

BRB No. 02-0349

TERRY M. DOWD)
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 Claimant-Respondent)
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 v.)
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 ASTORIA METAL CORPORATION) DATE ISSUED: Jan. 21,
) 2003
 and)
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 AMERICAN HOME ASSURANCE)
)
 Employer/Carrier-) DECISION and ORDER
 Petitioners)

Appeal of the Compensation Order – Approval of Attorney Fee Application of Philip G. Williams, District Director, United States Department of Labor.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order – Approval of Attorney Fee Application (OWCP No. 13-97370) of District Director Philip G. Williams 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. See *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a crush injury to his left foot on January 26, 1998, during the

course of his employment as a rigger. Employer voluntarily commenced payment of temporary total disability benefits and medical equipment expenses pursuant to the Act. In 1999, a dispute arose as to the nature and scope of medical care that was reasonable and necessary for the work injury. The claim was referred to the Office of Administrative Law Judges for a formal hearing, but the parties were able to reach an agreement prior to the hearing. The stipulations entered into and approved by Administrative Law Judge Burch provided for ten hours per week of housekeeping services at the rate not to exceed \$30 per hour and the sum of \$4,746.50 for attorney's fees and costs incurred to that date before both the Office of Workers' Compensation Programs and the Office of Administrative Law Judges.

In January 2001, a dispute arose over the amount to be paid for claimant's housekeeping services, as employer unilaterally reduced the rate to \$12 per hour. An informal conference was held on July 3, 2001 to address this issue, and on July 19, 2001, the district director issued a "Compensation Order Section 7(g)" for continuing housekeeping services at the prevailing community rate of \$21 per hour. The district director denied employer's motion for reconsideration on October 2, 2001.

Subsequent to the issuance of the district director's compensation order, claimant's counsel submitted an application for an attorney's fee for the period from February 24, 2000 to August 3, 2001, requesting \$9,358.50 in fees at the hourly rates of \$185 for the attorney and \$95 for the law clerk. Employer filed objections, contending that the fee application was premature, that the fee award should be limited to the services performed on the issue of the rate for housekeeping services, that the services provided by the unknown law clerk were secretarial in nature, and that many of the items requested were for services performed before the California State Workers' Compensation Appeals Board (WCAB). The district director reviewed the fee application and employer's objections and found that all the services requested were reasonable and necessary, but reduced the hourly rate of the law clerk to \$65. Thus, the district director awarded an attorney's fee in the amount of \$9,277.50, representing 49.2 hours of legal services at the hourly rate of \$185 for the attorney and \$65 for the law clerk.

On appeal, employer contends that the attorney's fee award is premature as there has been no resolution through either litigation or settlement of any issue except the housekeeping rate issue. Thus, employer also contends that compensable services should be limited to those related to the housekeeping issue. In addition, employer contends that the work performed before the WCAB should not be compensated under the Act, and that the district director erred in finding that it had the burden to show that those services were not necessary. Claimant has not responded to this appeal.

Initially, we reject employer's contention that the district director's award of any attorney's fee is premature. Section 28 of the Act, 33 U.S.C. §928, provides for the award of an attorney's fee to claimant's attorney upon successful prosecution of a claim. In the instant case, a dispute arose between the parties regarding the appropriate rate for housekeeping services, which was resolved by the district director in a compensation order. See generally *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Employer was ordered to increase the hourly rate for housekeeping services from \$12 per hour to \$21 per hour. Although employer contends that there are numerous outstanding issues to be resolved in this case, they were not at issue before the district director. As claimant's counsel successfully gained benefits greater than those being paid by employer on the sole disputed issue, we hold that an attorney's fee for work performed before the district director on the issue of a reasonable hourly rate for housekeeping services is not premature. 33 U.S.C. §928; 20 C.F.R. §702.134.

However, we agree with employer that claimant's counsel's fee should be limited to the work performed on the sole issue in dispute, *i.e.*, the rate for housekeeping services. The proper test to determine whether an attorney's work is compensable is whether, at the time the attorney performed the work in question, he or she could reasonably regard it as necessary to establish entitlement. See generally *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Claimant's entitlement to housekeeping services was not in dispute before the district director, as the parties had agreed by stipulation that employer would pay for ten hours per week for ongoing housekeeping services and that the services would not be withdrawn without a physician's opinion that such services were no longer reasonable and necessary. Employer did not withdraw all housekeeping services, but rather reduced the amount paid for the services, contending that \$30 per hour did not represent the prevailing rate in the community given the scope of duties required. Therefore, contrary to the district director's finding, it was not necessary for claimant's counsel to review documentation relating to the necessity of the services in order to address the issue of the hourly rate to be paid for these services. It is axiomatic that the services for which a fee is sought must relate to the issues in dispute before the district director. Therefore, we vacate the district director's finding that claimant's counsel is entitled to a fee for review of the record to determine the necessity of housekeeping services, and we remand this case for further findings regarding the number of hours reasonably expended in pursuit of an increased housekeeping rate.

In addition, while the district director may award an attorney's fee for services performed in connection with collateral actions, if counsel shows that the same services are necessary to, and are used in the prosecution of, the federal compensation claim, see *Roach v. New York Protective Covering*, 16 BRBS 114 (1984), claimant's counsel has the burden to show that legal services provided were

reasonable and necessary to the pursuit of the claim under the Act. *Id.*; 20 C.F.R. §702.132. Contrary to the district director's statement, it is not employer's burden to show the services were not reasonable or necessary. There is no evidence of record to establish how claimant's counsel's work before the WCAB pursuing penalty petitions was necessary to the prosecution of the claim for a higher hourly rate for housekeeping services under the Act. Therefore, on remand, the district director must reconsider his finding that these services are compensable. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Thus, on remand, the district director may hold employer liable only for a reasonable fee for services related to obtaining an increase in the rate for housekeeping services.

Accordingly, the district director's award of an attorney's fee is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹ In addition, we vacate the district director's finding that claimant's counsel is entitled to a fee for services provided during the period from February 24, 2000 through March 22, 2000, as these services were covered by the fees paid pursuant to the parties' stipulations.