BRB Nos. 10-0195
and 10-0195A

JOSEPH HEDBERG	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: 09/24/2010
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Order on Attorney's Fees and the Order on Motion for Reconsideration of Karen P. Staats, District Director, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Order on Attorney's Fees and the Order on Motion for Reconsideration (Case No. 14-151290) 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 district director's attorney's fee award will not be set aside unless it is shown by the

challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained a work-related injury to his elbow on June 9, 2008, which resulted in no lost time from work. Nonetheless, the injury required medical treatment. A bill for treatment on June 9, 2008 was paid by employer on July 24, 2008. Three medical bills for services rendered in July and August 2008 were sent to employer in September 2008. Claimant first met with his attorney on December 2, 2008. The fee petition states that claimant and counsel discussed the unpaid medical bills. The bills were paid on January 27, 2009.

On July 13, 2009, claimant's counsel filed a fee petition for work performed before the district director. Counsel requested a fee of $1,758, representing four hours of legal services at the hourly rate of $425 for work performed from December 2, 2008 through January 12, 2009, .30 hours of legal assistant time at an hourly rate of $110, and costs of $25. Counsel provided documentation in support of his requested hourly rate. Employer objected to the request for a fee on the ground that it paid medical benefits and never filed a notice of controversion, and thus, that counsel's services did not provide a benefit to claimant.

The district director awarded claimant's counsel a fee of $330.50, representing 1.3 hours of attorney time at an hourly rate of $235. The district director disallowed the remaining attorney time, as well as the legal assistant services as clerical work, which is part of the attorney's overhead. In reducing the number of hours, the district director also stated that "counsel's services were not a factor in obtaining payment" of the medical bills because the bills were being processed by employer around the time counsel and claimant first met. Order at 1. In reducing the hourly rate, the district director discussed a fee award by an administrative law judge in an unrelated case, wherein the judge awarded counsel a rate of $285. The district director awarded counsel a rate of $235, as the work counsel performed in this case before the district director's office was less complicated.

Claimant and employer filed motions for reconsideration. In her Order on Reconsideration, the district director denied counsel's motion for an increase in the number of hours and hourly rate. The district director found that the deposition of attorney Nate Manakee, offered to support an hourly rate of $350, was insufficient to demonstrate counsel's entitlement to this rate. Consequently, the district director denied claimant's motion for reconsideration. The district director did not address employer's motion for reconsideration in which it asserted it cannot be liable for any attorney's fee under either Section 28(a) or Section 28(b) of the Act, 33 U.S.C. §928(a), (b), or pursuant to the district director's own finding that counsel's services "were not a factor" in

claimant's obtaining payment of medical benefits. Claimant and employer both appeal the district director's fee award.

On appeal, claimant's counsel contends the district director erred in finding that his services were not related to claimant's obtaining payment of medical benefits, that that the hourly rate awarded is not consistent with law, and that certain services were clerical in nature. In its appeal, employer contends that it is not liable for any attorney's fee pursuant to Section 28 of the Act, but that if it is, the district director's fee award should be affirmed.

We first address employer's contention that it cannot be held liable for counsel's fee under either Section 28(a) or (b) of the Act. Employer did not raise this specific objection in its initial response to counsel's fee petition, but did raise it in its motion for reconsideration to the district director. The district director did not address this contention. We agree that employer cannot be liable for claimant's fee pursuant to Section 28(a) of the Act as it appears claimant never filed a claim for compensation or medical benefits that was sent by the district director to employer.[1] *See Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003).

However, we reject employer's contention that application of Section 28(b) is precluded. The Ninth Circuit, within whose jurisdiction this case arises, has not construed the language of Section 28(b) as strictly as have some other circuit courts. *Compare Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) and *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68

[1] Section 28(a) 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 chapter 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 in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. §928(a).

(9th Cir. 1979) *with Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009), *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007), and *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir.), *cert. denied*, 546 U.S. 960 (2005). In general, the Ninth Circuit has permitted an employer-paid attorney's fee if an employer pays or tenders compensation and thereafter a controversy develops over claimant's entitlement to additional compensation which claimant thereafter procures. *National Steel & Shipbuilding*, 606 F.2d at 880, 11 BRBS at 71. For purposes of the Act's attorney's fee provisions, medical benefits constitute "compensation." *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F. 2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

Because the district director did not make any determination concerning the Act's fee liability provisions, we must remand this case. Although employer did not file a notice of controversion, it appears that there was a delay of about four months between the time claimant submitted medical bills in September and employer paid them in January. In this interim, claimant consulted an attorney; on his fee petition, counsel seeks a fee for services for contacting both OWCP and employer about the unpaid medical bills. Under these circumstances, employer's lengthy inaction may subject it to fee liability under Section 28(b). *See generally Caine v. Washington Metro. Area Transit Auth.*, 19 BRBS 180 (1986); *Trachsel v. Brady-Hamilton Stevedore, Co.*, 15 BRBS 469 (1983). Therefore, the district director must address employer's liability for claimant's attorney's fee in accordance with Ninth Circuit precedent.

Moreover, the district director must address anew her finding that counsel's services did not result in employer's paying the medical bills. As the parties note, this finding is inconsistent with an award of any attorney's fee. However, there is no support in the administrative file sent to the Board for the district director's finding that the medical bills were being processed by employer in December 2008 around the time that claimant and counsel first met on December 2. If this is indeed the case, the district director must support her finding with reference to correspondence or other communications. In addition, if claimant was unaware of the processing of the bills, then the district director must consider whether the attorney's services were necessary at the time they were performed, as counsel is entitled to a fee for such services. *See, e.g., O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). The fact that the bills were not paid until January 27, 2009, lends credence to counsel's assertion that his actions assisted in the resolution of the payment issue.

We next address claimant's contention that the district director erred in disallowing attorney and paralegal services on the ground that they are clerical in nature and therefore must be subsumed in the attorney's office overhead. The district director found that the entries in this case pertaining to "opening files" and "obtaining records" are clerical work. We reverse this finding. The service for one-third of an hour on December 3, 2008, to "review documents and open file" was performed by counsel's paralegal on the day after counsel first met with claimant. The review of documents is not a purely clerical task, and, moreover, this work was charged at a lower rate. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976).[2] The attorney services disallowed pertain to letters to OWCP or to employer concerning counsel's representation of claimant and the medical bills at issue. This is not clerical work involving routine cover letters or scheduling appointments. Rather, this work requires independent legal judgment. *See Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156 (1994). Therefore, on remand, the district director must reassess the compensability of all the services listed on the fee petition. 20 C.F.R. §802.203.

With regard to counsel's appeal of the hourly rate, we agree that this must be reconsidered as well. The district director appears to have adopted the analysis of Administrative Law Judge Berlin, in a different case, of counsel's documentation supporting his claimed hourly rate of $425. Stating that Judge Berlin had awarded counsel a rate of $285, the district director awarded a rate of $235 because the work performed before her office was "considerably less complicated." Order at 2. On reconsideration, the district director addressed the deposition of Mr. Manakee and found it insufficient to support counsel's claimed rate.

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[2] In *Todd Shipyards*, the Ninth Circuit stated,

> One of the necessary incidents of an attorney's fee is the attorney's maintaining of a competent staff to assist him. Paralegals and other assistants can free the attorney to spend his more costly time for greater productivity in more important areas. . . allowing an attorney's paralegal assistant to be included as "reasonable attorney fees" not only saves the attorney time, but would save the employer here costs as well. Paralegals can do some of the work that the attorney would have to do anyway and can do it at substantially less cost per hour, resulting in less total cost billed to the employer.

545 F.2d at 1181, 5 BRBS at 29.

We cannot affirm the awarded hourly rate. While the district director, arguably, is within her discretion in relying on an administrative law judge's analysis of documentation offered to support a given rate, there is no indication that the rate awarded by the district director is based on proper considerations. In *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009), the Ninth Circuit held that a "reasonable fee" should be calculated according to the "prevailing market rates in the relevant community;" such rates cannot be limited to those awarded in longshore cases in a geographic region, although such rates may provide guidance when the fee applicant fails to produce relevant market evidence. *Id.*, 557 F.3d. at 1055, 43 BRBS at 9(CRT); *see also Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008); *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973 (9th Cir. 2008); *Student Pub. Interest Research Group of N.J. v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988). Especially relevant to this case is the Ninth Circuit's decision in *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009), wherein the court held that the hourly rate cannot be reduced due to the case's lack of complexity. In this case, the district director did not identify any factors that formed the basis for her award of an hourly rate of $235, other than this case was less complicated that the one in which Judge Berlin awarded a rate of $285.[3] This finding is contrary to the dictate of *Van Skike*. Therefore, we must vacate the hourly rate awarded and remand this case for the district director to award a fee based on an hourly rate determined in accordance with relevant precedent. *See H.S. [Sherman] v. Dep't of the Army/NAF*, 43 BRBS 41 (2009).

[3] In the portion of Judge Berlin's decision quoted by the district director, there is no indication on what factors the administrative law judge based his finding that a rate of $285 was appropriate.

Accordingly, the district director's fee award is vacated and the case is remanded for further consideration 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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REGINA C. McGRANERY
Administrative Appeals Judge