

BRB Nos. 14-0098
and 14-0102

JOSEPH RUSSO)
)
 Claimant-Respondent)
)
 v.)
)
 LOGISTEC, INCORPORATED)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY) DATE ISSUED: Dec. 9, 2014
 ASSOCIATION)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeals of the Compensation Orders Awarding of Attorney Fees of David Groeneveld, District Director, United States Department of Labor.

Carolyn P. Kelly (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Peter D. Quay (Law Office of Peter D. Quay, LLC), Taftville, Connecticut, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge,
McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Orders Awarding of Attorney Fees (OWCP Nos. 01-171478, 01-171997) of District Director David Groeneveld rendered on claims 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 it is shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained work-related injuries to his right shoulder on February 8, 2005, and to his right knee on September 8, 2008, while working for employer as a longshoreman/foreman. Claimant did not lose time from work, but filed a claim for medical benefits for his right shoulder injury (OWCP No. 01-171478) on August 3, 2010. Employer controverted the claim, on the ground that it was time barred, on August 20, 2010. On March 31, 2011, Dr. Reznik recommended arthroscopic surgery. A dispute arose over employer's liability for the shoulder surgery, and an informal conference was scheduled for September 2011, which, subsequently, was canceled as the parties resolved their differences. Claimant underwent arthroscopic surgery on November 1, 2011, and employer paid claimant temporary total disability benefits through July 2, 2012, the date on which claimant's physician stated he could return to work with restrictions. A dispute then arose over claimant's entitlement to temporary total disability benefits after July 2, 2012, and an informal conference was held on November 20, 2012. The district director recommended that employer reinstate temporary total disability benefits as of July 2, 2012. Employer rejected the district director's recommendation and the matter was referred to the Office of Administrative Law Judges (OALJ). The parties subsequently resolved their differences, and the case was remanded to the district director. We cannot ascertain from the administrative file or the parties' pleadings how this claim was resolved.

On July 16, 2013, claimant's counsel sought an attorney's fee for services performed before the district director in connection with this claim. Specifically, counsel sought \$5,301.25, representing 13.5 hours of attorney time at \$325 per hour (\$4,387.50) and 10.75 hours of paralegal time at \$85 per hour (\$913.75) for services rendered between July 21, 2010 and November 20, 2012. Employer objected to the fee petition, challenging the hourly rate and the compensability of some of the services itemized. Employer also contended that it paid claimant temporary total disability benefits through July 2, 2012, such that services performed before July 2, 2012, were not necessary to claimant's successful prosecution of the claim. Claimant's counsel responded that controversies requiring the services of an attorney existed prior to July 2, 2012, and thus that she is entitled to a fee for services related to those controversies. Employer replied,

reiterating its position that it is not liable for any attorney fees incurred prior to the date a controversy developed.

In his Order dated December 6, 2013, the district director concluded that neither party had presented adequate evidence of the hourly rate for attorneys in the relevant market; therefore, he awarded a reduced hourly rate based on his consideration of the criteria set forth in 20 C.F.R. §702.132 and on prior fee awards.¹ The district director noted that employer “raised objections to all charges prior to July 2, 2012, no dispute pending;” however, stating only that he took “all factors mentioned into consideration,” and that “no further reductions or deletions were necessary,” he awarded claimant’s counsel a fee of \$4,913.75, payable by employer. Employer appeals the fee award, and claimant and the Director, Office of Workers’ Compensation Programs (the Director), respond, urging affirmance. Employer filed a reply brief.

Claimant also injured his right knee when he stepped in a pothole on September 8, 2008, while working for employer. Claimant filed a claim (OWCP No. 01-171997) for medical benefits under the Act on November 23, 2010. Employer controverted the claim on December 8, 2010. On July 26, 2012, Dr. McCallum recommended total knee replacement surgery. Employer disputed the need for knee surgery and an informal conference was held on February 11, 2013. The district director recommended that employer authorize the surgery. Employer initially rejected the recommendation and the matter was referred to the OALJ, but the parties’ differences were resolved before a hearing was held; the case was remanded to the district director. We cannot ascertain how the claim was resolved.

On July 16, 2013, claimant’s counsel sought an attorney’s fee for services performed before the district director in connection with this claim. Counsel sought \$5,297.50, representing 13.75 hours of attorney time at \$325 per hour (\$4,468.75) and 9.75 hours of paralegal time at \$85 per hour (\$828.75). Employer objected to the fee, challenging the hourly rate requested by counsel and arguing that two of the entries should be denied as duplicative of those requested in OWCP No. 01-171478. Employer also argued that the dispute in this claim arose on July 26, 2012, when a doctor first recommended knee surgery; therefore, it asserted that all charges prior to July 26, 2012, should be disallowed. Claimant’s counsel responded that there had been controversies regarding medical coverage since the date the claim was filed. Employer replied, reiterating its position.

¹ Specifically, the district director awarded hourly rates of \$270, \$300, and \$310 for attorney work rendered in 2010, 2011, 2012-13, respectively. The district director awarded the requested \$85 hourly rate for all paralegal work.

The district director issued a compensation order awarding an attorney's fee on December 6, 2013. As in his Order awarding a fee in OWCP No. 01-171478, the district director concluded that neither party had presented adequate evidence of a market-based hourly rate, and he awarded the same reduced hourly rates. *See* n. 1, *supra*. The district director disallowed charges for both entries to which employer had objected, finding the charges duplicative of those in OWCP No. 01-171478. Further, although he again observed that employer had challenged the compensability of services counsel performed before a dispute between the parties allegedly arose, the district director stated only that he had taken "all factors mentioned into consideration," and he awarded claimant's counsel an attorney's fee of \$4,946.25 payable by employer. Employer appeals the fee award, and claimant and the Director respond, urging affirmance. Employer filed a response brief.

The Board consolidated employer's appeals for decision. On appeal, employer asserts the district director erred in failing to specifically address its argument that services performed by counsel prior to the time controversies arose between the parties are not compensable. In this regard, employer asserts the district director did not address how the work counsel performed prior to the development of controversies resulted in claimant's successful prosecution of his claims.² Claimant responds, urging affirmance of the district director's fee awards. The Director also urges affirmance of the fee awards, contending that employer made only vague objections to counsel's fee petitions, such that its "generalized assertions" of error are insufficient to establish that the district director abused his discretion. Employer has filed a brief in reply to the two response briefs.

We reject the Director's contention that employer failed to raise specific objections to the district director in response to counsel's fee petitions. In each case, employer objected to counsel's fee petition, claimant's counsel responded to the objections, and employer filed a brief in reply to counsel's response. It is clear from these pleadings that employer contested its liability for services performed by claimant's counsel prior to the date employer alleged that a controversy arose between the parties; it asserted this date was July 26, 2012 in OWCP No. 01-171997 and July 2, 2012 in OWCP

² We note that, before the district director, employer agreed that it is liable for counsel's attorney's fees; employer contested only the amount of the attorney's fees due. *See* Emp. Objections to Attorney Fee at 1 (Aug. 28, 2013). We affirm, as unchallenged, the district director's hourly rate determinations. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

No. 01-171478. Indeed, in each fee order, the district director specifically recognized that employer was raising this contention.³

Thus, employer is entitled to raise on appeal a challenge to the district director's failure to address these contentions. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980). Moreover, we agree with employer that the cases must be remanded for the district director to address its objections in the first instance. *See generally Ferguson v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 17 (2002); *Jensen*, 33 BRBS 97. As noted, employer did not contest its liability for claimant's counsel's fee. *See n. 2, supra*. It did contest its liability for fees that it avers were not necessary because the parties allegedly were not in disagreement at the time the services were performed or because the services performed by claimant's counsel did not contribute to claimant's success. The regulation at 20 C.F.R. §702.132(a) states that "Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. . . ." It is well-established that the test for "necessary work done" is "whether, at the time that [the attorney] performs the work in question, [he or she] could reasonably regard the work as necessary to establishing entitlement." *Cabral v. General Dynamics Corp.*, 13 BRBS 97, 100 (1981). Moreover, a claimant's ultimate success entitles his attorney to a fee for all necessary work leading to that success, even if the claimant was unsuccessful in intermediate proceedings. *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). As the district director did not address employer's contentions, we must vacate his findings that all claimed services in OWCP No. 01-171418 are compensable and that all but two claimed entries, for paralegal services, are compensable in OWCP No. 01-171997. On remand, the district director must address employer's contentions concerning the date a controversy arose in each case and the necessity of attorney services performed prior to such date.

³ In OWCP No. 01-171997, the district director wrote, "On August 28, 2013 the Employer/Carrier raised objections to all charges prior to July 26, 2012, no dispute pending." In OWCP No. 01-171478, the district director wrote, "On August 28, 2013 the Employer/Carrier raised objections to all charges prior to July 2, 2012, no dispute pending."

Accordingly, we affirm the hourly rates awarded by the district director to claimant's counsel for attorney and paralegal work. However, we vacate the district director's two Compensation Orders Awarding of Attorney Fees, and we remand the cases for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge