

CARLOS LOPEZ)	
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Claimant-Respondent)	
)	
v.)	
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BAY DECKING)	
)	
and)	
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SIGNAL MUTUAL INDEMNITY ASSOCIATION)	DATE ISSUED: 04/13/2006
)	
Employer/Carrier-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of Hipatia Hernandez, Acting District Director, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Roy D. Axelrod, Solana Beach, California, for employer/carrier.

Matthew W. Boyle (Howard Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees (Case No. 18-67586) of Acting District Director Hipatia Hernandez 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant injured his back on March 1, 1998, and filed a claim for benefits.¹ The administrative law judge awarded claimant permanent partial disability benefits for the period between August 16 and November 14, 1999, and from May 2, 2000, and continuing. The Board affirmed the administrative law judge's award of permanent partial disability benefits for the period in 1999, but it remanded the case for reconsideration of claimant's wage-earning capacity subsequent to May 2, 2000. *Lopez v. Bay Decking*, BRB No. 03-0194 (Nov. 17, 2003). On remand, the administrative law judge awarded claimant permanent partial disability benefits from May 2, 2000, based on the parties' stipulation regarding claimant's wage-earning capacity. Claimant's counsel then requested, and was awarded, an attorney's fee for work performed before the

¹An informal conference was held on July 13, 1998. Employer rejected the claims examiner's recommendations and filed a notice of controversion on July 23, 1998. On October 28, 1998, employer accepted the July recommendations and agreed to pay claimant temporary total disability and medical benefits. On June 7, 2000, employer filed a notice of controversion, arguing that as claimant had completed vocational rehabilitation his benefits should convert to permanent partial disability benefits. Another informal conference was held on September 7, 2001, and the memorandum associated with that conference reported that employer paid claimant temporary total disability benefits from March 2, 1998, through August 16, 1999, permanent total disability benefits from August 17 through November 2, 1999, and permanent partial disability benefits from November 3, 1999, and continuing. The case was transferred to the administrative law judge on September 2, 2001. Cl. Exs. 4, 6-7; Emp. Exs. 6-7, 9. The hearing was scheduled for July 17, 2002, and the parties arrived with stipulations that resolved several of the disputed issues. They agreed that claimant was temporarily totally disabled from March 2, 1998, through August 15, 1999, that claimant's condition reached maximum medical improvement on August 16, 1999, that claimant cannot return to his usual work, and that claimant was permanently totally disabled during the period he was in vocational rehabilitation, November 15, 1999, through May 1, 2000. ALJ Ex. 1. Thus, the only issue left for the administrative law judge to resolve was the extent of claimant's disability between August 16 and November 14, 1999, and from May 2, 2000, and continuing.

administrative law judge.² The administrative law judge reduced some routine tasks from .25-hour to .13-hour, rejected employer's argument that the fee should be reduced by 15 percent due to claimant's limited success, and awarded an additional fee for counsel's defense of his fee petition. The administrative law judge's fee award is not at issue but is relevant to the issues raised on appeal.

At issue before the Board is the attorney's fee award for work performed by claimant's counsel before the district director. Counsel requested a fee of \$14,862.50, representing 59.45 hours of work at a rate of \$250 per hour. Ms. Hernandez, a claims examiner who was performing the duties of the district director in an "acting" capacity, issued the fee award. She stated that her decision was "in keeping with the Honorable Judge Malamphy's ruling[,]" and she reduced the hourly rate to \$225, reduced routine tasks to .13-hour, and denied employer's request for an across-the-board reduction of the fee request due to limited success. Thus, Ms. Hernandez awarded claimant's counsel an attorney's fee of \$13,662, representing 58.97 hours of work, plus 1.75 hours to defend the fee request, at a rate of \$225 per hour. Employer appeals this fee award. Claimant's counsel responds, urging affirmance, and requests a fee for work performed before the Board in this and the prior appeals. The Director, Office of Workers' Compensation Programs (the Director) responds, arguing that Ms. Hernandez had authority to award the fee.

Employer first argues that Ms. Hernandez, a claims examiner, did not have authority to award an attorney's fee. The Director explains that, at the time this fee was awarded, District Director Eric Richardson's authority had been delegated to the claims examiners in his office on a rotating basis because he had been called to active military duty. Mr. Richardson established the schedule for delegating his duties, which was approved by the Regional Director. The Board has held that when a deputy commissioner is unavailable, and the delegation of his duties is properly authorized, then an assistant deputy commissioner, acting as the deputy commissioner, has the authority to award an attorney's fee. *Hill v. Nacirema Operating Co.*, 12 BRBS 119, 121 (1980); *see also House v. Southern Stevedoring Co.*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983) (proper authority to approve settlements). Although employer argues that the delegation of duties should have been approved by either the Director or the Secretary of Labor, the district director is authorized to act on behalf of the Director, 33 U.S.C. §§939, 940; 20 C.F.R. §§701.201, 701.301(a)(6), (7), and employer has not demonstrated any impropriety in the delegation of duties to Ms. Hernandez. Therefore, as the delegation of authority to Ms. Hernandez was properly approved, we reject employer's assertion and

²In light of the Board's decision to remand the original decision in this case, BRB No. 03-0194, it vacated the administrative law judge's original fee award. *Lopez v. Bay Decking*, BRB No. 04-0222 (Oct. 19, 2004).

hold that Ms. Hernandez had the authority to issue an attorney's fee award in this case in her capacity as Acting District Director during the absence of District Director Richardson.³ *Hill*, 12 BRBS at 121.

Employer next asserts that the district director failed to address its argument that no controversy existed between the parties prior to May 2, 2000, or alternatively, that claimant did not successfully prosecute his claim for benefits due prior to May 2, 2000. It appears that employer paid benefits for various periods but also controverted the claim on several occasions. *See* n.1, *supra*. The district director did not address the provisions of Section 28(a), (b), 33 U.S.C. §928(a), (b), but merely held employer liable for a fee for the entire time the claim was pending before that office. Therefore, because the district director did not discuss Section 28 as it pertains to this case, and did not address whether there was a controversy related to, or a successful prosecution of, the claim for benefits due prior to May 2, 2000, we vacate the fee award, and we remand this case to the district director for further consideration of this issue. *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983). Because employer concedes liability for approximately 20 hours of services performed by counsel related to the post-May 2, 2000, issues, we affirm that portion of the fee award. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (claimant's ultimate success renders an employer liable for all reasonable and necessary work leading to that success).

Employer also alleges that claimant was unsuccessful in his claim for permanent total disability benefits; therefore, the fee should be reduced overall by 20 percent, and it further contends counsel is not entitled to a fee for his work in defending his fee petition. Initially, the district director relied on the administrative law judge's findings regarding claimant's level of success pertaining to the claim for permanent total disability benefits. The administrative law judge concluded that claimant was "fairly successful" in that he established his entitlement to permanent partial disability benefits at a higher rate than that proposed by employer, making a 15 percent reduction unreasonable. The district director's reliance on the administrative law judge's findings on this issue was reasonable, and employer has shown no abuse of discretion. Therefore, we reject employer's argument that the fee must be further reduced in light of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS

³Employer also challenges the award in light of the fact that Ms. Hernandez signed the order as herself "for" the district director, concluding that she did not sign with the authority of an acting district director. We reject this argument. To vacate the award on this ground would be to elevate form over substance, and we decline to do this in light of the Director's statement that the delegation of duties was proper. For the remainder of this decision, we shall refer to Ms. Hernandez as "the district director."

27(CRT) (3^d Cir. 2001). Additionally, it is well established that counsel is entitled to a reasonable fee for work related to his fee petition; therefore, we also reject the argument that counsel is not entitled to a fee for this work.⁴ *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982).

Finally, claimant's counsel requests a fee for work performed before the Board in the amount of \$5,431.25, representing 19.75 hours at an hourly rate of \$275 for work performed in BRB Nos. 03-0194 and 05-0594. Employer objects to the fee petition, challenging the hourly rate, the lack of identification of the person who performed the services, and time requested in three specific entries. Additionally, employer argues that the fee petition covers only non-compensable work performed on fee litigation. We agree with employer that an hourly rate of \$275 is excessive, and we reduce the rate to \$250 per hour. 20 C.F.R. §802.203(d)(4), (e). However, we reject employer's remaining arguments. Counsel is a sole-practitioner; therefore, he need not designate himself as the person who performed the services in each entry of his fee application. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001). His fee petition covers nine hours of work performed from December 12, 2002, through November 21, 2003, when the merits of the case were on appeal before the Board, BRB No. 03-0194, and 10.75 hours of work performed from February 25 through June 3, 2005, on the current appeal, BRB No. 05-0594.⁵ Thus, his fee petition does not pertain solely to fee litigation, and counsel is entitled to a fee for work performed in defending his entitlement to an attorney's fee. *Zeigler Coal Co.*, 326 F.3d 894; *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT); *Jarrell*, 14 BRBS 883. Additionally, employer has not demonstrated that the work in May and June 2005 is excessive or

⁴Contrary to employer's argument, *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65(CRT) (9th Cir. 1991), is distinguishable from the instant case. In *Watts*, the case did not progress past the district director level and the only issue disputed was counsel's fee. Because there was no dispute over benefits after the informal conference, the court held that the employer was not liable for a fee under Section 28(a), (b). In this case, unresolved issues on the merits were resolved by the administrative law judge, and claimant ultimately gained some benefits beginning May 2, 2000. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

⁵Though claimant urged affirmance in the earlier appeal, and the Board vacated the decision in part and remanded the case for further consideration; on remand, the parties stipulated to a wage-earning capacity beginning May 2, 2000, which is higher than that on which employer paid benefits.

unnecessary. 33 U.S.C. §928; *see generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994); 20 C.F.R. §802.203. Consequently, claimant's counsel is entitled to an attorney's fee payable by employer in the amount of \$4,937.50, representing 19.75 hours at a rate of \$250 per hour for work he performed before the Board in two appeals in this case.

Accordingly, the district director's fee award is vacated, and the case is remanded for the district director to consider whether there was a controversy and/or whether claimant successfully prosecuted his claim for benefits prior to May 2, 2000, consistent with this opinion. 33 U.S.C. §928(a), (b). In all other respects, the district director's fee award is affirmed. Claimant's counsel is entitled to a fee of \$4,937.50, payable directly to counsel by employer, for work performed before the Board in BRB Nos. 03-0194 and 05-0594.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge