

BRB No. 14-0090

TIMOTHY HEYDEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CHET MORRISON, INCORPORATED)	
)	DATE ISSUED: <u>Oct. 17, 2014</u>
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees and the Compensation Order Award of Attorney Fees on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Isaac H. Soileau, Jr. (Soileau & Associates, L.L.C.), New Orleans, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney's Fees and the Compensation Order Award of Attorney Fees on Reconsideration (Case No. 07-179123) of District Director David A. Duhon 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (the Act). The attorney's fee award 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.

Conoco, Inc. v. Director, OWCP, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sought compensation under the Act for injuries he sustained to his neck and shoulders while working as a rigger/painter for employer on June 2, 2006.¹ Employer controverted the claim on the basis that claimant was a “member of a crew” excluded from coverage under the Act, 33 U.S.C. §902(3)(G). The parties subsequently reached agreement on all issues except attorney’s fees, and the settlement was approved by the administrative law judge pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), on June 4, 2013.²

Claimant’s counsel filed fee petitions for work performed at the Office of Workers’ Compensation Programs (OWCP) from October 24, 2006 to January 6, 2009, June 7 to October 15, 2010, and June 17 to August 24, 2011. Specifically, counsel sought a total fee of \$71,031.49, representing 141.1 hours by Isaac H. Soileau, Jr., at an hourly rate of \$250, 98.8 hours by Ryan Jurkovic at an hourly rate of \$210, and 153.3 hours by paralegal, John Helgason, at an hourly rate of \$80, plus costs and advances of \$2,720.49. In his Compensation Order Award of Attorney’s Fees, the district director denied counsel’s petition for fees for work performed from October 24, 2006 to January 6, 2009, and June 7 to October 15, 2010, finding that claimant did not successfully prosecute any claim during these periods. The district director awarded counsel an attorney’s fee of \$2,959 for the period from June 17 to August 24, 2011.

Claimant’s counsel filed a motion for reconsideration. In denying the motion, the district director stated that counsel had twice requested remand of the case from the OALJ to the district director’s office without justification and when no additional work was required before the district director’s office. The district director stated that, therefore, the work performed during these periods did not result in a successful outcome and, alternatively, that the unexplained remands resulted in excessive and unnecessary charges.

¹Claimant also filed suit under the Jones Act, 46 U.S.C. §688(a), which ultimately was dismissed.

²Pursuant to the parties’ agreement, claimant received \$200,000 for disability benefits and a Medicare Set Aside to cover the costs of future medical care, and employer assumed liability for unpaid medical treatment and out-of-pocket pharmacy bills amounting to approximately \$12,000. Employer also accepted liability for claimant’s attorney’s fees, although the amount of the fee remained in dispute.

On appeal, claimant challenges the district director's denial of an attorney's fee for most of counsel's services.³ Employer responds, urging affirmance of the district director's fee award.⁴

Claimant challenges the district director's denial of a fee for time expended during the periods from October 24, 2006 to January 6, 2009 and June 7 to October 15, 2010. The district director denied a fee for this time because counsel had not "successfully prosecuted" any claim for benefits during these periods. The district director reasoned that in each instance the claim had been referred to the OALJ and thereafter remanded to the OWCP without the payment of any benefits by employer and with employer continuing to controvert claimant's entitlement to benefits under the Act; thus, there was no "success" during these periods. On reconsideration, the district director summarily added that, "claimant's requests for remand in those two time periods resulted in excessive and unnecessary charges in pursuit of benefits in this case." Order on Reconsideration at 2.

The district director erred in denying a fee on the basis that claimant was not "successful" in each discrete period. The claim is to be viewed a whole, and claimant's ultimately successful claim, pursuant to the parties' settlement agreement, renders employer liable for all reasonable and necessary work performed while the claim was before the OWCP. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). Accordingly, we vacate the district director's denial of an attorney's fee for the periods from October 24, 2006 to January 6, 2009, and June 7 to October 15, 2010.⁵ As counsel is entitled to a

³In his Petition for Review and brief, claimant's counsel challenges the fee award issued in this case by Administrative Law Judge Kennington. Claimant did not file a notice of appeal, or any document that could be construed as such, of the administrative law judge's fee award within 30 days of the date the fee order was filed by the district director. See Claimant's Notice of Appeal dated December 13, 2013; *Heyden v. Chet Morrison, Inc.*, BRB No. 14-0090 (Feb. 24, 2014) (Board's acknowledgement order); 33 U.S.C. §921; 20 C.F.R. §§702.350, 802.205(a), 802.208. Therefore, we will not address claimant's contention in this regard.

⁴Employer also filed a Motion to Strike 16 exhibits claimant submitted with his Petition for Review and brief. As none of the documents challenged by employer is relevant to the merits of claimant's appeal of the district director's fee order, employer's motion is moot. 20 C.F.R. §802.219.

⁵The district director's award of an attorney's fee of \$2,959 for the period covering June 17 to August 24, 2011, is affirmed as it is unchallenged on appeal.

fee only for work that was reasonable and necessary at the time the service was rendered, we instruct the district director that, on remand, he must apply this standard to the time expended from October 24, 2006 to January 6, 2009, and June 7 to October 15, 2010.⁶ *See generally O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980). In addition, the district director should take into account claimant's degree of success. 20 C.F.R. §702.132. The district director must explain his rationale for denying a fee for specific services. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

Accordingly, the district director's denial of an attorney's fee for the periods from October 24, 2006 to January 6, 2009 and June 7 to October 15, 2010, is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the district director's Compensation Order Award of Attorney's Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁶We note that this test is also applicable to any award of costs requested by counsel during this time frame. *See* 33 U.S.C. §928(d); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).