ESTHER BROWN (Widow of ARCHIE BROWN) Claimant-Petitioner v. MARINE TERMINALS CORPORATION and SAN FRANCISCO STEVEDORE COMPANY and ITT HARTFORD/SPECIALTY RISK SERVICES Employer/Carrier- Respondents	)	BRB No. 95-0784
ESTHER BROWN (Widow of ARCHIE BROWN) Claimant-Respondent v. MARINE TERMINALS CORPORATION and SAN FRANCISCO STEVEDORE COMPANY and ITT HARTFORD/SPECIALTY RISK SERVICES Employer/Carrier- Petitioners	)	BRB No. 95-1183 DATE ISSUED: _____

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	*EN BANC*

Appeals of the Supplemental Decision and Order - Awarding Attorney Fees of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor, and the Supplementary Compensation Order of Edward Orozco, District Director, United States Department of Labor.

Victoria Edises (Kazan, McClain, Edises, Simon & Abrams), Oakland, California, for claimant.

Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

HALL, Chief Administrative Appeals Judge:

Claimant, the widow of Archie Brown (decedent), appeals the Supplemental Decision and Order - Awarding Attorney Fees (93-LHC-1743) of Administrative Law Judge Vivian Schreter-Murray, and employer appeals the Supplementary Compensation Order (Case No. 13-87609) of District Director Edward Orozco, 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).[1] We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Carter v. Merritt Ship Repair,* 19 BRBS 94 (1986). 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

[1]By Order dated March 22, 1995, the Board consolidated for purposes of decision claimant's appeal of the administrative law judge's Supplemental Decision and Order - Awarding Attorney Fees, BRB No. 95-0784, and employer's appeal of the district director's Supplementary Compensation Order, BRB No. 95-1183. 20 C.F.R. §802.104.

with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). We grant the Director's motion to consider the issues raised in this case *en banc*. *See generally* 33 U.S.C. §921(b)
(5); 20 C.F.R. §802.407(c).

Decedent filed a claim for benefits under the Act on October 10, 1990, against several longshore employers, based on his work-related exposure to asbestos. He died on November 23, 1990, due to mesothelioma. Thereafter, on March 26, 1992, claimant filed a claim for death benefits. Subsequent to the hearing before an administrative law judge in the instant matter, claimant entered into a settlement with employer pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i)(1988), on June 16, 1994, wherein employer agreed to pay a lump sum of $40,000 to claimant, plus a reasonable attorney's fee and costs.

On June 23, 1994, the administrative law judge issued an order approving the settlement, which was subsequently filed in the office of the district director and served on the parties on June 27, 1994. On July 5, 1994, employer sent a check to claimant for the settlement amount; however, because the check was issued in the name of decedent and not claimant, employer issued and delivered a second check, payable to claimant, on July 8, 1994. Claimant thereafter sought imposition of a penalty under Section 14(f) of the Act, 33 U.S.C. §914(f), contending that employer's payment of compensation was not timely made. In his Supplementary Compensation Order dated February 10, 1995, the district director found that employer was liable for a Section 14(f) penalty in the amount of $8,016.25, as its payment on July 8, 1994, was not timely made. Employer subsequently paid to claimant the Section 14(f) assessment.

On May 25, 1994, claimant's counsel submitted an attorney's fee petition to the administrative law judge requesting an attorney's fee of $23,955, representing 119.8 hours of legal services performed by claimant's lead counsel at an hourly rate of $175, 18.3 hours of legal services performed by claimant's associate counsel at an hourly rate of $125, and 14.05 hours of services performed by counsel's paralegals at an hourly rate of $50, plus $8,090.91 in expenses. Employer submitted objections to the fee petition. In a Supplemental Decision and Order - Awarding Attorney Fees dated November 21, 1994, the administrative law judge considered employer's specific objections to the fee petition and reduced the number of hours sought by claimant's lead counsel to 69.125, reduced the hourly rate sought for services performed by claimant's lead counsel to $165, reduced the hourly rate sought for services performed by claimant's associate counsel to $100, reduced the number of hours sought for services performed by counsel's paralegals to 1.6, and disallowed $5,219 in expenses. The administrative law judge thereafter awarded counsel a fee of $12,785.63, plus $2,871.91 in expenses.

On appeal, employer challenges the district director's determination that it is liable for a Section 14(f) penalty, contending that the district director should have applied Rule 6(a) of the Federal Rules of Civil Procedure (FRCP), Fed. R. Civ. P. 6(a), when computing the 10-day time limit under Section 14(f). Claimant responds, urging affirmance of the district director's decision. BRB No. 95-1183. The Director, Office of Workers' Compensation Programs (the Director), has

filed a motion to dismiss employer's appeal, asserting that since the district director's award was essentially a supplementary order of compensation, the Board lacks jurisdiction to decide the appeal pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a). Alternatively, the Director filed a response to employer's appeal urging affirmance of the district director's decision, arguing that Rule 6(a) is not applicable to determinations of timeliness under Section 14(f).

In her appeal of the administrative law judge's award of an attorney's fee, claimant challenges the reductions in the attorney's fee petition ordered by the administrative law judge. BRB No. 95-0784. Employer has not filed a response to claimant's appeal.

I. JURISDICTION

Initially, we address the Director's motion to dismiss employer's appeal of the district director's order awarding a Section 14(f) penalty. The Director contends that the district director's order was a supplementary award declaring the amount of the default under Section 18(a) which can only be reviewed by the appropriate district court.[2] We disagree. Under Section 18(a) of the Act, an order regarding an employer's default in paying a compensation award may be enforced only by the Federal District Court for the judicial district in which the employer has its principal place of business, or maintains an office, or in which the injury occurred. 33 U.S.C. §918(a); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1219, 18 BRBS 60, 62-63 (CRT)(5th Cir. 1985); *Providence Washington Insurance Co. v. Director, OWCP [Kain]*, 765 F.2d 1381, 1386, 17 BRBS 135, 139 (CRT)(9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT)(5th Cir. 1983).

In *Lauzon*, *Kain*, and *Patterson*, the employers refused to pay compensation, requiring district court enforcement of the award under Section 18(a). In the instant case, however, employer has paid both the compensation and the Section 14(f) penalty awarded to claimant. The United States Court of Appeals for the Third Circuit recently affirmed the Board's longstanding position that it retains jurisdiction in cases such as this involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring enforcement of that penalty pursuant to Section 18(a). *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *see also McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989). In *Barry*, the Third Circuit rejected the Director's contention that the Board lacks jurisdiction to review the propriety of the Section 14(f) assessment on facts akin to those herein. The court stated that once the Section 14(f) penalty has been paid, review is unavailable by a district court, and that the Director's reasoning would require an employer to withhold payment in order to force litigation in a district court. The court stated that requiring a claimant to await the outcome of this litigation before receiving payment is counter to the purposes of the Act. *Barry*, 41 F.3d at 906-907, 29 BRBS at 4-5

[2]We note that in her appeal, the Director does not contend that a district director's order cannot be directly reviewed by the Board. Rather, the Director argues that the district director's order in the instant case was a supplementary award under Section 18(a) of the Act and, therefore, can only be reviewed by an appropriate federal district court.

(CRT). For these reasons, therefore, we deny the Director's motion to dismiss employer's appeal.

In so holding, we note that our dissenting colleagues raise an issue not presented by any of the parties to this appeal. No one raises the issue of whether a direct appeal from the district director can be taken or asserts that a hearing before the administrative law judge is necessary or required. The Board, in agreement with the position of the Director, OWCP, in cases under the Longshore Act, has consistently held since its inception that a direct appeal may be taken when the issue raises a discretionary act of the district director or a legal question requiring no findings of fact. *See, e.g., Glenn v. Tampa Ship Repair*, 18 BRBS 705 (1986). Contrary to the opinion of our dissenting colleagues, the Rules of Practice and Procedure before the Board specifically permit an aggrieved party to appeal a decision of a district director to the Board. *See* 20 C.F.R. §802.201(a). The current version of Section 802.201(a) was adopted after the 1984 Amendments to the Act to provide for appeals of decisions of the administrative law judge or the district director. *Compare* 20 C.F.R. §802.201(a)(1984) *with* 20 C.F.R. §802.201(a)(1994). While our dissenting colleagues rely on the decision of the United States Court of Appeals for the Seventh Circuit in *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), that decision was issued prior to this regulatory change and involved a statutory provision repealed by Congress in 1984, 33 U.S.C. §914(j)(1982)(repealed 1984).

Moreover, the remaining cases cited by our dissenting colleagues, *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), and *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989), were decided under the Black Lung Act, which has its own regulations contained at 20 C.F.R. Part 725. These regulations are not applicable to the Longshore Act. Most significantly, in both cases, the Director vigorously asserted that direct appeal was inappropriate and that the cases should have been referred for a hearing by administrative law judges. By contrast, the Director is a longstanding proponent of direct appeal in appropriate Longshore Act cases.[3] *See, e.g., Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988). Lastly, in each of the cases relied upon by our dissenting colleagues, a hearing was requested.[4] This simply is not the case before us. In the instant case, no party seeks a

[3]In fact, in a supplemental filing in *Lukman*, the Director clarified her brief on this point, stating:

> [I]t is not the Director's position...that Section 21(b)(3) of the Longshore Act, 33 U.S.C. §921(b)(3), limits the jurisdiction of the Benefits Review Board in all cases to review of administrative law judge decisions. Rather, the Director reads the second sentence of Section 21(b)(3)...as merely prohibiting the Board from taking new evidence and limiting it to the record made before an administrative law judge or [district director].

November 21, 1989, letter brief of Director, OWCP. The Director concluded that because the issue raised in *Lukman* involved basic entitlement questions raised by a claim, a hearing was necessary in that case.

[4]As our dissenting colleagues note, the court in *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), relied on 20 C.F.R. §702.316, which provides for transfer to the Office of

formal hearing before an administrative law judge and there is no factual issue in dispute. With regard to the issue of a Section 14(f) penalty, all parties agree that following the administrative law judge's June 23, 1994 order approving the settlement between claimant and employer, payment was made to claimant on July 8, 1994. Thus, resolution of the issue presented requires only a legal interpretation of the 10-day time limit contained in Section 14(f), and requires no factual determinations with regard to time of filing, time of payment and method of proof. As the Fifth Circuit stated in *Nordahl*, where a proceeding presents exclusively an issue of pure law and requires no factfinding by an administrative law judge, it would be "illogical" and "inefficient" to hold an evidentiary hearing that would produce "additional delay without the possibility of a different outcome." *Nordahl*, 842 F.2d at 784, 21 BRBS at 42 (CRT). Similarly, the issue controverted by the parties herein was solely a legal one which did not require factfinding by an administrative law judge and, thus, the scheduling of a formal hearing would only result in administrative inefficiency.

II. SECTION 14(f)

Next, we consider the merits of employer's appeal of the district director's determination that employer's payment of compensation was untimely pursuant to Section 14(f). BRB No. 95-1183. Section 14(f) states:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

Administrative Law Judges by the district director when "further conference would be unproductive, or if any party has requested a hearing." The court emphasized the latter phrase and the fact that claimant Pearce requested a hearing. Unlike *Pearce*, *Lukman* and *Pyro Mining*, there is no assertion here that a hearing is necessary to resolve any issue.

33 U.S.C. §914(f). Compensation payable under an order becomes due on the day the order is filed with the district director. 33 U.S.C. §921(a); *see also* 33 U.S.C. §919(e). It is well-established that when payment is sent by mail, the time of payment is the date payment is received by the payee and not the date it was mailed. *See, e.g., Barry*, 27 BRBS at 264; *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989). In the instant case, it is uncontroverted that the compensation awarded in the order approving the parties' settlement became due on June 27, 1994, the day the administrative law judge's order was filed by the district director. Thus, the issue presented by this appeal is whether claimant's receipt of employer's check on July 8, 1994, 11 days after it was due, was untimely payment under Section 14(f).

Employer's sole argument on appeal is that in computing the 10-day time limit under Section 14(f), the district director should have applied Rule 6(a) of the FRCP. Employer urges the Board to adopt the position of the United States Court of Appeals for the Fifth Circuit, *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (CRT), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT) (5th Cir. 1990), *cert. denied* 500 U.S. 916 (1991), that Rule 6(a) applies to time computations under Section 14(f). Rule 81(a)(6) of the FRCP provides that the FRCP apply to "proceedings for enforcement or review of compensation orders under the [LHWCA] U.S.C., Title 33, §§918, 921 . . ." Fed. R. Civ. P. 81(a)(6). Rule 6(a) provides:

> In computing any period of time prescribed or allowed by these rules . . ., or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days. *When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.*

Fed. R. Civ. P. 6(a)(emphasis added). Since the prescribed period in Section 14(f) is less than 11 days, employer argues that the district director should have excluded the intermediate Saturdays and Sundays, as well as the Fourth of July holiday, thus extending the period allotted for payment by 5 days, and found that employer's payment on July 8, 1994 was timely under Section 14(f). We reject employer's contention.

In the time since employer filed its brief on appeal, the Board held that Rule 6(a) of the FRCP is not applicable to time computations under Section 14(f), and that the 10-day time limit under Section 14(f) means 10 calendar days. *Irwin v. Navy Resale Exchange*, 29 BRBS 77 (1995). In so holding, the Board declined to accept the rationale of the Fifth Circuit in *Quave* and instead adopted the reasoning of the United States Court of Appeals for the Fourth Circuit in *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 28 BRBS 118 (CRT)(4th Cir. 1994), wherein the court concluded that Section 14(f) is a substantive, not a procedural, provision which does not involve a "proceeding for enforcement or review" under the Act. *Reid*, 41 F.3d at 202, 28 BRBS at 121 (CRT). Thus, for the reasons set forth in *Irwin* and *Reid*, we reject employer's contention that

Rule 6(a) of the FRCP applies to Section 14(f).[5] We affirm the district director's finding that employer's payment of compensation to claimant on July 8, 1994, 11 days after it became due, was untimely under Section 14(f), and that employer is liable for a Section 14(f) assessment.[6]

III. ATTORNEY'S FEE

Lastly, we consider claimant's appeal of the administrative law judge's Supplemental Decision and Order - Awarding Attorney Fees. BRB No. 95-0784. Claimant first contends that the administrative law judge erred in reducing the hours requested in the fee petition. Specifically, claimant contends that the time counsel spent in obtaining settlements from other employers should not have been disallowed by the administrative law judge, and that billing for the preparation of internal memoranda should be compensable. An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Parrott v. Seattle Joint Port Labor Relations Committee of the Maritime Ass'n*, 22 BRBS 434 (1989).

In her Supplemental Decision and Order, the administrative law judge reduced the hours requested by claimant's lead counsel for time spent in securing settlements from other employers, finding that these services were chargeable to the other employers, not employer herein, and further noting that counsel had already received an aggregate amount of $7,969 in fees and costs from these employers pursuant to the other settlements.[7] The administrative law judge also reduced the number of requested hours for services she found to be inadequately explained in counsel's fee petition, disallowed entries that she deemed part of counsel's overhead, including time spent on intra-office communication, reduced the time requested for the review of ordinary correspondence, and disallowed the entries for services performed by counsel's paralegals which she deemed to be clerical in nature and part of counsel's overhead.[8] Thus, the administrative law judge reduced the

[5]While the United States Court of Appeals for the Ninth Circuit, wherein this case arises, has yet to rule on this issue, we note that *Irwin* also arose in the Ninth Circuit.

[6]Based on our ruling herein, we need not address claimant's argument that employer's payment of compensation was untimely pursuant to Section 18.4(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.4(a).

[7]Claimant, in her brief, concedes that lead counsel unintentionally failed to deduct from the attorney's fee petition $2,750 in fees and $5,219 in costs received pursuant to prior settlements with other employers, and that the proper amount requested should have been $24,086.91, representing $21,205 in fees and $2,871.91 in costs. *See* Claimant's Brief at 4.

[8]Traditional clerical duties performed by clerical employees are not compensable services for which separate billing is permissible; rather, these services must be included as part of counsel's overhead. *See Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979).

number of hours sought by claimant's counsel from 152.15 to 88.72.

We hold that claimant's assertions on appeal are insufficient to meet her burden of proving that the administrative law judge abused her discretion in reducing the number of hours requested in the fee petition. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). In each instance, the administrative law judge set forth the rationale upon which she relied in reducing the number of hours sought by claimant's counsel. It is well-established that fees for services deemed excessive may be properly disallowed. *See Davenport v. Apex Decorating Company, Inc.*, 18 BRBS 194 (1986). Accordingly, we affirm the reductions made, and consequently the number of hours awarded to counsel, by the administrative law judge.

Claimant next challenges the reductions made in the hourly rates sought by counsel. Specifically, claimant asserts that the administrative law judge erred in reducing the hourly rate sought by claimant's lead counsel to $165, since the instant claim was complex and the rate awarded is not commensurate with counsel's qualifications. Similarly, claimant challenges the hourly rate of $100 awarded to her associate counsel, asserting that the awarded rate does not account for the legal experience of this attorney.

The complexity of legal issues is but one factor to be considered when awarding an attorney's fee. *See* 20 C.F.R. §702.132; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). In the instant case, the administrative law judge specifically considered the complexity of the legal issues, as well as the qualifications of claimant's lead and associate counsel, in finding that an hourly rate of $165 for lead counsel, and an hourly rate of $100 for associate counsel, were commensurate with the services performed. Inasmuch as claimant's assertions that counsel's qualifications require higher hourly rates are insufficient to meet her burden of proving the hourly rates awarded by the administrative law judge are unreasonable, we affirm the rates awarded by the administrative law judge. *See Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Next, claimant asserts that the administrative law judge improperly limited the amount of the awarded fee to that commensurate with the amount of the settlement agreed to by employer. In her award of an attorney's fee, the administrative law judge noted that the amount of the awarded fee is equal to 32 percent of claimant's net recovery of $40,000. The administrative law judge thereby recognized that the amount of benefits obtained is a proper consideration in determining the amount of an attorney's fee award. *See generally Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566 (1992); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992); 20 C.F.R. §702.132(a). We therefore reject claimant's contention.

Claimant's contention that the fee award of District Director Edward Orozco in another case mandates a different result in this case is without merit. The determination of the amount of an attorney's fee is within the discretion of the body awarding the fee based on the circumstances of the

specific case before it. *See* 33 U.S.C. §928(c); 20 C.F.R. §702.132.

Accordingly, the Supplemental Decision and Order - Awarding Attorney Fees of the administrative law judge, BRB No. 95-0784, and the Supplementary Compensation Order of the district director, BRB No. 95-1183, are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

BROWN and McGRANERY, Administrative Appeals Judges, concurring and dissenting:

The procedural history of this case is set forth in the majority's opinion. Decedent's claim for compensation and claimant's claim for death benefits were settled by employer pursuant to Section 8(i) of the Act for $40,000. Employer made payment, but claimant believed it was not timely and requested the district director to impose a penalty, pursuant to Section 14(f) of the Act. The district director imposed the penalty and employer appealed the penalty order to the Board. When claimant submitted her request for an attorney's fee to the administrative law judge, employer entered objections and the administrative law judge reduced the fee award. Claimant then appealed that decision to the Board. The Board has consolidated these appeals for decision. We concur in the affirmance of the administrative law judge's compensation award for attorney's fees but dissent from the majority's decision to affirm the district director's penalty order, although we agree with the majority that the Director's argument that employer should have sought review of the penalty order in district court is without merit.

We shall address first employer's appeal to the Board of the district director's order and the Director's motion to dismiss the appeal. The Director has moved to dismiss employer's appeal of the

district director's Section 14(f) penalty order, contending that it was a supplemental award under Section 18(a) and that it can be reviewed only by a Federal District Court. In this case, however, employer had paid both the compensation and the Section 14(f) penalty. Under these circumstances the Court of Appeals for the Third Circuit has held that once the penalty has been paid, review is unavailable by a district court. *See Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994), *aff'g* 27 BRBS 260 (1993). The court rejected the Director's contention that the Board lacks jurisdiction to review the propriety of a Section 14(f) penalty. Based upon the reasoning in *Barry*, the majority denies the Director's motion to dismiss employer's appeal. That portion of the majority opinion is correct as far as it goes. We believe, however, that it goes too far when it purports to extrapolate from *Barry*, justification for the Board's exercise of jurisdiction in the case at bar. The majority appears to argue that because the Third Circuit upheld the Board's exercise of jurisdiction in *Barry*, the Board has jurisdiction over the instant appeal, asserting that the facts in *Barry* are akin to those in the case at bar. They are not. In *Barry*, following the district director's issuance of a penalty order, employer paid the penalty and requested a hearing before an administrative law judge. After the administrative law judge issued his decision, an appeal was taken to the Board. *See Barry*, 27 BRBS at 261. In the present case, in contrast, one important step is missing. The case was never submitted to an administrative law judge. Employer took an appeal from the district director's order directly to the Board. The case was not referred to the Office of Administrative Law Judges for a hearing. We believe that the Board does not have jurisdiction to review a district director's penalty order, as employer requests. We find no authority in the statute, the regulations or court decisions for such an exercise of jurisdiction. Although the majority points out that none of the parties objects, it is well established that the parties, by their actions or agreement, cannot confer jurisdiction. Accordingly, we would dismiss the appeal and refer the case to the Office of Administrative Law Judges for a hearing, or, if the parties waive their right to a hearing, for a decision on the record.

The issue of the Board's authority to entertain an appeal of a decision by a district director was specifically addressed in *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981). The claimant in *Pearce* applied to the deputy commissioner (now district director) for a commutation (pursuant to a statutory provision subsequently repealed). The deputy commissioner denied the application and claimant appealed directly to the Board, contending that the deputy commissioner should have granted his request for a hearing. The Board affirmed the deputy commissioner's order, holding that it could not do otherwise unless an abuse of discretion had been shown. One Board member dissented, stating that the case should have been referred to the Office of Administrative Law Judges for a hearing pursuant to the Act and regulations, because the Board was without authority to review the ruling of the deputy commissioner. Therefore, the appeal should have been dismissed. The United States Court of Appeals for the Seventh Circuit agreed with the dissenting judge and reversed the Board. The court considered Sections 19(d) and 21(b)(3) and (4) of the Longshore Act which set forth the functions of the administrative law judge and the Board, as well as the pertinent regulation, 20 C.F.R. §702.316, which provides for the transfer of a case from the district director to the Office of Administrative Law Judges when the parties are unable to enter an agreement before the district director. The court held that the deputy commissioner and the Board violated both the statute and the regulations. Consequently, it reversed the Board and

remanded the case to the Chief Administrative Law Judge for a hearing. It chose not to dismiss the appeal outright, since that would have finalized the district director's order *contrary to law*.

The court issued its decision in *Pearce* on April 8, 1981. Two months later, before the Longshore bar had time to consider the significance of *Pearce*, the Board issued *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614, 615 n.1 (1981), and made the pronouncement in a footnote that the Board members were aware of the *Pearce* holding, but that "we decline to follow this holding." The Board did not limit application of this decision to cases arising in circuits other than the Seventh. That was an extraordinary demonstration of non-acquiescence.

The majority seeks to evade the force of *Pearce* by distinguishing the case at bar, in which a hearing has not been requested, from *Pearce*, in which the court held that the parties were entitled to the hearing they had requested, citing 20 C.F.R. §702.316. Review of this regulation, however, reveals that all cases which cannot be resolved before the district director must be transferred to the Office of Administrative Law Judges.[9] The regulation sets forth the procedures to be followed by the district director after conference has concluded yet agreement has not been reached: the district director may continue to seek agreement until either he or a party decides that further discussion would be futile, at which time the district director "shall prepare the case for transfer to the Office of the Chief Administrative Law Judge." Thus, after conference has been held and disagreement established, a party has authority to terminate discussions before the district director by requesting a hearing, notwithstanding the district director's view that further discussion would be beneficial. If, on the other hand, the district director is the first to conclude that further discussion would be unproductive, he shall transfer the case to the Office of Administrative Law Judges on his own motion. The significance of the party's request for a hearing in 20 C.F.R. §702.316 is that it is the means whereby a party can advance his case procedurally to a final decision, when he concludes that

[9]20 C.F.R. §702.316 states:

> When it becomes apparent during the course of the informal conference that agreement on all issues cannot be reached, the district director shall bring the conference to a close, shall evaluate all evidence available to him or her, and after such evaluation shall prepare a memorandum of conference setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues. Copies of this memorandum shall then be sent by certified mail to each of the parties or their representatives, who shall then have 14 days within which to signify in writing to the district director whether they agree or disagree with his or her recommendations. If they agree, the district director shall proceed as in §702.315(a). If they disagree (Caution: See §702.134), then the district director may schedule such further conference or conferences as, in his or her opinion, may bring about agreement; if he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the district director shall prepare the case for transfer to the Office of the Chief Administrative Law Judge (see §702.317, §§702.331-702.351).

disagreement is beyond informal resolution, before the district director has reached that conclusion. In sum, if the parties persist in disagreement before the district director, the case must be transferred to the Office of Administrative Law Judges. Section 702.316 leaves the district director no discretion. *See Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994). With the exception of specific Black Lung regulations, discussed *infra*, there is no authority for the district director to transfer a case to the Board, whether it be at the request of the parties, or on his own motion. Yet that is exactly what the district director purported to do here.

Both the Tenth and Sixth Circuits have also addressed the issue of direct appeals from the district director to the Board. In *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the Tenth Circuit stated that the Longshore Act provides no authority for an appeal to be taken directly from the district director to the Board. The court held that the Longshore Act, as incorporated into the Black Lung Act, can be read only as requiring that all black lung claims be processed in a "three-tier" administrative review process going from the district director to an administrative law judge and then to the Board. The court declared that there is no statutory basis to permit a bypassing of an administrative law judge hearing by petitioning the Board for immediate review of a district director's "determination on any type of claim." *Lukman*, 896 F.2d at 1252, 13 BLR at 2-340.

The *Lukman* court pointed out that there are only two exceptions to the "three-tier" process. These involve attorney's fee awards by a district director, 20 C.F.R. §725.366(e), and commutation of black lung benefits, 20 C.F.R. §725.521(c). *Lukman*, 896 F.2d at 1252-1253, 13 BLR at 2-342. In these two exceptions, provided by specific Black Lung regulations, appeals may be taken directly from the district director to the Board. There are no other exceptions in the Black Lung regulations and no exceptions, whatsoever, in the Longshore regulations.

After *Lukman* was issued, the Board *en banc*, promptly issued a decision holding that it would apply the three-tier procedure in the resolution of Black Lung claims in all judicial circuits. *See Dotson v. Director, OWCP*, 14 BLR 1-10 (1990)(*en banc*)(a case involving a duplicate claim). *See also Krizner v. United States Steel Mining Co., Inc.* 17 BLR 1-31 (1992)(Brown, J., concurring)(Smith, J., dissenting); *see also Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989)(in which the Sixth Circuit Court of Appeals upheld the three-tier administrative review process).

Despite the explicit wording of Sections 19(d) and 21(b)(3) of the Longshore Act, the Black Lung regulations, 20 C.F.R. Part 725, the Longshore regulations, 20 C.F.R. Part 702, and the opinions of the Courts of Appeals of three circuits, the fallacy persists that appeals may be taken to the Board from an order of a district director if it involves a discretionary determination or involves solely an issue of law, particularly if none of the parties has asked for a hearing before an administrative law judge. There is, however, no authority for direct appeals to the Board in cases involving a discretionary act of a district director or involving solely an issue of law. *See* 20 C.F.R. Part 702, Subpart C-Adjudication Procedure. Section 702.301 sets forth authority for district directors to resolve controverted claims amicably by informal procedures. The section provides,

however, that "[w]here there is a genuine dispute of fact *or* law which cannot be so disposed of informally resort must be had to the formal hearing procedures as set forth beginning at §702.331," 20 C.F.R. §702.301 (emphasis added)(providing procedures for formal hearings conducted by an administrative law judge). The regulation could not be clearer. When the district director is unable to resolve the dispute between the parties, whether it be a question of fact or law, the parties must take their case to an administrative law judge for a decision. The regulation makes plain that the administrative law judge is authorized to decide purely legal questions as well as factual questions and mixed questions of law and fact. He decides legal issues, just as a district court judge issues decisions on motions for summary judgment. This understanding of the administrative law judge's responsibility is confirmed by 20 C.F.R. §702.316, which provides that if the parties cannot come to an agreement after a conference with the district director, or additional conferences if the parties and the district director choose, the case shall be transferred to the Office of Administrative Law Judges. Thus, a party dissatisfied with the district director's decision must take his case to an administrative law judge. There is no provision to refer the case to the Board.

Although the Board has authored many opinions holding that decisions raising purely legal issues may be appealed directly from the district director to the Board, review of these opinions fails to disclose any rationale for this proposition, and no authority *other than an earlier Board* case making the same statement.[10] These opinions ignore Sections 702.301 and 702.316 and the circuit courts' decisions in *Pearce*, *Lukman* and *Pyro Mining Co.*

There are also many Board decisions holding that acts of discretion may or must be appealed directly to the Board from the district director, but again, no rationale supports the proposition and no authority is cited other than an earlier Board case making the same assertion.[11] The seminal Board case for this proposition is *Mazzella v. United Terminals Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978), in which the Board made reference to the 1972 Amendments to the Longshore Act, and particularly the amended Section 19(d), which withdrew from deputy commissioners the adjudicatory power to conduct hearings and conferred it upon hearing examiners. When the Act was amended in 1978, the reference to hearing examiners was changed to administrative law judges. The Board asserted that this adjudicatory power of administrative law judges does not encompass review of discretionary acts by district directors and that such review is properly undertaken by the Board. *Mazzella*, 8 BRBS at 758. As authority the Board cited *Loiselle v. Portland Stevedoring Co.*, 2 BRBS 214 (1975), which apparently was reversed on other grounds, *Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977), and the Board's decision in *Pearce v. McDonnell Douglas Corp.*, 5 BRBS 573 (1977), which clearly was

[10]*See, e.g., Jennings v. Sea-Land Inc.*, 23 BRBS 12 (1989); *Glenn v. Tampa Ship Repair and Dry Dock*, 18 BRBS 205 (1986); *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614, 615 n.1 (1981); *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1977).

[11]For instance, *see Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989); *Glenn v. Tampa Ship Repair and Dry Dock*, 18 BRBS 205 (1986); *Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978).

reversed on the ground that in exercising jurisdiction over an appeal from a decision by the district director, the Board violated the statute and regulations. *Pearce*, 647 F.3d at 716, 13 BRBS at 241. Thus, the authority for the Board's position on appeals of discretionary acts completely vanished. Despite this, as pointed out above, the Board in a footnote in *Tupper* declared that it declined to follow the Seventh Circuit's holding in *Pearce*. In sum, we have shown that the majority's contention that the Board has authority to entertain direct appeals from decisions of the district director because the Board has held so from its inception, is as solid as the proverbial house built on sand.

The majority rests its exercise of jurisdiction on the Fifth Circuit's decision in *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988), and the regulation found at 20 C.F.R. §802.201(a).[12] *See Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347, 354 n.5 (1994)(McGranery, J., dissenting). That regulation, however, does not create jurisdiction in the Board to hear direct appeals from decisions of district directors. The regulation is contained in Part 802 entitled Rules of Practice and Procedure and its reference to an appeal of a decision or order of an administrative law judge or district director to the Board is simply in conformity to the jurisdictional authority set forth in Sections 19(d) and 21(b)(3) and (4) of the Longshore Act, as well as the two Black Lung regulations allowing direct appeals of the district director's attorney fee awards, 20 C.F.R. §725.366(a), and commutations of Black Lung benefits, 20 C.F.R. §725.521(a). There are no other exceptions to the "three-tier" jurisdictional procedures set forth in the Black Lung Act or the Longshore Act, and its extensions.[13]

In sum, there is no support in the statute, regulations or circuit court cases authorizing a party to appeal to the Board a discretionary act of the district director or a decision by the district director raising solely a legal issue. All the legal authority is to the contrary. Accordingly, we would remand this case to the Office of Administrative Law Judges.

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[12]20 C.F.R. §802.201(a) provides in part as follows:

> (a)(1) Any party or party-in-interest adversely affected or aggrieved by a decision or order issued pursuant to one of the Acts over which the Board has appellate jurisdiction may appeal a decision or order of an administrative law judge or deputy commissioner to the Board by filing a notice of appeal pursuant to this subpart.

[13]There may be decisions relating to the Secretary's supervision of medical care under Section 7 of the Act, 33 U.S.C. §907, as well as the administration of rehabilitation under Section 39, 33 U.S.C. §939, which would not be subject to any review. Those sections contain provisions such as "authorized by the Secretary," "Secretary shall actively supervise," "shall have authority," "in his judgment," "shall administer the provisions" and "in his discretion." *See generally Dalton v. Specter*, 114 S.Ct. 1719 (1994)(involving the Defense Base Closure and Realignment Act where the Supreme Court held that "where a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.").

As to the attorney's fee issue, we concur in the majority's decision. We write separately to point out that the administrative law judge's reduction of the attorney fee in light of the size of claimant's award was entirely proper. This accorded with the Supreme Court's teaching in *Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983), that attorney's fee awards should be tailored to the amount of success obtained. *Accord Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566, 574 (1992); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 166, 27 BRBS 14, 16 (CRT) (5th Cir. 1993); *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1540, 25 BRBS 161, 172 (CRT)(D.C. Cir. 1992). Prior to issuance of the Supreme Court's decision in *Hensley*, the size of claimant's award was simply a proper consideration, 20 C.F.R. §702.132, which is the basis of the majority's affirmance of the administrative law

judge's decision. But in *Hensley*, the Supreme Court made clear that it is not simply a valid consideration, but "the most critical factor" in determining the reasonableness of the fee award. *Farrar*, 113 S.Ct. at 574; *Hensley*, 461 U.S. at 436. On that basis we would affirm the administrative law judge's decision reducing claimant's attorney's fee.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge