Workers' Compensation Board. She stated that she limited her review exclusively to those hours associated with work at the OALJ level.² See *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). She thus overruled employer's objection on this issue.

After review of the attorney's fee petition submitted to the administrative law judge, however, there is merit in employer's challenge to specific entries as involving only the state claim. Initially, the entries of .1 hours on December 31, 2004, and .2 hours on October 13, 2005, involve work performed in conjunction with the Connecticut Workers' Compensation Board and must be disallowed. Additionally, as the hearing before the administrative law judge in this case took place in New London, Connecticut, on June 22, 2005, the .8 hours awarded on June 17, 2005, for "travel to and from Hartford," the site of the state workers' compensation hearing on that date, is not relevant to the resolution of claimant's claim under the Act. Consequently, we reduce the fee award by \$237.50, representing that .9 hours at an hourly rate of \$225, and .2 hours at an hourly rate of \$175.

In addition, we agree that claimant's counsel is not entitled to .2 hours claimed on December 17, 2004, or .5 hours claimed on December 20, 2004. These entries must be disallowed as they pertain to actions, a Motion to Correct the transcript and review thereof, which could not be related to the Longshore case as they occurred prior to the date of the June 22, 2005, hearing before the administrative law judge. We therefore reduce the fee award by an additional \$132.50, representing .2 hours at an hourly rate of \$225, and .5 hours at an hourly rate of \$175. With regard to the remaining entries listed

² The time entries relating to the state claim generally challenged by employer include services performed in late December of 2004, and in June, October, and December of 2005, and all fall within the time span from after the date of the informal conference before the district director on December 14, 2004, to the issuance of the administrative law judge's Decision and Order Awarding Benefits on December 19, 2005. See Hearing Transcript at 6; Decision and Order Awarding Medical Benefits dated December 19, 2005.

by employer as involving the state claim, employer's contention is rejected, as it has not established that this time is related solely to the state claim.

Additionally, while employer is correct in noting that claimant's entitlement to permanent partial disability benefits and his average weekly wage calculation ultimately were not issues resolved by the administrative law judge's decision in this case, the record contains evidence that they were potential issues for resolution while the case was pending before the administrative law judge. See ALJX 1, 5, 7. Employer, by letter dated May 31, 2005, sought clarification from the administrative law judge as to whether claimant's entitlement to permanent partial disability benefits was an issue. ALJX 8. The entries challenged by employer on this issue occurred prior to and on the date of the May 31, 2005, clarification letter and include work performed for a subsequent conference call between the parties and administrative law judge in which all sides apparently agreed that claimant's entitlement to permanent partial disability benefits and his average weekly wage were not issues in this case. The test for compensability of related issues concerns whether the attorney, at the time the work was performed, could reasonably regard it as necessary, rather than whether evidence or other work was actually used at the formal hearing. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The work related to the conference call is compensable under this test. Nonetheless, we agree that the entries pertaining to the calculation of claimant's average weekly wage are severable and should be excluded at this time, as the average weekly wage issue was unrelated. We thus reduce the fee award in this regard by \$100.³

Employer's remaining contention, that the administrative law judge erred by awarding attorney's fees for services related to claimant's unsuccessful efforts to obtain benefits for a physical therapy program, was not specifically raised before the administrative law judge and cannot be raised for the first time on appeal. *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Consequently, as employer's remaining assertions are otherwise insufficient to meet its burden of proving that the administrative law judge abused her discretion in awarding an attorney's fee in this case, *Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997), her award of an attorney's fee, as modified herein, is affirmed. Accordingly, claimant's counsel is entitled to an attorney's fee totaling \$11,279.25 payable by employer for work performed at the OALJ level.

Employer contends that the district director erred by awarding attorney's fees for work performed on issues that were not controverted, and for work performed in furtherance of claimant's state workers' compensation claim. Employer also argues that

³ This reduction represents the disallowance of .2 hours at \$225 per hour on April 25 and May 4, 2005, and 1.1 hours at \$50 per hour on May 17 and May 19, 2005.

the district director erred by awarding fees for work performed on issues upon which claimant did not prevail. The district director's Compensation Order reflects that he "reviewed the fee application taking into consideration the complexity of the case, the issues involved and the results obtained, the actual necessary work performed and other factors including the expertise of the attorney." Compensation Order at 1. It also indicates that he considered employer's "response letter of 3/15/06" prior to issuing his award of an attorney's fee. *Id.*

The district director specifically acknowledged that employer "raise[d] the issue of work being billed that was directed towards the State of Connecticut Act," but determined that he could "see nothing in the billing to suggest that such work was not contributory to the successful prosecution of benefits under the [Longshore Act]." Compensation Order at 1. He therefore concluded that the total attorney's fee requested of \$7,488.57 "is reasonably commensurate with the actual necessary work performed" while the case was pending before the Office of Workers' Compensation Programs.

In its brief, employer alleges that it submitted objections to claimant's counsel's fee petition before the district director on January 23, 2006, and on March 15, 2006. In its January 23, 2006, correspondence, employer objected to all entries for services performed prior to March 2004, as it alleged that there was no controversy until that time, and challenged the hourly rate requested in the fee petition. In its March 15, 2006, pleading, employer initially objected to, as indicated by the district director, all services relating to the state workers' compensation claim. Employer, however, also reiterated its challenge to all entries for services performed prior to March 2004, and further argued that certain other expenses were unreasonable as they involved work on issues ultimately dismissed by the administrative law judge.

While the district director recited the appropriate regulatory criteria, 20 C.F.R. §702.132, and provided a sufficient explanation for rejecting employer's specific objection regarding time allegedly spent exclusively on the state claim, he did not adequately discuss employer's other objections to the fee petition. We are thus compelled to vacate the district director's award of an attorney's fee and remand the case to the district director for explicit consideration of the remaining objections employer raised in its correspondence dated January 23, 2006, and March 15, 2006. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

Accordingly, the administrative law judge's award of an attorney's fee is modified to reflect an attorney's fee totaling \$11,279.25. In all other regards, the administrative law judge's decisions are affirmed. The district director's Compensation Order Award of Attorney Fee is vacated, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge