BRB Nos. 01-0633
and 01-0635

JEFFREY LEE MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McGINNIS, INCORPORATED	)	DATE ISSUED: April 25, 2002
	)	
and	)	
	)	
FRANK GATES ACCLAIM	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Granting Attorney Fees of Thomas F. Phalen, Jr., Administrative Law Judge, and the Compensation Order-Award of Attorney's Fees of Thomas C. Hunter, District Director, United States Department of Labor.

Steven C. Schletker (Schletker, Hornbeck & Moore), Covington, Kentucky, for claimant.

Gregory P. Sujack (Garofalo, Schreiber & Hart), Chicago, Illinois, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees (99-LHC-2766) of Administrative Law Judge Thomas F. Phalen, Jr., BRB No. 01-633, and the Compensation Order-Award of Attorney's Fees (Case No. 10-0036277) of District Director Thomas C. Hunter, BRB No. 01-635, 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] 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).

This case has a lengthy and complicated procedural history. To recapitulate the background of this case relevant to the instant appeals, claimant sustained a work-related injury on September 6, 1995. Claimant filed a timely claim for compensation under the Act on February 11, 1997. Employer controverted the Longshore Act claim and, instead, paid compensation pursuant to the workers' compensation laws of Ohio during claimant's periods of temporary total disability from the date of injury until December 1997, when compensation benefits were terminated. On December 11, 1997, claimant requested that employer initiate compensation payments under the Act, which employer declined to do. On May 18, 1998, claimant resumed receiving compensation benefits pursuant to the workers' compensation laws of Ohio. After the claim's referral to the Office of Administrative Law Judges, but prior to the formal hearing, employer stipulated that claimant was entitled to coverage under the Longshore Act. In a Decision and Order-Awarding Benefits issued March 18, 1999, Administrative Law Judge Rudolf L. Jansen awarded claimant temporary total disability compensation under the Act from September 6 to October 23, 1995, from December 12, 1995, to February 6, 1996, and from January 22, 1997, and continuing, as well as medical benefits. 33 U.S.C. §§908(b), 907. The administrative law judge further found employer entitled to a credit for compensation previously paid to claimant under the Ohio workers' compensation laws. 33 U.S.C. §903(e).

Subsequent to the issuance of Administrative Law Judge Jansen's Decision and Order, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of $26,062.50, representing 182.25 hours at an hourly rate of $150 for lead counsel and an hourly rate of $125 for associate counsel, plus costs of $5,680.35. In a Supplemental Decision and Order Granting Attorney Fees issued June 25, 1999, Administrative Law Judge Jansen rejected employer's objections to the requested fee and awarded claimant's counsel the requested fee and costs. Employer thereafter appealed Administrative Law Judge Jansen's Supplemental Decision and Order Granting Attorney Fees to the Board. On appeal, the Board rejected employer's contentions that it is not liable for a fee, that the fee was excessive and that claimant's counsel's quarter-hour minimum billing method was improper and affirmed Administrative Law Judge Jansen's attorney's fee award. *Martin v. McGinnis*,

[1]By Order dated May 16, 2001, the Board, on its own motion, consolidated BRB Nos. 01-633 and 01-635, for purposes of this decision. *See* 20 C.F.R. §802.104.

Inc., BRB No. 99-1122 (Jul. 27, 2000)(unpublished). Subsequently, in an Order dated October 25, 2000, the Board awarded claimant's counsel a fee of $1,837.50 for work performed before the Board in defense of employer's appeal in BRB No. 99-1122. Employer then appealed both the Board's affirmance of the administrative law judge's attorney's fee award and the Board's award of an attorney's fee for work performed before the Board to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed both fee awards, holding that claimant had successfully prosecuted his claim, that claimant's attorney properly itemized the actual time worked, and that the time itemized for work before the Board was reasonable. *McGinnis, Inc. v. Martin*, Nos. 00-4159, 00-4604 (6th Cir. Dec. 17, 2001).

Simultaneous to the proceedings before the administrative law judge, the Board and the Sixth Circuit regarding claimant's attorney's fee request, the parties were attempting to resolve a dispute concerning the date on which employer's credit for its payment of Ohio workers' compensation expired and compensation payments under the Longshore Act were to commence. An additional dispute also existed involving claimant's request that medical benefits be provided under the Longshore Act, rather than the Ohio workers' compensation system. Claimant also sought modification of Judge Jansen's Decision and Order - Awarding Benefits pursuant to Section 22 of the Act, 33 U.S.C. §922, on the basis that claimant had now reached maximum medical improvement and, thus, was entitled to permanent total disability benefits. Informal conferences were held before the district director on June 25, 1999 and July 9, 1999. By letter dated July 28, 1999, the district director instructed the parties to advise him by August 6, 1999, whether they had accepted the compromise date of September 19, 1999, for the expiration of employer's credit, and, if not, to submit pre-hearing statements (LS-18s). Although employer's attorney had previously advised claimant's attorney that he would notify him when a decision whether to accept the proposed compromise date had been made, claimant, by letter dated August 18, 1999, informed the district director that he was still awaiting employer's response and, thus, was enclosing an LS-18. Subsequent to the August 23, 1999, referral of the case to the Office of Administrative Law Judges, the case was transferred from Judge Jansen to Administrative Law Judge Phalen (the administrative law judge). The issues presented at the November 22, 1999, hearing before the administrative law judge involved the nature and extent of claimant's disability, maximum medical improvement, medical benefits, and attorney's fees. After the hearing had been held, the parties entered a stipulation agreeing to the September 19, 1999, compromise date for the expiration of employer's credit, which was accepted by the administrative law judge in his December 5, 2000, Decision and Order- Awarding Benefits. *See* Decision and Order at 4. In this Decision and Order, the administrative law judge rejected employer's arguments that claimant had not reached maximum medical improvement and that it had demonstrated the availability of suitable alternate employment, and he awarded claimant permanent total disability compensation. 33 U.S.C. §908(a).

Prior to issuance of the administrative law judge's December 5, 2000, Decision and Order, claimant's counsel had submitted a fee petition to the administrative law judge requesting a fee of $25,689.28, representing 140.9 hours at an hourly rate of $150, and expenses of $4,554.28. Employer responded that the fee petition should be held in abeyance until the decision in this case was issued and requested 30 days after issuance of the administrative law judge's decision in which to respond to the fee petition. The administrative law judge's December 5, 2000, Decision and Order accordingly granted employer 30 days to file a response to claimant's attorney's fee petition. *See* Decision and Order at 24. In a Supplemental Decision and Order Granting Attorney Fees issued March 23, 2001, the administrative law judge stated that employer had not filed a response to the fee petition and, accordingly, he awarded claimant's counsel the requested fee and expenses, totaling $25,689.28, to be paid by employer.

Claimant's attorney also filed fee petitions with the district director for work performed before that official. The first petition, covering the period from September 17, 1996 through January 26, 1998, requested a fee of $10,412.50, representing 61.5 hours of services rendered at an hourly rate of $150 for lead counsel, and 9.5 hours of services rendered at an hourly rate of $125 for associate counsel, and $250 in expenses. The second petition, covering the period from March 24, 1999 through August 23, 1999, requested a fee of $3,450.00, representing 23 hours at $150 per hour. Employer filed a response to the fee petitions in which it objected to counsel's one-quarter hour billing method, as well as to various entries. Additionally, employer asserted that counsel should be awarded a fee only for the time spent in furtherance of the claim for permanent total disability and not for time spent on other issues. The district director considered and rejected each of employer's objections, and thereafter awarded the requested fee, totaling $14,112.50, for both of the time periods itemized in counsel's fee petitions.

On appeal, employer challenges the fee awards of both the administrative law judge and the district director. Claimant responds, urging affirmance of both fee awards in their entirety.

ALJ's Fee Award - BRB No. 01-633

Employer first challenges the attorney's fee award of $25,689.28 made by the administrative law judge. Claimant responds that employer failed to file objections to the fee petition with the administrative law judge and may not challenge the appropriateness of a fee for the first time on appeal. It is well-established that the Board will not consider objections to a fee petition not raised before the administrative law judge. *See Pozos v. Army & Air Force Exch. Serv.*, 31 BRBS 173 (1997); *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)*(en banc)*(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding,*

Inc. v. Director, OWCP [Biggs], 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). This rule is premised on the principle that an assertion of error for the first time on appeal will not be considered because the error, if any, might have been avoided if the issue had been raised before the administrative law judge. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). As employer failed to object to the attorney fee petition before the administrative law judge, we will not consider the arguments made by employer on appeal; we therefore affirm the administrative law judge's Supplemental Decision and Order Granting Attorney Fees.

District Director's Fee Award-BRB No. 01-635

We will now address employer's challenge to the attorney's fee of $14,112.50 awarded by the district director to claimant's counsel. Specifically, employer first argues that claimant's counsel impermissibly employed a quarter-hour billing method. The arguments made by employer with respect to this issue are identical to those considered and rejected by both the Board and the Sixth Circuit in employer's previous appeals in this case. *McGinnis, Inc. v. Martin*, Nos. 00-4159, 00-4604 (6th Cir. Dec. 17, 2001), *aff'g Martin v. McGinnis, Inc.*, BRB No. 99-1122 (July 27, 2000)(unpublished). The Sixth Circuit stated, in this regard, that while counsel's services were itemized in one-quarter hour increments, smaller tasks were grouped together so that the time allocated to the tasks represents actual time worked. Because the billing format employed in counsel's fee petitions for work before the district director, which are contested in the present appeal, is identical to the format approved by the Sixth Circuit, we reject employer's challenge to counsel's billing method. Moreover, we reject employer's related argument that counsel's use of compound entries makes it difficult to ascertain whether the charges accurately reflect the services rendered by counsel on claimant's behalf. As previously discussed, the Sixth Circuit specifically approved counsel's use of compound entries as an accurate representation of time worked. We hold that employer failed to meet its burden of showing an abuse of discretion by the district director in finding that counsel's entries were sufficiently detailed to conform with the regulatory requirements governing attorney fee applications. *See* 20 C.F.R. §702.132; *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). Employer also has failed to show an abuse of discretion by the district director in approving the 1.25 hours itemized for research on the maximum medical improvement issue, after he considered and rejected employer's objection that the time requested was excessive. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Employer next argues that it is not responsible for counsel's services performed on issues on which claimant was not successful. Specifically, employer first contests the district director's approval of a fee for work related to counsel's efforts to obtain payment by

employer of claimant's medical bills pursuant to Section 7 of the Act.[2] The district director, having considered employer's objection to these services, determined that counsel's work on this issue was critical to the claim and entailed a reasonable amount of time. We do not agree with employer that claimant was unsuccessful on this issue, and we therefore uphold the district director's approval of a fee for counsel's work in securing payment under Section 7 by employer of claimant's medical bills. Employer also contends that claimant was unsuccessful on the issue of the expiration date for employer's credit for Ohio workers' compensation payments, and, thus, is not entitled to a fee for work on this issue. We disagree. As our previous summary of the background of this case reveals, employer did not file a timely response to the district director's instruction to advise him whether it accepted the proposed compromise date.[3] Rather, employer acquiesced to the compromise date only after referral of the case to the Office of the Administrative Law Judges; thus, claimant successfully obtained Longshore Act coverage commencing on September 19, 1999, rather than commencing on the later date of October 15, 1999 previously urged by employer.

[2]Although employer avers on appeal that the issue of claimant's unpaid medical bills was not the subject of an informal conference, Employer's Response to Motion for Attorney Fees filed with the district director states that an informal conference was held on this issue. *See* Employer's Response to Motion for Attorney Fees at 2.

[3]Employer acknowledges that claimant agreed to the compromise date prior to requesting a hearing. *See* Emp. Petition for Review and Brief at 6-7.

Next, employer raises, for the first time on appeal, an objection to the district director's approval of a fee for counsel's efforts to establish that claimant has a permanent total disability; employer's objection is based on the premise that it is not liable for a fee for work on an issue that was not the subject of an informal conference.[4] Employer avers that the Board may address this newly-raised objection on the basis that the issue presents a question of law. We disagree. As previously discussed, the Board will not consider objections to an attorney fee petition not raised below. *See Bullock,* 27 BRBS 90; *Clophus,* 21 BRBS 261; *see also Long,* 767 F.2d 1578, 17 BRBS 149(CRT). An exception to the general rule that a party may not raise a new issue on appeal may exist where a pure question of law is concerned and failure to address it would result in a miscarriage of justice. *See Bernuth Marine Shipping, Inc. v. Mendez,* 638 F.2d 1232 (5th Cir. 1981); *Turk v. Eastern Shore Railroad Inc.*, 34 BRBS 27, 32 (2000). The issue now raised by employer, however, is not a pure question of law, but rather involves factual determinations. Specifically, although employer avers that claimant did not seek an informal conference on the nature and extent of claimant's disability, claimant maintains that this subject was discussed at the July 9, 1999, informal conference. *See* Cl. Brief at 10. We therefore decline to consider employer's objection, first raised on appeal, that is not liable for a fee for counsel's services related to establishing claimant's permanent total disability. *See Turk*, 34 BRBS at 32; *Clophus,* 21 BRBS 261.

Lastly, claimant's counsel has filed a fee petition for time expended before the Board in defense of employer's present appeals in this case (BRB Nos. 01-0633 and 01-635). Counsel requests a fee of $1,785.00, representing 10.2 hours at an hourly rate of $175.[5] Employer requests 30 days to respond to claimant's fee petition after issuance of the Board's decision. It is well-established that due process requires that employer be given a reasonable time to respond to a fee request. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976); *Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998). Accordingly, employer's request is granted; its response to counsel's fee petition must be received within 30 days from receipt of this decision.

Accordingly, the administrative law judge's Decision and Order Granting Attorney Fees and the district director's Compensation Order - Award of Attorney's Fees are affirmed. Employer is granted 30 days to respond to claimant's fee petition for services rendered before the Board.

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[4]Contrary to its present position, employer in its response to Motion for Attorney Fees filed with the district director, accepted liability for a fee for work performed by claimant's counsel pertaining to establishing that claimant is permanently totally disabled.

[5]By Order dated January 30, 2002, the Board stated that because the appeal was still pending before the Board, claimant's fee petition was premature. The Board therefore denied the motion for attorney fees pending a decision by the Board.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge