BRB No. 05-0767

RODNEY BARNES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS	)	DATE ISSUED: 05/24/2006
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-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.

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

PER CURIAM:

Claimant appeals the Compensation Order-Approval of Attorney Fee (Case No. 14-135737) 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 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 Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his left shoulder on March 10, 2001, in the course of his employment as a longshoreman. He underwent surgery on May 24, 2001, and sought benefits for a 4 percent impairment of the left arm pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), and a *de minimis* award for prospective loss in wage-earning capacity pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). Employer responded,

contending that claimant had an unscheduled injury, that he had no loss in wage-earning capacity, and thus, that he was not entitled to continuing disability benefits under the Act. Following the referral of the claim to the Office of Administrative Law Judges (OALJ) for a hearing, the parties agreed to an unscheduled nominal award. Therefore, the case was remanded and the district director entered a Consent to the Entry of Compensation Order on March 31, 2005.

Subsequently, claimant's attorney submitted a fee application in the amount of $3,237.50, for 11 hours of legal services rendered before the Office of Workers' Compensation Programs at the hourly rate of $275, .75 hours of legal assistant services at the hourly rate of $100, .5 hours of attorney time for responding to employer's objections, plus $354.72 in costs. In her Compensation Order, the district director disallowed the 3.75 hours of legal services performed prior to the date the dispute over permanent partial disability arose. In addition, the district director reduced the number of hours requested for pursuit of permanent partial disability benefits and the amount of the costs by half to reflect claimant's failure to establish entitlement to a scheduled award under Section 8(c)(1). The district director awarded claimant's attorney an additional .5 hours for preparation of his fee petition and .5 hours to prepare his response to employer's objections. The district director also reduced the hourly rate to $200, and, thus, awarded a fee in the amount of $725, representing 3.5 hours of legal services at the hourly rate of $200, .25 hours of legal assistant time at the hourly rate of $100, plus costs of $177.36.

On appeal, claimant contends that the district director erred in disallowing a fee for all services performed prior to May 27, 2003, in not allowing a fee for "wind-up" services, and in reducing the costs and the hourly rate. Claimant also contends that the district director should not have reduced the fee based on the nominal nature of the award of benefits or for failing to obtain a scheduled award. Employer has not responded to this appeal.

Initially, claimant challenges the district director's finding that employer is not liable for legal services performed before May 27, 2003. Employer may be held liable for an attorney's fee under Section 28(a) if it declines to pay any compensation, and claimant is thereafter successful in obtaining benefits. 33 U.S.C. §928(a); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). Employer's fee liability accrues only after: (1) employer declines to pay any compensation on or before the 30th day after receiving notice of the claim from the district director; and (2) thereafter, the claimant utilizes the services of an attorney in the successful prosecution of the claim. *Id*. In the instant case, employer voluntarily paid temporary total disability benefits until September 16, 2001, when claimant returned to work. Subsequently, claimant filed a claim for permanent partial disability benefits under the Act, which employer initially declined to pay. Although the district director found that a dispute

between the parties did not arise until claimant's letter dated May 30, 2003, the district director did not address when employer received notice from the district director that claimant intended to pursue a claim for permanent partial disability benefits. Therefore, as the earliest date that employer's liability can accrue is the date it received notice of the claim from the district director, we vacate the district director's award of an attorney's fee only from May 30, 2003, and remand for further findings.[1] *Id.*

Claimant also contends that the district director improperly reduced the fee requested due to his acceptance of a *de minimis* award. Contrary to claimant's contention, the district director did not reduce the fee based on the nominal award. Rather, the district director found that claimant had pursued both a scheduled award under Section 8(c)(1) of the Act and a *de minimis* award for prospective loss in wage-earning capacity under Section 8(c)(21) of the Act. As claimant settled the claim for the *de minimis* award alone, the district director found that the number of hours spent pursuing the two claims should be reduced by half. The district director rationally accounted for claimant's limited success by reducing the fee request in proportion to the success achieved. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Contrary to claimant's contention, the Board's decision in *Marcum v. Director, OWCP*, 12 BRBS 355 (1980), does not require a different result as the Board held in that case that claimant's counsel is entitled to a fee for reasonable and necessary time spent establishing the claim. The district director found that counsel was not fully successful in establishing both a scheduled injury under Section 8(c)(1) and an unscheduled injury under Section 8(c)(21), and that counsel did not specify for which disability claim the time requested was performed, and thus the district director rationally reduced the number of hours requested by half. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

However, we agree with claimant's assertion that the district director erred by also reducing the amount of costs claimed by half, from $354.72 to $177.36. The district director reduced these costs for the same reasons she reduced the hours requested by claimant's attorney, *i.e.*, that claimant was only partially successful. Section 28(d) of the

[1] Claimant's reliance on *Liggett v. Crescent City Marine Ways & Drydock, Inc.*, 31 BRBS 135 (1997)(*en banc*)(Smith & Dolder, JJ., dissenting), for the proposition that employer's liability accrues from an earlier date, is without merit as that case has been effectively overruled. *Childers v. Drummond Co., Inc.*, 22 BLR 1-148 (2002) (*en banc*) (McGranery and Hall, JJ., dissenting); *see also Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993)(table).

Act, 33 U.S.C. §928(d), the statutory provision authorizing the assessment of costs, provides that where an attorney's fee is awarded against an employer there may be a further assessment against the employer of costs. Section 28(d) requires only an analysis of the reasonableness and necessity of the costs incurred by counsel in litigating the case. Accordingly, *Hensley* is inapplicable to the award of costs. *Ezell*, 33 BRBS 19. The test for determining the necessity of work performed by counsel is whether, at the time it was performed, the attorney reasonably believed it was necessary to establish entitlement. *Id.* at 31. Although the district director found that claimant did not establish that the records covered by the costs were necessary in establishing claimant's entitlement to a *de minimis* award, this finding is not supported by the record. The issue in dispute related to the extent of claimant's disability, and the records obtained may have been relevant in establishing that claimant is entitled to a continuing award of benefits under the Act, even if nominal in extent. Therefore, we vacate the district director's finding that the claimant's counsel is entitled to costs only in the amount of $177.36, and remand for further consideration of the reasonableness and necessity of all claimed costs. *See Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

In addition, we vacate the district director's finding that the hours requested from March 4, 2005 to March 19, 2005, are disallowed. These hours represent the time following remand by the OALJ until the consent order was entered. Contrary to the district director's finding, employer may be held liable for reasonable "wind-up" services after it has agreed to pay benefits. *See Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). The district director herein rejected all time requested for attorney services performed after February 25, 2005, as there was "no basis for an award against employer/carrier for this time," which was spent "explaining stipulations to the claimant, obtaining his signature and submitting it to this Office." The district director did not consider the necessity and reasonableness of the time requested as it may relate to any service performed to "wind-up" this case. We therefore vacate the district director's denial of an attorney's fee for services performed between March 4, 2005 and March 19, 2005, and remand for the district director to address employer's liability for these wind-up services consistent with law. *Id*.

Lastly, claimant's counsel contends that the district director erred in reducing the hourly rate requested from $225 to $200. The district director cited the administrative law judge's decision in *Pittman v. Marine Terminals/Majestic Insurance*, 2003-LHC-01653 (May 25, 2004)(unpub.) and found that "the number of years in practice, nor something as amorphous as general reputation in the legal community are things the Secretary evaluates when setting fees." Order at 4. In addition, the district director found that the hourly rate awarded to counsel by other forums in other cases is not dispositive of the appropriate rate to be awarded under the facts in this case, and that the only evidence

submitted of the market rate is the affidavit of Mr. Markowitz. After considering the amount of benefits awarded and the lack of any complex issues, the district director concluded that the hourly rate of $200 for claimant's counsel is appropriate in this case. Contrary to claimant's contention, the district director may consider these factors when determining the appropriateness of the hourly rate, as the regulation at 20 C.F.R. §702.132(a) states: "Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded…." 20 C.F.R. §702.132(a); *see also Moody v. Ingalls Shipbuilding, Inc.*, 27 BRBS 173 (1993)(Brown, J., dissenting), *recon. denied*, 29 BRBS 63 (1995). As claimant's counsel has not met its burden of showing that the hourly rate awarded is unreasonable, we affirm the hourly rate of $200. *See also Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

Accordingly, the hourly rate awarded is affirmed, as is the district director's accounting for claimant's partial success. The award of costs is vacated. The case is remanded for further consideration consistent with this opinion regarding employer's liability for a fee for services rendered prior to May 30, 2003, for wind-up services and for all claimed costs.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge