

BRB No. 92-1650

ZARINA SHIVJI (Widow of	)	
ANVERALI SHIVJI)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLTEN MARINE COMPANY,	)	
INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
STATE INSURANCE FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Daniel J. Savino, Jr. (Caruso, Spillane, Contrastano & Ulaner, P.C.), New York, New York, for claimant.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (Case No. 10-31346) of District Director Richard V. Robilotti 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).

Decedent died during the course of his employment with employer while working in Michigan. Claimant, decedent's widow, filed a claim for death benefits on September 25, 1991, but

due to a lack of medical evidence showing a causal relationship between the employment and the death, employer filed a notice of controversion. On December 2, 1991, claimant presented employer with proof of her status as widow and her child's dependent status, and on February 26, 1992, employer received medical evidence showing that decedent's death was work-related. Following receipt of this evidence, employer conducted an investigation which led it to accept liability for death benefits.

On April 3, 1992, claimant's counsel submitted a petition for a fee to the district director. He requested a total fee of \$8,500, representing 10.25 hours of attorney time and 3.75 hours of secretarial time. Carrier received the request on April 9, 1992, and formulated its objections thereto by April 13, 1992. Emp. Brief at 2. In his April 10, 1992, Order, the district director listed the factors he considered in awarding the fee, including the value of counsel's services to claimant, the complexity of the case, the amount of time involved, the results achieved, and the professional expertise of counsel, and he summarily awarded counsel a fee in the amount of \$5,500. Employer appeals the fee award, and claimant's counsel responds, urging affirmance.<sup>1</sup>

Employer first contends that the fee application submitted by counsel is inadequate and does not satisfy the regulatory criteria. Specifically, it argues that counsel failed to indicate the hourly billing rate and who performed the work, and further, that he inappropriately included secretarial tasks in the request. Employer also contends that counsel's fee petition effectively bills employer at the "grossly excessive" rate of approximately \$829 per hour (\$8,500 divided by 10.25 hours of attorney time), and the district director's reduction of the total fee results in an hourly rate of approximately \$536 (\$5,500 divided by 10.25 hours of attorney time). For the following reasons, we agree with employer's contentions.

Section 702.132(a) of the regulations provides in pertinent part:

The [fee] application shall be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status . . . of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work. Any fee approved shall be reasonably commensurate with the necessary work done. . . .

20 C.F.R. §702.132(a). A review of the fee petition in this case reveals that counsel omitted his normal billing rate from the request. Such omission renders the fee application incomplete. When a fee request is incomplete, the fee must be withheld until a completed statement is filed. *See Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981). Moreover, in awarding a fee based on this incomplete petition, the district director failed to indicate which hours of service he approved

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<sup>1</sup>Employer states it has voluntarily paid counsel a fee of \$1,281.25, representing 10.25 hours of services at a rate of \$125 per hour. Emp. Brief at 5 n.2. Claimant's counsel argues that he is entitled to at least an hourly rate of \$250. Oct. 6, 1993 Addendum to Cl. Brief.

and the hourly rate he awarded. Such omission renders this fee award unreviewable.<sup>2</sup> *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984). As the fee request is incomplete and the fee award is unreviewable, we must vacate the award and remand the case for more complete consideration.<sup>3</sup> *See Smith v. Aerojet-General Shipyards*, 16 BRBS 49 (1983).

Employer also contends the district director's fee award denied it due process by failing to allow it a reasonable opportunity to respond and object to the fee petition. Employer's argument has merit. Due process requires that the fee request be served on employer and that employer be given a reasonable time to respond. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). The Board has held that five days is not a reasonable time within which to respond, even when the parties do not object at the hearing to such a limited response time. *Harbour v. C & M Metal Works, Inc.*, 10 BRBS 732 (1978). In this case, counsel's fee petition is dated April 3, 1992. Employer received the petition on April 9, and, on April 10, the district director awarded a fee. Thus, employer was not afforded a reasonable time within which to file its objections to counsel's fee petition and was denied due process. *See id.* at 734. On remand, the district director must allow employer an opportunity to respond and object to counsel's fee petition, and he must address those objections prior to issuing a new fee award.

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<sup>2</sup>We also agree with employer that the hourly rates requested and awarded, as computed from the petition and the fee award, are excessive.

<sup>3</sup>We note that counsel included time for work performed by his secretary in his fee request. Traditional clerical duties are not compensable services and must be included as part of the attorney's overhead, *see Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979); however, if clerical employees perform work which is usually performed by an attorney, law clerk, or paralegal, the time spent on that task is separately compensable. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986); *Staffile v. International Terminal Operating Co., Inc.*, 12 BRBS 895 (1980). The district director did not determine whether the requested secretarial time is compensable; therefore, he must do so on remand.

Accordingly, the district director's Compensation Order awarding an attorney's fee is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge