

BRB Nos. 06-0622
and 06-0622A

J. P.)
)
 Claimant-Respondent)
 Cross-Petitioner)
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 v.)
)
 KINDER MORGAN BULK) DATE ISSUED: 01/31/2007
 TERMINALS)
)
 and)
)
 MUTUAL CASUALTY COMPANY)
)
 Employer/Carrier-)
 Petitioners)
 Cross-Respondents) DECISION and ORDER

Appeal of the Compensation Order Approval of Attorney Fee of Karen P.
Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Richard M. Slagle (Slagle Morgan LLP), Seattle, Washington, for
employer/carrier.¹

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Compensation Order Approval

¹ On June 1, 2006, the district director amended the compensation order to reflect that the carrier in this case is the Mutual Casualty Company rather than the initially named SeaBright Insurance Company.

of Attorney Fee (Case No. 14-137586) of District Director Karen P. Staats 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 may be set aside only if the challenging party shows it 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 injured his back on April 3, 2002, during the course of his employment for employer as a mechanic. Employer voluntarily paid compensation for temporary total disability while claimant was unable to work. Claimant could not return to work as a mechanic. He returned to light-duty longshore employment on October 6, 2003. Claimant filed a claim for permanent partial disability compensation based on a loss of wage-earning capacity. *See* 33 U.S.C. §908(c)(21). After a formal hearing, the parties settled the claim, and the administrative law judge issued a decision approving the settlement. *See* 33 U.S.C. §908(i).

The administrative law judge's decision and order approving the agreed settlement was filed and served on December 15, 2005. On January 9, 2006, the Office of Workers' Compensation Programs (OWCP) received a letter from claimant's attorney advising that claimant received the settlement proceeds on January 5, 2006. Claimant's attorney then requested a compensation order assessing a Section 14(f) penalty, 33 U.S.C. §914(f), and interest against employer for late payment of compensation. On January 20 and January 27, 2006, the OWCP received letters from employer confirming that it had paid the Section 14(f) penalty and interest.

Claimant's counsel subsequently submitted a fee petition to the district director for fees for time spent obtaining the penalty payment and interest, requesting a fee of \$412.50, representing 1.5 hours of attorney time at \$275 per hour. Employer objected to the fee request. Claimant's counsel replied to employer's objections and requested an additional \$175, representing .5 hours of attorney time at \$350 per hour, for preparing the reply to carrier's objections.

In her Compensation Order, the district director reduced the hourly rate requested by claimant's counsel to \$225. The district director rejected employer's objection to its liability for any fees for time expended related to the Section 14(f) assessment. Accordingly, employer was held liable for an attorney's fee totaling \$450, representing two hours at \$225 per hour.

On appeal, claimant challenges the district director's reduction of the hourly rate for attorney time to \$225. BRB No. 06-0622. Employer responds, urging affirmance of the hourly rate. Claimant replies to employer's response. Employer cross-appeals the district director's finding that it is liable for any attorney's fee. BRB No. 06-0622A.

Claimant responds, urging affirmance of the district director's assessment of fee liability on employer.

We first address employer's cross-appeal. Employer argues that as it timely paid claimant the Section 14(f) penalty and interest thereon, the district director's finding that it is liable for any attorney's fee related to this issue is not in accordance with law. Employer states that it did not "decline to pay" the Section 14(f) assessment and interest, *see* 33 U.S.C. §928(a), and therefore cannot be held liable for the fee. In her Compensation Order, the district director cited cases holding that successfully prosecuting a claim for penalties and interest entitles claimant's attorney to fees.² The district director reasoned that had employer timely paid the award on the underlying claim, claimant's attorney would not have had to review the file and request a penalty and interest payment. She therefore concluded that employer is liable for claimant's counsel's fee for legal work obtaining the Section 14(f) penalty and interest.

We affirm the district director's finding that employer is liable for a fee for claimant's counsel. The district director's finding is predicated on the premise that the penalty and interest were due to the delay in payment of the underlying award and therefore are part of the original claim. In *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2003), *cert. denied*, 126 S.Ct. 478 (2005), the Fourth Circuit construed the phrase "filing a claim" under Section 28(a) as a "formal action that initiates a legal proceeding, rather than an informal action that seeks to alter or amend a pre-existing settlement on a prior claim[.]" *Id.*, 398 F.3d at 317, 39 BRBS at 3(CRT). The court thus held that a claimant's request for additional benefits five months after he filed his claim was not a "claim" within the meaning of Section 28(a). As the employer timely paid benefits after the formal claim was filed, the court held that it was not liable for an attorney's fee under Section 28(a) when it did not pay the additional benefits. Similarly, in this case, claimant's letter seeking a Section 14(f) assessment and interest clearly relate to the initial claim, which employer had controverted. *See Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Therefore, we reject employer's argument that as it timely paid the 14(f) assessment and interest, it is not liable for an attorney's fee; this "claim" is not separate from the initial controverted disability claim. As claimant successfully obtained a Section 14(f) assessment and interest and as employer has not shown that the district director erred in this regard, her finding that employer is liable for claimant's attorney's fee is affirmed. *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

² The district director cites *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43(CRT), *on reh'g*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991), and *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992), for the proposition that successfully prosecuting a claim for penalties and interest entitled the claimant's attorney to fees. Employer correctly notes that the penalty or interest was contested by the employers in those cases.

Claimant challenges the hourly rate awarded by the district director for attorney time. Claimant's counsel requested an hourly rate of \$275 for 1.5 hours of his services, and \$350 per hour for .5 hours for attorney time for later services. The district director found the requested hourly rates excessive. The district director found that the issue presented was relatively straightforward and did not present a level of complexity meriting an hourly rate higher than the \$225 hourly rate previously awarded to claimant's counsel. The district director observed that the fee request was based on two telephone calls to claimant, the writing of three letters, and an affidavit for a supplemental attorney's fee. The district director reasoned that the fee request is an issue with which claimant's counsel has dealt many times and does not involve new or novel legal theories. The district director concluded that an hourly rate of \$225 is reasonable for claimant's counsel's services. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995); *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997).

We reject claimant's argument based on the "Laffey Matrix" as the Ninth Circuit, in whose jurisdiction this case arises, has held it inapplicable to determining an attorney's fee under fee-shifting statutes in cases within its jurisdiction. *See Maldonado v. Lehman*, 811 F.2d 1341 (9th Cir. 1987), *cert. denied*, 484 U.S. 990 (1987). Thus, we affirm the awarded hourly rate of \$225 as the district director adequately addressed the relevant regulatory factors, and claimant has not shown that the district director abused her discretion in reducing the hourly rate based on the regulatory criteria, including the lack of complexity of the case. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3^d Cir. 2001).

Accordingly, the district director's Compensation Order Approval of Attorney Fee is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge