

BRB No. 10-0401

STEVEN JACKSON)
)
 Claimant-Petitioner)
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 v.)
)
 LABOR READY, INCORPORATED) DATE ISSUED: 02/28/2011
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Order on Remand - Award of Attorney Fees of Eric L. Richardson, District Director, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

John J. Rabalais, Janice B. Unland and Deanne B. McCauley (Rabalais, Unland & Lorio), Covington, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order on Remand – Award of Attorney Fees (Case No. 18-75727) of District Director Eric L. Richardson 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).

This case is before the Board for the second time. Relevant to this appeal, claimant’s counsel, Eric A. Dupree, having successfully represented claimant in a claim for additional compensation pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f), sought an attorney’s fee for work performed before the district director. Specifically, Mr. Dupree filed three fee applications with the district director itemizing work performed by

him and his associate, Mr. Myers, related to the Section 14(f) claim. Mr. Dupree's Supplemental Petition, dated March 21, 2007, itemized a total of 26.3 hours of work at an hourly rate of \$385 for his work and hourly rates of \$175 and \$100 for Mr. Myers. The Second Supplemental Petition, dated August 21, 2008, itemized 50 hours at an hourly rate of \$400 for Mr. Dupree and a rate of \$200 for Mr. Myers. The Third Supplemental Petition, dated October 2, 2008, requested 57.7 hours at hourly rates of \$400 for Mr. Dupree and \$200 for Mr. Myers. Employer responded to these fee requests, challenging the hourly rates sought and making specific objections to the time requested. Counsel submitted replies to employer's objections.

In his initial Order Awarding Attorney Fees, the district director awarded Mr. Dupree an hourly rate of \$250 and Mr. Myers an hourly rate of \$175. After addressing employer's objections to the number of hours sought, the district director approved 25.05 hours of services for Mr. Dupree and 6.95 hours of services for Mr. Myers. Consequently, claimant's counsel was awarded a fee of \$7,479, representing 25.05 hours of services at an hourly rate of \$250, and 6.95 hours of services at an hourly rate of \$175. Order at 6, 8. Counsel appealed the district director's fee award to the Board, challenging the hourly rate determinations and the reductions in the number of hours sought. The Board vacated the fee award and remanded the case for the district director to determine reasonable hourly rates consistent with the intervening decisions of the United States Court of Appeals for the Ninth Circuit in *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), and *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), and to reconsider the summary reductions made in the number of hours sought by claimant's attorneys. *S.J. [Jackson] v. Labor Ready, Inc.*, BRB Nos. 09-0173/A (May 27, 2009)(unpub.).

In his Order on Remand, the district director awarded Mr. Dupree an hourly rate of \$423 and Mr. Myers an hourly rate of \$192. Order on Remand at 3, 5. The district director reconsidered employer's objections to the number of hours sought, rejected some of those objections, and disallowed or reduced a total of 77.8 hours sought by claimant's counsel. *Id.* at 3-5. Accordingly, the district director awarded claimant's counsel a fee of \$16,736.50, representing 25.9 hours of services at an hourly rate of \$423, 29.9 hours at an hourly rate of \$192, and .4 hour at an hourly rate of \$100. *Id.* at 5.

On appeal, claimant challenges the district director's reduction in the number of hours for which counsel claimed an attorney's fee. Employer responds, urging affirmance of the district director's fee award in its entirety.

Claimant makes a number of specific contentions regarding the district director's disallowance or reduction on remand of various services itemized in his three fee petitions.¹ We first reject claimant's challenge to the district director's disallowance of the entries documenting services rendered between December 14, 2006 through January 2, 2007. The district director disallowed these services, which were performed prior to the filing of the claim for additional compensation under Section 14(f), on the basis that the itemized work was not related to the Section 14(f) claim. Order on Remand at 3. As claimant's assertions on appeal are insufficient to establish that the district director abused his discretion in disallowing the work on this basis, we affirm the disallowance of these entries. See *Brown v. Marine Terminals Corp.*, 30 BRBS 29(1996) (*en banc*) (Brown and McGranery, J.J., concurring and dissenting).

Claimant next challenges the district director's disallowance of all time related to counsel's communications with claimant regarding the latter's allegations of harassment by employer and its counsel in reprisal for claimant's filing of the Section 14(f) claim. Order on Remand at 3. As a general matter, counsel is entitled to a fee for time spent in communications with claimant which are necessary and related to the compensation claim. See *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375, 383 (1979). In this case, however, any alleged misconduct by employer's representatives or its counsel, even if in retaliation for claimant's pursuit of a remedy under Section 14(f), would not be actionable under the Act itself as the Act provides no remedy for alleged misconduct of this nature. See 33 U.S.C. §§931(c), 948a. Thus, the district director did not err in finding that claimant's attorney is not entitled to a fee under the Act for communications with his client regarding this issue. See generally *Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999) (no attorney's fee if services are not "in respect of a claim" pursuant to Section 19(a)).

We next address claimant's assignment of error to the district director's disallowance of two specific entries itemized in his March 21, 2007 fee petition. First, the district director disallowed an entry of .4 hour itemized on March 6, 2007, as duplicative of a previous entry of 1.2 hours on the same date. Order on Remand at 4. We agree with claimant that these two entries cannot reasonably be viewed as duplicative; rather, the latter entry lists reasonable and necessary work performed to follow up on the

¹ Contrary to employer's assertion that the fee awarded to Mr. Myers is not at issue in this appeal, see Employer's Memorandum at 10, claimant clearly challenges the reduced fee awarded to both Mr. Dupree and his associate, Mr. Myers.

services itemized in the former entry.² We therefore modify the district director's Order on Remand to reflect counsel's entitlement to a fee for the .4 hour disallowed by the district director. Next, the district director disallowed as unnecessary an entry of 1.6 hours itemized on March 20, 2007. Order on Remand at 4. Specifically, the district director found this entry, which involved research regarding the methodology for establishing a reasonable hourly rate for counsel's services in the relevant community, to be unnecessary "as we have seen the rate methodology explained and billed by [Mr. Dupree] in other cases, . . ." *Id.* Claimant's counsel, however, notes that the disallowed entry specifically states that this research time is billed on a *pro rata* (10%) basis as he prorated the time spent researching hourly rate methodology across ten cases. Claimant's counsel additionally notes that the disallowed entry also includes time spent on a telephone call with another attorney regarding current hourly rates. In view of recent case precedent concerning hourly rate determinations, it was reasonable for claimant's counsel to perform the work itemized in this entry in order to establish a market rate for his services. The district director's Order on Remand is therefore modified to reflect counsel's entitlement to a fee for the 1.6 hours disallowed on March 20, 2007.

Claimant further assigns error to the district director's reductions in various entries dated May 18, 2007 through August 21, 2008, on the basis that the itemized services were excessive and/or unnecessary.³ Order on Remand at 4. We disagree with claimant's contention that the district director did not provide a sufficient explanation in making these reductions. Only necessary attorney work is compensable and fees for services found to be "excessive, redundant, or otherwise unnecessary" may be properly reduced or disallowed. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 955, 41 BRBS 53, 57(CRT) (9th Cir. 2007); *see Brown*, 30 BRBS at 34; *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194, 197 (1986). In this case, the entries reduced by the district director itemize work related to the preparation of counsel's multiple fee petitions and his replies to employer's objections to his fee requests. While counsel is entitled to reply to employer's objections, he must exercise discretion in doing so. *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009); *see also Anderson v. Director, OWCP*, 91 F.3d

² Specifically, the March 6, 2007 entry itemizing 1.2 hours of work performed by Mr. Dupree involves his review of various settlement agreement-related documents as well as his instructions to Mr. Myers to obtain other documents from the Office of Workers' Compensation Programs (OWCP). The subsequent entry of .4 hour itemizes Mr. Dupree's review of Mr. Myers's contact with OWCP, confirmation of revisions made to the settlement agreement, and a telephone conversation with his co-counsel regarding these issues.

³ Specifically, claimant challenges reductions made to entries dated May 18, 2007, July 11, 12, 13, 16, 17, and 18, 2007, and August 21, 2008. *See Cl. Br.* at 11-12.

1322, 30 BRBS 67(CRT) (9th Cir. 1996) (counsel entitled to a *reasonable* fee for preparing fee petition). We note in this regard that the Supreme Court has admonished that, “A request for attorney’s fees should not result in a second major litigation.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Beckwith*, 43 BRBS at 157. In this case, the district director engaged in a thorough examination of the hours claimed and the objections made by employer, and rationally determined that the amount of time claimed for work related to the defense of claimant’s counsel’s fee petition was unnecessary or excessive. Order on Remand at 4. We, therefore, affirm the reductions made by the district director regarding entries from May 18, 2007 through August 21, 2008.

Claimant makes a similar argument with respect to entries dated September 18 through October 2, 2008.⁴ Order on Remand at 4. We reject claimant’s assertion that because employer did not file objections to claimant’s attorney’s Third Supplemental Fee Petition, the district director was required to approve all of the entries in the petition. The body awarding the fee has the duty to independently review the fee request even absent objections from the opposing party. *Sullivan v. St. Johns Shipping Co., Inc.*, 36 BRBS 127, 130-131 (2002). Furthermore, for the reasons stated in the foregoing discussion, we do not agree with claimant that the district director abused his discretion in finding that the time itemized during this period for work solely related to counsel’s fee was duplicative or excessive. *See Hensley*, 461 U.S. at 437; *Beckwith*, 43 BRBS at 157. We, therefore, affirm the disallowances and reductions of various services itemized from September 18 through October 2, 2008.

⁴ The district director disallowed entries dated September 22 and 28, 2008 and October 1, 2008, and reduced entries dated September 18, 27, 29 and 30, 2008, and October 1, 2008.

Accordingly, the district director's attorney's fee award is modified to reflect counsel's entitlement to an additional fee of \$846 representing .4 hour on March 6, 2007 and 1.6 hours on March 20, 2007, at an hourly rate of \$423. In all other respects, the district director's Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge