

MIKLE W. JOHNSON)	
)	
Claimant-Petitioner)	
)	
v.)	
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NABORS OFFSHORE DRILLING, INCORPORATED)	DATE ISSUED: <u>JUN 24, 2004</u>
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

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

Warren A. Perrin (Perrin, Landry, deLaunay, Dartez & Ouellet), Lafayette, Louisiana, for claimant.

Wilton E. Bland, III (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Compensation Award of Attorney's Fees (7-149977) 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 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, e.g., Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on May 31, 1998, while working for employer. The case was referred to the Office of Administrative Law Judges on November 12, 1998. In a Decision and Order issued on October 7, 1999, the administrative law judge awarded

claimant, *inter alia*, temporary total disability benefits from May 31, 1998, and continuing, as well as all medical expenses related to the injury. Both parties appealed to the Board, which affirmed the administrative law judge's decision. *Johnson v. Nabors Offshore Drilling Inc.*, BRB Nos. 00-416/A (Jan. 9, 2001)(unpub.).

The parties thereafter entered into settlement negotiations, and subsequently agreed to settle claimant's claim for a payment to claimant of \$170,000, and a fee in the amount of \$37,400 to claimant's attorney. On November 29, 2002, District Director Gleasman issued an Order approving the parties' executed settlement agreement. *See* 33 U.S.C. §908(i). Employer immediately filed a Motion for Reconsideration and Request to Vacate Order on the ground that the settlement agreement forwarded to and approved by the Department of Labor mistakenly stated that claimant's counsel's fee was to be paid "in addition" to the compensation payable to claimant. On December 5, 2002, District Director Gleasman issued an Order Vacating Settlement, and instructed the parties to correct the agreement and resubmit it. Cl. brief at Ex. D.

On December 13, 2002, employer wrote to claimant's attorney:

[B]ased upon my conversation with [the district director] . . . it is apparent that the settlement, as we proposed it was not going to be acceptable. [T]he district director advised that [claimant] would need 'more money in his pocket' in order for the settlement to be approved. . . . [A]ttached is a revised 8(i) Application. It is the same except that I have put into the Application that Mr. Johnson will receive \$160,000 in his pocket, and that the attorney's fees *as approved*, will be paid in addition to that amount.

Emp. brief at Ex. A, p. 28 (emphasis added).

On December 18, 2002, the parties executed a settlement agreement, the terms of which called for claimant to receive a lump sum payment of \$160,000. Regarding the issue of claimant's counsel's fee, the settlement agreement states:

18.

Claimant's representative's Itemized Fee Statement is in the amount of \$54,978.95 (Attached hereto as Exhibit "F.") Claimant's representative prays for fees and costs totaling \$37,400.00

19.

In the event the District Director determines that the amount of the attorney fees claimed by Claimant's representative is excessive or unreasonable, any reduction in attorney fees ordered by the District Director shall be credited to Employer and shall not be paid to Claimant.

December 18, 2002, Settlement Agreement.

Upon submitting the executed December 18, 2002, settlement agreement to the Department of Labor for approval, employer attached a cover letter stating that "it is agreed that my client will pay to Mr. Johnson the sum of \$160,000, and that any attorney's fees that are approved, will be in addition to that. [The district director] had previously advised me that he would look very carefully at the requested fee of \$37,400, which is being requested and which is handwrote [sic] in the spaces within the 8(i) settlement." Emp. br. at Ex. A, p. 30.

On January 17, 2003, District Director Gleasman issued an Order approving the executed December 18, 2002, settlement agreement. Regarding the issue of claimant's counsel's requested fee, the January 17, 2003, Order states that "The employee's authorized representative, . . ., has submitted an application for attorney's fees to the District Director for consideration. The employer in this case has agreed to pay a fee as approved by the District Director. . . . An order awarding attorneys fees, payable in addition to compensation, will be issued separately." Emp. br. at Ex. F.

Thereafter, in a Compensation Award of Attorney's Fees dated May 29, 2003, District Director Duhon (hereinafter, the district director) considered claimant's counsel's fee request and disallowed 148.2 hours for work performed while this case was before the administrative law judge, the time requested for services performed prior to the date of controversy, and additional time which he found unrelated to the underlying claim, excessive or lacking in specificity. As a result of these reductions, the district director awarded counsel a fee of \$5,913.

On appeal, claimant challenges the district director's fee award, alleging that he is entitled to an attorney's fee of \$37,400, as originally awarded by District Director Gleasman. Employer responds, urging affirmance of the district director's fee award.

Claimant initially argues that the initial settlement agreement executed by the parties and approved by District Director Gleasman was thereafter vacated after an *ex parte* communication between employer and district director. Employer, in response,

avers that that it sent claimant copies of all of its correspondence with the district director, and claimant has not produced any evidence to the contrary. Claimant on appeal has cited no support for the allegation that the initial order was vacated due to *ex parte* communication; employer filed a Motion for Reconsideration and Request to Vacate Order after the initial settlement approval, and there is no evidence these documents were not properly served. As the vacated initial Order approving the settlement also contained the fee Order, it follows that the subsequent Order vacated both the initial settlement and the fee as well. Claimant did not object to District Director Gleasman's Order vacating his approval of the parties' initial agreement nor did claimant request reconsideration of that Order. Thereafter, the parties submitted a revised settlement application for approval. We therefore reject claimant's implied contention of error regarding District Director Gleasman's Order Vacating Settlement.

Claimant next argues that employer's agreement to pay his counsel's attorney's fee "as approved" by the district director indicates employer's acceptance of and willingness to pay the \$37,400 previously approved by District Director Gleasman; accordingly, claimant contends that it was error for District Directors Gleasman and Duhon to reconsider his requested fee and ultimately award an amount significantly lower than that requested. We disagree. As we have discussed, the initial Compensation Order Approving Settlement, which included the fee of \$37,400 payable to claimant's counsel, was rationally vacated by District Director Gleasman on November 29, 2002. The subsequent settlement agreement executed by the parties clearly indicates, in paragraphs 18 and 19, that claimant's counsel had submitted a statement requesting fees and costs, and that the district director was to determine whether that request was excessive or unreasonable. Thereafter, in his January 17, 2003, Compensation Order Approving Settlement, District Director Gleasman noted employer's agreement to pay a fee "as approved" by the district director; he further stated that the requisite order awarding counsel's fee would be issued separately. As claimant's counsel's prior fee award had been vacated, and given the language in the agreement, it was rational for the district director to interpret employer's agreement to pay a fee "as approved" as meaning a reasonable fee awarded after his review pursuant to the regulations and in conjunction with the contemporaneous settlement agreement. *See* 20 C.F.R. §§702.241, 702.132(c). Accordingly, there is no error in the refusal to reinstate claimant's prior fee award and in the district director's decision to review the merits of the fee request.

Claimant, in the alternative, challenges the reduction in the number of hours sought by counsel and the hourly rate awarded by the district director. In the instant case, although claimant's counsel sought a fee of \$37,400, he submitted a fee petition documenting 173.9 hours of services rendered at an hourly rate of \$75, 290.4 hours of services rendered at an hourly rate of \$135, and \$2,732.45 in costs. In his Compensation Award of Attorney's Fees, the district director disallowed 148.2 hours for work

performed before the administrative law judge, 13.5 hours for work performed before a controversy existed, and 258.8 hours which he found to be either excessive, lacking in specificity, or unrelated to the underlying claim. The district director therefore awarded claimant's counsel a fee of \$5,913, representing 43.8 hours of services rendered at an hourly rate of \$135.

We will initially address claimant's contention that the instant fee award should be modified to reflect an hourly rate of \$175. In support of his position, claimant avers that he learned that this higher rate is now routinely approved by the Department of Labor. In his fee petition, however, claimant's counsel specifically sought an hourly rate of \$75 for services performed before October 20, 1999, and an hourly rate of \$135 for services performed thereafter. The district director awarded the higher of these two requests for all of the time that he approved. The district director is not bound by hourly rates awarded in other cases, and claimant has not shown that he abused his discretion in awarding the higher of the two figures requested. Accordingly, we affirm the district director's decision to award claimant's counsel an hourly rate of \$135. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

We have reviewed counsel's contentions regarding the reductions in hours made by the district director, and we cannot say that counsel has established that the district director abused his discretion in reducing the requested fee. In this regard, we note that the Act provides that the decision-maker at each level in the resolution of the case is responsible for awarding a fee for work performed at that level; thus, the district director properly declined to award claimant's counsel a fee for services performed while this case was before the Office of Administrative Law Judges. *See* 33 U.S.C. §928(c); 20 C.F.R. §702.132(a). Additionally, the district director provided a valid rationale for the remaining reductions made to the hours of services requested by counsel, and claimant's counsel's assertions on appeal are insufficient to meet his burden of establishing that the district director abused his discretion in determining that many of the services requested by counsel were either excessive or lacked specificity.¹ We therefore affirm the fee awarded to claimant's counsel by the district director. *See generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995); *see also Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Pozos v. St. Mary's Hospital & Medical Center*, 31 BRBS 173 (1997).

¹ Claimant, in his brief on appeal, concedes that he "could have been more specific in the itemization of work." *See* Cl. brief at 5.

Lastly, claimant avers that the district director erred in failing to consider his request for the reimbursement of expenses totaling \$2,732.45. *See* 33 U.S.C. §928(d); 20 C.F.R. §702.135. We agree. Claimant's counsel may be entitled to recover costs that are reasonable, necessary, and in excess of those normally considered to be a part of overhead. *See generally Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). The district director did not address the request for costs in his Compensation Award. We, therefore, remand the instant case for consideration of this issue.²

Accordingly, the district director's Compensation Order Award of Attorney's Fees is affirmed. The case is remanded for consideration of counsel's entitlement to an award of costs consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

² The costs requested by counsel are not itemized. On remand, the district director may allow claimant's counsel the opportunity to amend his fee petition to provide the details of these requested costs. In turn, employer also should be provided with the opportunity to respond to any submission by claimant. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 91(CRT) (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).