



BRB Nos. 15-0393A
and 16-0305

LAUREN SEEL)	
)	
Claimant-Cross-Respondent)	
Respondent)	
)	
v.)	
)	
NAVY EXCHANGE SERVICE)	DATE ISSUED: <u>Feb. 8, 2017</u>
COMMAND)	
)	
Self-Insured)	
Employer-Cross-Petitioner)	
Petitioner)	DECISION and ORDER

Appeals of the Order Awarding Attorney’s Fees and Costs of Steven B. Berlin, Administrative Law Judge, and the Compensation Order on Attorney Fees and the Compensation Order Denying Claimant’s Motion for Reconsideration of R. Todd Bruininks, District Director, United States Department of Labor.

Matthew J. Witteman (Law Offices of Matthew J. Witteman), San Rafael, California, for claimant.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, California, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Attorney’s Fees and Costs (2009-LHC-01414) of Administrative Law Judge Steven B. Berlin and the Compensation Order on Attorney Fees and the Compensation Order Denying Claimant’s Motion for Reconsideration (OWCP No. 13-104993) of District Director R. Todd Bruininks, 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. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

Following the administrative law judge's award of permanent partial disability and medical benefits to claimant, claimant's attorney submitted fee petitions to both the administrative law judge and the district director for work performed before them. To the administrative law judge, counsel submitted a request for a fee of \$78,620, representing 196.55 hours of attorney services at an hourly rate of \$400, plus \$10,252.39 in costs. The administrative law judge determined that the relevant market is San Francisco, and, after addressing the evidence presented, he awarded counsel an hourly rate of \$305. He disallowed 13.45 hours for work that was performed before the district director, as well as 4.1 hours of "trial preparation" that was dated after the hearing had occurred. Due to claimant's limited success and what the administrative law judge deemed to be counsel's inadequate settlement efforts, the administrative law judge then reduced the total fee by 35 percent; however, due to the delay in payment of a fee, the administrative law judge increased the award by two percent. Thus, he awarded claimant's counsel a fee of \$36,196.49, payable by employer. The administrative law judge awarded \$6,985.44 in costs. Order at 11-16. Employer appeals the fee award, and claimant responds, urging affirmance. Employer filed a reply brief. BRB No. 15-0393A.¹

To the district director, claimant's counsel presented multiple fee petitions for various periods of work, totaling over \$18,000.² Because he found that employer submitted a letter in 2013 generally stating that it had objections to the fee, but only specifically objecting to the hourly rate, the district director did not reduce the hours requested.³ The district director relied on the administrative law judge's findings and awarded counsel an hourly rate of \$305; thus, he awarded claimant's counsel a total fee

¹ By Order dated May 27, 2016, the Board reinstated the appeals in BRB Nos. 15-0393/A and consolidated them with BRB No. 16-0305. By Order dated December 19, 2016, the Board granted claimant's motion to withdraw her appeal in BRB No. 15-0393.

² Counsel submitted a fee petition in March 2012 requesting a fee for 14.05 hours of work at an hourly rate of \$400, plus \$88.73 in costs. He subsequently sought a fee for an additional five hours for work on the fee petition and reply. Counsel also submitted a fee petition in September 2013 for 17.4 hours of work at an hourly rate of \$400. In 2015, due to the delay, he submitted a letter requesting an increased fee.

³ The letter also asked the district director to hold the attorney's fee petition in abeyance pending the administrative law judge's fee award.

of \$12,184.75, plus \$88.73 in costs, payable by employer. Comp. Order at 2-4. The district director denied claimant's motion for reconsideration. Employer appeals the district director's fee award, and claimant responds, urging the Board to find the petition for review untimely filed and, alternatively, to affirm the award.⁴ BRB No. 16-0305.

Employer contends the administrative law judge and the district director erred in awarding counsel a fee for the time he spent preparing his fee petition and on any briefs related to his securing an attorney's fee. Employer asserts that, pursuant to the Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, 135 S.Ct. 2158 (2015), counsel is not entitled to a fee for services related to securing his attorney's fee because the Longshore Act, like the Bankruptcy Code addressed in *Baker Botts*, does not specifically authorize shifting liability to employer for the payment of a fee that is not in pursuit of "compensation" for the claimant.⁵ The Board addressed this issue in its decision in *Clisso v. Elro Coal Co.*, 50 BRBS 13 (2016) (Order on Recon. *en banc*).

In *Clisso*, the Board held that *Baker Botts* is not applicable to Section 28(a) of the Longshore Act, 33 U.S.C. §928(a), because the Supreme Court distinguished Section 330(a)(1) of the Bankruptcy Code, 11 U.S.C. §330(a)(1), from statutes such as the Longshore Act that explicitly provide for fee shifting. *Clisso*, 50 BRBS at 14-15. For the reasons set forth in *Clisso*, we reject employer's contention that the administrative law judge and district director erred in awarding counsel a fee for services related to securing a fee and defending his fee application, as fees for these services may be shifted to

⁴ We reject claimant's assertion that employer's appeal should be dismissed because it did not timely file its Petition for Review and brief in response to the Board's May 27, 2016, Order. In an Order dated October 14, 2016, the Board denied claimant's motion to dismiss employer's cross-appeal in the companion case, BRB No. 15-0393A, which was filed on the same basis. The Board accepted the brief in BRB No. 15-0393A as timely filed, and we similarly accept the Petition for Review and brief in BRB No. 16-0305 as timely filed, as it was filed on the same date as the brief in BRB No. 15-0393A. 20 C.F.R. §802.211.

⁵ We reject claimant's assertion that employer may not raise this issue on appeal because it did not raise the issue before the administrative law judge. While the Board generally will not consider objections to an attorney's fee petition that were not raised before the administrative law judge, *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988), an issue may be considered for the first time on appeal when there is a change in law and the new law might materially alter the result. *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97 (1988). The administrative law judge's fee award was issued on June 2, 2015, and *Baker Botts* was issued on June 15, 2015; thus, employer could not have raised this issue before the administrative law judge.

employer in accordance with Section 28 of the Act. *Id.*; see *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996); *Baumler v. Marinette Marine Corp.*, 40 BRBS 5 (2006). As there is no other challenge to the attorney's fee awarded by the administrative law judge, we affirm it.

Employer also contends the district director erred in failing to address its objections to counsel's fee petitions. We agree. In his Compensation Order, the district director stated that employer filed a letter in 2013 which indicated only that it had objections to the fee petition generally. The district director addressed only the challenge to the hourly rate, stating that employer's other objections were not specified. Comp. Order at 2. Contrary to the district director's statement, however, the administrative file contains employer's fee objections dated April 2012 and June 2015.

In the 2012 objections, in addition to challenging the hourly rate sought, employer objected to a fee for travel time and disputed as excessive the time requested for preparing the fee petition and for being in contact with claimant. Employer also asked the district director to reduce the fee due to claimant's limited success. In the 2015 objections and in a supplemental letter filed after the administrative law judge issued his fee order, employer challenged the hourly rate and made the argument with respect to *Baker Botts*, as well as contending it is not liable for a fee under Section 28(b) of the Act, 33 U.S.C. §928(b), and challenging as excessive the time for preparing the fee petition. Except for the hourly rate, the district director did not address employer's objections. Therefore, we vacate the district director's fee award and remand the case for him to further consider counsel's fee petitions and employer's objections.⁶ See generally *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

⁶ As the district director addressed the hourly rate objection, and employer did not specifically challenge the hourly rate awarded by the district director, it is affirmed as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2004). Further, we decline to address claimant's single-sentence argument that employer's objections were not timely filed, as that must first be addressed by the district director. See generally *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). However, we note that the 2012 objections appear to comply with the claims examiner's letter dated March 5, 2012, stating that objections must be filed by April 5, 2012, and, as requested by employer, a ruling on the fee petitions was held in abeyance pending action by the administrative law judge.

Accordingly, the district director's Compensation Order on Attorney Fees and Compensation Order Denying Claimant's Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the district director's Compensation Orders are affirmed. The administrative law judge's Order Awarding Attorney's Fees and Costs is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge