BRB No. 98-1147

JORGE DANIEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DODGE ISLAND TERMINAL CORPORATION	)	DATE ISSUED: May 20, 1999
	)	
and	)	
	)	
HARTFORD INSURANCE GROUP	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Supplemental Compensation Order - Awarding Attorney's Fees Upon Remand of Jeana F. Jackson, District Director, United States Department of Labor.

Clifford R. Mermell (Gillis & Mermell, P.A.), Miami, Florida, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Supplemental Compensation Order - Awarding Attorney's Fees Upon Remand (6-143977) of District Director Jeana F. Jackson 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).

This is the second time this case is before the Board. To recapitulate the facts, claimant, a machine operator, suffered an injury to his left foot when it became caught between a pallet jack and a fork-lift on February 3, 1992. Employer, though initially compensating claimant under the Florida Workers' Compensation Act, subsequently conceded claimant's coverage under the Act and paid claimant three weeks of temporary total disability benefits, followed by payment of permanent partial disability benefits on November 23, 1992. Claimant returned to his usual employment on June 10, 1992.

On October 26, 1993, claimant's counsel facsimiled a letter to Dr. Hinds asking whether the physician believed, to a reasonable degree of medical certainty, that claimant had lost complete use of his left little toe to the point where it was the equivalent of a surgical removal of the toe. Dr. Hinds replied in the affirmative. That day, counsel telephoned employer, asserting that claimant was entitled to additional compensation for the complete loss of use of his little toe. Counsel memorialized this conversation in a letter to employer, dated July 8, 1994, again asserting that claimant was entitled to additional compensation under the Act. Employer, on February 6, 1996, paid claimant additional compensation under the schedule for a 100 percent disability to his little toe.

Thereafter, claimant's attorney submitted a fee petition to the district director seeking a fee of $5,250, representing 21 hours of services rendered at an hourly rate of $250. The fee petition included entries dated back to February 14, 1992, and thus, counsel's fee request included work with respect to the initial injury as well as services rendered in gaining claimant's increased disability compensation. In response, employer conceded its liability for a fee, but challenged both the hourly rate and the number of hours sought by counsel. In her initial Compensation Order, the district director reduced the hourly rate sought by counsel to $125, eliminated all hours incurred prior to October 26, 1993, the date upon which she determined a controversy arose, and disallowed 1.5 hours sought for preparation of claimant's fee petition. Accordingly, the district director awarded counsel a fee of $575, representing 4.6 hours at an hourly rate of $125.

On appeal, the Board affirmed the district director's reduction in counsel's hourly rate, but vacated the district director's conclusion that a controversy arose in the instant matter on October 26, 1993, as the district director did not provide a rationale for this conclusion, and remanded the case for reconsideration. On remand, the district director found that a claim for additional compensation was made on July 8, 1994, accompanied by the October 26, 1993 opinion supporting the claim. As employer had voluntarily paid claimant temporary total disability and permanent partial disability compensation with regard to the original claim, the

district director again concluded that October 26, 1993 was the date a controversy arose in the instant matter, and reaffirmed her original award of an attorney's fee.

Claimant appeals, challenging the district director's reduction in the number of hours sought by counsel. Specifically, claimant contends that the district director erred in concluding that October 26, 1993 was the date a controversy arose, asserting that a controversy arose 14 days after claimant's accident of February 3, 1992, when employer failed to either file a notice of controversion or commence payment under the Act. Claimant additionally asserts, for the first time, that he is entitled to an assessment under Section 14(e) of the Act, 33 U.S.C. §914(e). Employer has not responded to this appeal. For the reasons that follow, we remand the case to the district director for further consideration.

The Board, in its initial decision in this matter, remanded the case to the district director for reconsideration of the date a controversy arose over claimant's entitlement to compensation benefits under the Act. Pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by employer. *See Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). In her Supplemental Compensation Order, the district director found that employer voluntarily paid temporary total disability and permanent partial disability compensation for the original February 3, 1992 injury, and that a controversy arose with respect to claimant's contention of increased disability compensation on October 26, 1993. This finding, based on the medical opinion of Dr. Hinds, is supported by substantial evidence.

Nevertheless, claimant contends, as he did in his initial appeal, that a controversy in the instant matter arose at the time of claimant's initial injury on February 3, 1992. While the district director stated that employer made voluntary payments of temporary total disability compensation from February 25, 1992 through March 9, 1992, the record indicates these payments were initially made not under the Act but, rather, pursuant to Florida's workers' compensation scheme. Moreover, employer did not make any voluntarily payments of permanent partial disability compensation under the Act until November 1992.[1] Counsel has requested fees dating back to February 14, 1992, and thus, the fee request includes work with

[1]Claimant incorrectly invokes the provisions of Section 14(e), 33 U.S.C. §914(e), for the determination as to when a controversy arose with respect to Section 28, 33 U.S.C. §928.

respect to claimant's initial injury to his foot on February 3, 1992, as well as for services rendered in obtaining claimant's increased disability compensation. Inasmuch as the district director, on remand, did not make a specific finding as to when a controversy arose with respect to claimant's initial injury to his left foot, we must vacate the district director's conclusion that counsel is not entitled to a fee for services performed before October 26, 1993, the date a controversy arose regarding additional compensation due claimant. A determination on this issue requires a specific finding as to when employer began making voluntary payments of temporary total disability and permanent partial disability compensation to claimant under the Act and whether voluntary payments were timely.[2]

We reject claimant's request, raised for the first time on appeal, that employer must be assessed a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e). While the issue of liability for a penalty under Section 14(e) may be raised at any time, *see Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989), where, as here, no findings of fact have been made below with respect to this issue, the Board cannot address claimant's request. *See, e.g., Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989)(Board lacks jurisdiction to address request for Section 14(f) penalty where no findings made below).

Accordingly, the district director's award of an attorney's fee to claimant's counsel is vacated, and the case is remanded for further findings in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[2]We note that the Board has held that the fact that an employer has paid compensation pursuant to a state workers' compensation scheme does not alter the fact that it did not pay compensation pursuant to the Act and therefore, Section 28(a) of the Act, 33 U.S.C. §928(a), may be applicable to fees for work before employer commenced payment under the Act. *See Butler v. Lemont Shipbuilding & Repair Co.*, 3 BRBS 429 (1976).

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge