BRB No. 04-0817

TONY POOLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN OFFSHORE	)	DATE ISSUED: 07/15/2005
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order – Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

Patrick E. O'Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order – Award of Attorney's Fees (Case No. 07-159453) of District Director David A. Duhon 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).

Claimant sustained a work-related injury on February 27, 2001. The district director received employer's injury report on March 8, 2001, its Notice of Controversion on April 3, 2001, and claimant's Claim for Compensation on April 16, 2001. Employer avers, and claimant does not dispute, that it received formal notice of the claim from the district director on April 30, 2001. On May 24, 2001, the case was referred to the Office of Administrative Law Judges, and subsequently, Administrative Law Judge Clement J. Kennington awarded claimant temporary total disability compensation in a Decision and Order Awarding Benefits issued on June 25, 2002.

Thereafter, claimant's counsel filed a fee petition requesting a fee of $3,159.25, representing 17.625 hours for services rendered before the district director at an hourly rate of $175 and $74 in expenses. Employer filed objections to counsel's fee petition; specifically, employer objects, first, to the sufficiency of the application, second, to the services performed prior to the date employer received formal notice of the claim from the district director, and, lastly, to the amount of time itemized for contacts with claimant. Claimant's attorney filed a response, defending her fee petition against employer's objections; counsel also requested an additional fee of $550, representing 2.75 hours at an hourly rate of $200, for the time spent in defense of the fee petition. Employer submitted a reply, reiterating its original objections to claimant's attorney's fee petition.

In a Compensation Order – Award of Attorney's Fees dated June 29, 2004, the district director, after considering employer's specific objections, awarded claimant's counsel a fee of $3,114.63, for 17.375 hours at an hourly rate of $175, and $74 in expenses, payable by employer. On appeal, employer challenges the district director's attorney's fee award. Claimant responds, urging affirmance.

Employer first argues that the district director erred in holding employer liable for attorney fees for services performed prior to employer's receipt of formal notice of the claim from the district director. Employer's argument has merit. Section 28(a) of the Act states:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall *thereafter* have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a)(emphasis added). This case, which arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, is controlled by that court's

interpretation of Section 28(a). In its decision in *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 359, 360, 36 BRBS 12, 14(CRT) (5th Cir. 2002), the Fifth Circuit held that four triggering events were required before claimant's attorney's fees could be assessed against the employer: 1) formal notice of the claim from the district director, 2) employer controversion of the claim, 3) successful prosecution of the claim by the claimant, and 4) use of an attorney to prosecute the claim. Regarding this issue, the court held that because receipt of formal notice of the claim from the district director is a prerequisite to employer's liability for claimant's attorney fees, any fees incurred before employer's receipt of formal notice cannot be assessed against the employer. 282 F.3d at 359, 36 BRBS at 13(CRT).[1] In its subsequent decision in *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 853, 37 BRBS 116, 119(CRT) (5th Cir. 2003), *aff'g Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (*en banc*), *aff'd on recon. en banc,* 36 BRBS 65 (2002), the Fifth Circuit clarified that in a case in which the employer filed its controversion of the claim prior to receiving formal notice from the district director, attorney fees may be assessed against the employer from the date of its receipt of formal notice.[2] In the instant case, as in both the *Alario* and *Weaver* cases, employer's controversion predated its receipt of formal notice of the claim from the district director. Thus, employer's liability for claimant's attorney's fees commenced on the date it received formal notice from the district director; claimant may be held responsible for the payment of a reasonable fee for those services rendered by his attorney prior to the date employer's liability commenced. *See* 33 U.S.C. §928(c); *Weaver*, 282 F.3d at 359, 36 BRBS at 14(CRT); *Childers v. Drummond Co.*, 22 BLR 1-148, 1-157 (2002) (*en banc*)(McGranery and Hall, JJ., dissenting). We therefore modify the district director's

[1] The Fifth Circuit's holding in *Weaver* was based on the interpretation of Section 28(a) made in its previous unpublished decision in *Watkins v. Ingalls Shipbuilding, Inc.*, 12 F.3d 209, No. 93-04367 (5th Cir. Dec. 9, 1993)(table)(unpub.), *aff'g* 26 BRBS 179 (1993).

[2] The Board's most recent pronouncements regarding this issue are consistent with the decisions of the Fifth Circuit in *Alario, Weaver* and *Watkins. See Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001)(*en banc*), *aff'd on recon. en banc,* 36 BRBS 65 (2002); *Weaver v. Ingalls Shipbuilding, Inc.*, BRB No. 99-921 (June 1, 2000) (*en banc*)(unpub.)(Hall and Smith, JJ., concurring; Brown and McGranery, JJ., dissenting); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993); *see also Childers v. Drummond Co.*, 22 BLR 1-148 (2002) (*en banc*)(McGranery and Hall, JJ., dissenting). Thus, claimant's reliance on the Board's earlier decision in *Liggett v. Crescent City Marine Ways & Dry Dock Co.*, 31 BRBS 135 (1997)(*en banc*) (Smith and Dolder, JJ., dissenting in pertinent part) is misplaced, as *Liggett* was essentially overruled by the *en banc* decision in *Childers* and is, in any event, inconsistent with controlling Fifth Circuit precedent.

fee award to reflect employer's liability for only those services rendered by claimant's attorney subsequent to the date of employer's receipt of formal notice from the district director.

Finally, employer urges the Board to remand the case to the district director for a further reduction in the amount of the fee awarded for claimant's attorney's defense of her fee petition. In support of this request, employer avers that the Board's acceptance of employer's argument on appeal that employer is not liable for fees incurred prior to its receipt of formal notice from the district director renders claimant's counsel's defense of her fee petition before the district director less successful. We decline employer's request because we view remand for this purpose to be unnecessary under the circumstances presented by this case. Claimant's attorney is entitled to a reasonable fee for work performed in defense of her fee petition. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894, 903 (7th Cir. 2003); *see also Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001). In the present case, claimant's counsel successfully defended the adequacy of her fee petition as well as her charges for contacts with her client against employer's specific objections to those charges; counsel was ultimately unsuccessful only with regard to the issue of employer's liability for fees incurred prior to its receipt of formal notice from the district director. Although claimant's attorney requested a fee of $550 for her defense of her fee petition, the district director approved a fee of only $175 for this work, a reduction of nearly two-thirds in the amount sought by counsel. In view of the substantial reduction which the district director has already made in the fee awarded for counsel's defense of her fee petition, it is unnecessary to remand the case for the district director to consider whether a further reduction is warranted. *See, e.g., Pozos v. St. Mary's Hospital and Medical Center*, 31 BRBS 173, 178 (1997).

Accordingly, the district director's Compensation Order – Award of Attorney's Fees is modified to reflect that employer's liability for claimant's attorney fees commenced as of the date it received formal notice from the district director. In all other respects, the district director's fee award is affirmed. The case is remanded to the district director for entry of a fee award consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge