



BRB No. 17-0305

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| SCOTT PARKHURST |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| AAR AIRCRAFT GROUP |) | |
| |) | |
| and |) | |
| |) | |
| ALLIED WORLD ASSURANCE |) | DATE ISSUED: <u>Jan. 16, 2018</u> |
| COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Petitioners |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Compensation Order Award of Attorney's Fees of Kristina Hall, District Director, United States Department of Labor.

Kimberly A. Corkill (Soloway Law Firm), Pensacola, Florida, for claimant.

Jason Gillette (Schouest, Bamdas, Soshea & BenMaier, P.L.L.C.), Houston, Texas, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (OWCP No. 06-302005) of District Director Kristina Hall 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 the law. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

On November 12, 2012, claimant began working for employer in Afghanistan as an Airframe and Powerplant Rotor Wing Technician. Claimant alleged that, on or about December 27, 2013, he sustained hip, thigh, back, and psychological injuries while trying to prevent a 500-pound load of cargo from tipping out of a helicopter. Employer accepted the orthopedic injuries as compensable, but controverted the psychological injury in its entirety. Employer paid disability and medical benefits for the orthopedic injuries only. A dispute arose over the nature and extent of claimant's alleged physical/economic disability, but on May 27, 2016, the parties executed a Section 8(i), 33 U.S.C. §908(i), settlement agreement, discharging employer's liability for disability benefits in exchange for \$300,000, while leaving open medical benefits related to the orthopedic injury.¹ Settlement Agreement at 15. Employer additionally agreed to be responsible for claimant's counsel's "reasonable" attorney's fees, but not to a set amount. *Id.* On June 2, 2016, Administrative Law Judge Kennington approved the settlement.

On June 15, 2016, claimant's counsel submitted a petition to the district director, seeking \$70,784.43 in an attorney's fee for services rendered and costs accrued between July 7, 2014 and March 6, 2016, while the case was pending before the Office of Workers' Compensation Programs. This sum represents \$34,720 for 99.2 hours of Attorney Soloway's services at an hourly rate of \$350; \$19,271.25 for 85.65 hours of Attorney Corkill's services at an hourly rate of \$225; \$12,516.75 for Attorney MacLaren's services at an hourly rate of \$225; \$2,518.50 for 21.9 hours of paralegal time at an hourly rate of \$115; and, \$1,657.93 for costs and expenses.² On June 17, 2016,

¹ Claimant's entitlement to medical benefits for his psychological injury remained controverted in its entirety.

² Also on June 15, 2016, counsel submitted a fee petition to the Office of Administrative Law Judges, seeking \$15,629.75 in fees for services rendered between March 7 and April 6, 2016. On August 25, 2016, Judge Kennington awarded counsel a fee of \$8,288.25. No party appealed this award.

employer filed a motion to deny all fees prior to the date of controversy, which employer alleges is either February 4 or March 7, 2016.³ On June 30, 2016, counsel responded, asserting that the date of controversy predates his representation of claimant and he, therefore, is entitled to a fee for all services under Section 28(b) and the parties' settlement agreement. On July 14, 2016, employer filed additional objections to the fee petition, to which counsel responded on August 4, 2016.

On March 7, 2017, upon stating that she considered employer's objections, the district director awarded counsel an attorney's fee payable by employer. She awarded a total fee of \$49,133, representing \$23,820 for 79.4 hours of Attorney Soloway's time at an hourly rate of \$300; \$11,171.25 for 49.65 hours of Attorney Corkill's time at an hourly rate of \$225; \$10,716.75 for 47.63 hours of Attorney MacLaren's time at an hourly rate of \$225; \$1,971 for 21.9 hours of paralegal services at an hourly rate of \$90; and \$1,454 in costs.⁴ In awarding an attorney's fee for work prior to employer's alleged dates of controversy, the district director implicitly denied employer's motion.⁵

Employer appeals, contending the district director erred in failing to address its motion to deny all attorney's fees prior to the alleged date of controversy and in failing to adequately explain the basis for her findings with respect to the number of attorney hours awarded. Claimant responds, urging affirmance of the fee award. The Director, Office of Workers' Compensation Programs (the Director), also responds, agreeing with employer that the case should be remanded for the district director to adequately explain her findings.⁶

³ Employer's June 2016 motion alleged that the attorney's fee in this case is governed by Section 28(a), 33 U.S.C. §928(a), and that it should not be liable for fees prior to December 8, 2015, the date it received notice of claimant's claim. However, in July 2016, employer amended its motion to assert that the attorney's fee is governed by Section 28(b), 33 U.S.C. §928(b), and that the date of controversy is either the date the district director issued recommendations, February 4, 2016, or the date employer declined to accept the district director's recommendations, March 7, 2016.

⁴ The district director's Order incorrectly states that the sum of these figures is \$53,173. Order at 3. Claimant's counsel concedes this is a scrivener's error and that the amount the district director intended to award can be calculated by adding the time and costs awarded. Cl. Br. at 13.

⁵ The district director did not explicitly address employer's June 2016 motion.

⁶ We affirm, as unchallenged on appeal, the district director's hourly rate awards of \$300 for Attorney Soloway, \$225 for Attorneys MacLaren and Corkill, \$90 for

We agree with employer and the Director that the district director's fee award cannot be affirmed. The district director stated that, "[t]o the extent that the undersigned disallows any time requested, [employer's] objections are sustained. Otherwise, the hours requested are found to be reasonable," Order at 1, and she listed the individual reduced entries for services rendered by Attorneys Soloway and MacLaren. *Id.* at 2-3. The district director, however, did not address employer's June 17, 2016 motion, counsel's response thereto, or explain the basis for her reductions, *i.e.*, she did not state whether specific entries were excessive, unnecessary or clerical. With respect to Attorney Corkill, the district director specified only the total time she found to be compensable, and made no reference to employer's objections or any particular services rendered. *Id.* at 3.

The district director's failure to address employer's motion to deny all attorney's fees prior to the date of controversy, to address its objections with any specificity, or to provide reasons for her findings regarding the compensability of the contested entries prevents the Board's review of her findings. *See, e.g., Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Jensen v. Weeks Marine*, 33 BRBS 97 (1999); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Therefore, we vacate the district director's findings with regard to the compensable time for Attorneys Soloway, MacLaren, and Corkill, and we remand the case for the district director to address employer's objections and fully explain the basis for the reductions of the requested fee. On remand, the district director must also address employer's contentions that it is not liable for any attorney's fee incurred prior to its receipt of the notice of the claim or the alleged date a subsequent controversy arose. In this respect, the district director must specify whether employer's liability for claimant's attorney's results from the application of Section 28(a) or Section 28(b). *See generally Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017); *Davis v. Eller & Co.*, 41 BRBS 58 (2007).

paralegal time, and the awards of \$1,971 for paralegal services and \$1,454 in costs. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Accordingly, the district director's Compensation Order Award of Attorney's Fees is vacated in part, and the case is remanded for further findings consistent with this decision. The hourly rates awarded and the awards for paralegal services and costs incurred are affirmed as unchallenged on appeal.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge