BRB No. 92-2171

MICHAEL PONTORIERO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Compensation Order - Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Cornelius V. Gallagher (Linden & Gallagher), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order - Award of Attorney's Fees (2-76382) of District Director Richard V. Robilotti 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, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

In a 1986 Decision and Order, claimant was awarded permanent total disability compensation and continuing medical benefits for injuries to his leg and foot and psychiatric problems manifested as ulcerative proctitis resulting from work-related injuries he sustained on November 8, 1976 and April 16, 1982. Claimant's counsel thereafter sought an attorney's fee of $1,250, representing 5 hours of services at $250 per hour for work performed before the district director between January 15, 1992, and June 12, 1992, in connection with a dispute over medical expenses. Employer objected to the fee application in its entirety. The district director awarded claimant's counsel a fee of $700, payable by employer. Employer appeals, contending that the district director erred in determining that it is liable for the fee. In addition, employer argues that

claimant's counsel should be compensated at an hourly rate of $150 rather than the $250 hourly rate claimed and that various itemized entries should have been disallowed. Claimant has not responded to employer's appeal.

On appeal, employer initially argues that the district director erred in holding it liable for claimant's counsel's fee because the services claimed were performed in connection with claimant's unsuccessful attempt to obtain authorization for a second treating physician to monitor his condition closer to his home in New Jersey, consistent with the recommendation of his authorized treating gastroenterologist, Dr. Cohen, who was located in New York. Employer maintains that inasmuch as the claims examiner, after conducting an informal conference, issued a recommendation that claimant "select a Board certified gastroenterologist in New Jersey who will review the entire medical record and make a diagnosis and treatment plan," and employer accepted this recommendation which was consistent with its prior position,[1] it cannot be held liable for the fee under Section 28(b) of the Act, 33 U.S.C. §928(b), because there was no controversy after the issuance of the district director's recommendation and claimant did not ultimately obtain any additional compensation.

We are unable to resolve the fee liability question presented on appeal in light of the scanty state of the administrative file before us[2] and the district director's failure to provide

[1]According to employer, by letter dated April 7, 1992, it denied claimant's request for a second authorized physician and advised claimant that there was no evidence demonstrating the need for more than one authorized treating physician and that any emergency consultation or treatment necessitated by the compensable medical condition was clearly a covered expense under the Act. Moreover, employer asserts that it advised claimant that he had every right to change treating physicians if he so desired.

[2]Although employer argues that the only issue in controversy at the time of the informal conference was whether claimant should be allowed a second treating physician in New Jersey, we note that claimant's counsel's fee petition suggests that there may, in fact, have been other disputed medical expenses. Moreover, the record reflects that after the services in question were performed the case was again referred to the Office of Administrative Law Judges and that thereafter the parties ultimately reached an agreement regarding the payment of some medical expenses. It is unclear from the record, however, whether any of the medical expenses disputed before the district director were the same as those in dispute before the administrative law judge.

any explanation of his finding of fee liability.[3] Similarly, because the district director summarily reduced the fee to $700 without identifying the specific entries he reduced or disallowed or the hourly rate he applied, we are also unable to address employer's alternate arguments regarding the hourly rate and the compensability of specific itemized entries claimed.[4] Accordingly, we vacate the fee award made by the district director and remand the case to allow him to explicitly address employer's liability for the fee and to fully explain his fee award consistent with the requirements of 20 C.F.R. §702.132. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280, 288 (1990); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983).

Accordingly, the district director's Compensation Order-Award of Attorney's Fees is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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[3]Employer correctly asserts that liability for an attorney's fee under Section 28(b) commences as of the time a controversy arises between the parties. *See generally Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995). Although employer argues on appeal that there was no controversy in this case prior to the time that claimant requested an informal conference, this question must be addressed by the district director. To the extent, however, that employer is arguing that there must be a rejection of the district director's recommendation after the informal conference before fee liability commences, this argument has been previously rejected by the Board. *Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986).

[4]Employer correctly asserts that time spent by counsel for preparation of a fee petition is not compensable. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90, 95 (1995).