

R. B.)
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 Claimant-Petitioner)
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 v.)
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 KINDER MORGAN BULK TERMINALS) DATE ISSUED: 03/28/2007
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 and)
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 THE GRAY INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Compensation Order-Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

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

PER CURIAM:

Claimant appeals the Compensation Order-Approval of Attorney Fee (Case No. 14-135737) of District Director Karen P. Staats 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for the second time. Claimant injured his left shoulder on March 10, 2001, in the course of his employment as a longshoreman. He underwent surgery on May 24, 2001, and sought benefits for a four percent impairment of the left arm pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), and a nominal award for prospective loss in wage-earning capacity pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). Employer responded, contending that claimant had an unscheduled

injury, that he had no loss in wage-earning capacity, and thus, that he was not entitled to continuing disability benefits under the Act. Following the referral of the claim to the Office of Administrative Law Judges (OALJ) for a hearing, the parties agreed to an unscheduled nominal award. Therefore, the case was remanded and the district director entered a Consent to the Entry of Compensation Order on March 31, 2005.

Subsequently, claimant's attorney submitted a fee application in the amount of \$3,237.50, for 11 hours of legal services rendered before the Office of Workers' Compensation Programs at the hourly rate of \$275, .75 hours of legal assistant services at the hourly rate of \$100, .5 hours of attorney time for responding to employer's objections, plus \$354.72 in costs. In her initial Compensation Order, the district director disallowed the 3.75 hours of legal services performed prior to the date the dispute over permanent partial disability arose. In addition, the district director reduced the number of hours requested for pursuit of permanent partial disability benefits and the amount of the costs by half to reflect claimant's failure to establish entitlement to a scheduled award under Section 8(c)(1). The district director awarded claimant's attorney an additional .5 hours for preparation of his fee petition and .5 hours to prepare his response to employer's objections. The district director also reduced the hourly rate to \$200, and, thus, awarded a fee in the amount of \$725, representing 3.5 hours of legal services at the hourly rate of \$200, and .25 hours of legal assistant time at the hourly rate of \$100, plus costs of \$177.36.

Claimant appealed the fee award to the Board. *Barnes v. Kinder Morgan Bulk Terminals*, BRB No. 05-0767 (May 24, 2006) (unpublished). The Board affirmed the hourly rate awarded and the district director's accounting for claimant's partial success. The Board vacated the award of costs, as a partial success analysis is not applicable to costs pursuant to Section 28(d), 33 U.S.C. §928(d). The Board also vacated the district director's finding that employer is not liable for services performed before May 27, 2003, and from March 4, 2005 to March 19, 2005. The Board remanded the case for the district director to determine the date that employer received notice of the claim as its liability for a fee can accrue from that date. The Board further remanded for the district director to consider the necessity and reasonableness of the time requested from March 4, 2005 to March 19, 2005, as it may relate to services performed to "wind-up" the case. Claimant's motion to reconsider the Board's affirmance of the hourly rate awarded and the district director's accounting for claimant's partial success was denied. *Barnes v. Kinder Morgan Bulk Terminals*, BRB No. 05-0767 (Jan. 23, 2007) (order on recon.) (unpublished).

In her Order on remand, the district director determined that employer's fee liability commenced on November 18, 2001, when claimant's attorney wrote to employer that claimant was pursuing a claim for permanent disability. The district director calculated that claimant's counsel expended 8.5 hours of attorney time and .5 hours of

paralegal time during the period from November 18, 2001, to January 24, 2004. As the Board affirmed the prior 50 percent reduction in attorney time, the district director reduced by 50 percent to 3.375 the number of hours awarded for this period. The district director also determined, in the absence of any objection by employer, that claimant's counsel is entitled to a fee for 1.75 hours of attorney time expended in wind-up services from March 4, 2005 to March 19, 2005, after the case was remanded from the OALJ. The district director reinstated the award of one hour of attorney time to prepare and defend the fee application, as this previously awarded time was undisturbed by the Board. The district director next determined, in the absence of any objection by employer, that claimant's attorney is entitled to all costs claimed, totaling \$354.72. Accordingly, claimant's counsel was awarded a fee of \$1,275, representing 6.125 hours of attorney time at \$200 per hour, and .5 hours of paralegal time at \$100 per hour, plus costs of \$354.72.

On appeal, claimant contends that the district director erred in disallowing a fee for services performed prior to filing the claim on November 18, 2001, and in reducing the hourly rate. Claimant also contends that the district director should not have reduced the number of hours awarded for attorney time by 50 percent. Finally, claimant contends that the district director erred by issuing her fee order on remand on June 15, 2006, which is prior to the date the Board issued its decision on reconsideration, and that the district director erred by not augmenting the fee for the additional 13-month delay in obtaining a fee order after claimant's initial appeal to the Board. Employer has not responded to this appeal.

Initially, we address claimant's contention that the district director erred by disallowing a fee for all services performed prior to the filing of the claim on November 18, 2001, in reducing the hourly rate, and in reducing the number of hours awarded for attorney time by 50 percent. The Board held in its decision, consistent with the prevailing authority in the Ninth Circuit, in whose jurisdiction this case arises, that the earliest date that employer's fee liability can accrue is the date it received notice of the claim from the district director. 33 U.S.C. §928(a); *Barnes*, slip op. at 3; see *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Thus, the district director properly found that employer is not liable for any attorney's fees for work performed prior to November 18, 2001. Moreover, in its decision and on reconsideration, the Board affirmed, as within the district director's discretion and in accordance with law, the district director's reducing the hourly rate requested from \$225 to \$200, and her reducing the fee request in proportion to the success achieved. *Barnes*, slip op. at 3-5; *Barnes*, recon. slip op. at 1; see also *Hensley v. Eckerhart*, 461 U.S. 424 (1983); 20 C.F.R. §702.132. As the Board thoroughly considered these issues in its initial decision and on reconsideration, the Board's prior holdings constitute the law of the case. See, e.g., *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

Claimant next argues that the district director did not have jurisdiction at the time she issued her fee award on remand. The Board issued its decision on May 24, 2006. The district director issued her order on June 15, 2006. Subsequently, claimant timely moved for reconsideration of the Board's decision. The Board denied claimant's motion in an Order issued on January 23, 2007. Although it is preferable that the district director not issue a decision on remand until the Board physically remands the case upon the expiration of the time for filing a motion for reconsideration, the district director was not prohibited from issuing a new fee order pursuant to the Board's remand instructions while the motion for reconsideration was pending before the Board. In view of the Board's denial of claimant's motion for reconsideration, we reject claimant's contention that the district director's order on remand must be vacated.

Finally, claimant's counsel argues that the district director erred by not enhancing the fee award based on the 13-month delay in his receiving a fee order after claimant successfully appealed the district director's initial order. Claimant's counsel may submit a supplemental fee petition to the district director requesting a fee enhancement, as the district director has the authority to rule on whether enhancement is warranted. *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *see also Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 112(CRT) (9th Cir. 1999); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). Accordingly, we affirm the district director's fee award.

We next address claimant's counsel's request for an attorney's fee for work performed before the Board in the prior appeal in this case, BRB No. 05-0767. On July 7, 2006, counsel for claimant submitted an attorney's fee petition to the Board seeking a fee totaling \$3,522.50, representing 9.75 hours of attorney time at \$350 per hour, and 1 hour of legal assistant time at \$110 per hour.¹ Employer has not responded to the attorney's fee request. Claimant is entitled to an attorney's fee payable by employer for successfully prosecuting his appeal in part. *See McKnight v. Carolina Shipping Co.*, 32 BRBS 251, *aff'g on recon. en banc*, 32 BRBS 165 (1998); 20 C.F.R. §802.203(b). However, the time requested is excessive under the circumstances of this case, as claimant's counsel was only partially successful in pursuing his appeal of the district director's fee award, and his motion for reconsideration was wholly unsuccessful. In light of counsel's partial success before the Board, we approve 5.75 hours of attorney

¹ Claimant's petition states the legal assistant expended 7.25 hours; however, a review of itemized entries shows that the legal assistant expended one hour on this case.

time, and one hour of legal assistant time.² *Hensley*, 461 U.S. at 424; *see generally McKnight*, 32 BRBS at 253. Moreover, the requested hourly rate for claimant's counsel, \$350, is excessive and not commensurate with the rate the Board awards in the geographic region for similar cases. *See Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995); *see generally Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); 20 C.F.R. §802.203(d)(4). Therefore, we reduce claimant's counsel's hourly rate to \$250, and award a fee in the amount of \$1,547.50, representing 5.75 hours of legal services at the hourly rate of \$250, and one hour of legal assistant time at the hourly rate of \$110, payable directly to counsel by employer. 20 C.F.R. §802.203(e).

² We disallow .5 hours of attorney services performed on August 11, 2005, for preparing the brief and the 3.5 hours requested on June 23, 2006, for preparation of the wholly unsuccessful motion for reconsideration.

Accordingly, the district director's Compensation Order-Approval of Attorney Fee on remand is affirmed. Claimant's counsel is entitled to an attorney's fee of \$1,547.50 for work performed before the Board, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge