BRB No. 11-0123

BERNARD D. BOROSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DYNCORP INTERNATIONAL	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/CHARTIS INSURANCE	)	DATE ISSUED: 09/29/2011
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees and the Order Denying Motion for Reconsideration of the Award of Attorney's Fees of Charles D. Lee, District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Denty Cheatham (Cheatham, Palmero & Garrett), Nashville, Tennessee, for claimant.

Roger A. Levy and Stephanie N. Seaman (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees and the Order Denying Motion for Reconsideration of the Award of Attorney's Fees (Case No. 02-131801) of District Director Charles D. Lee 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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 Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Following the affirmance of the award of benefits by the Board in *B.B. [Boroski] v. Dyncorp Int'l*, BRB No. 08-0550 (Jan. 30, 2009) (unpub), claimant's counsel filed a fee petition for work performed before the district director.[1] Specifically, counsel sought an attorney's fee in the amount of $15,575, representing 44.5 hours of legal services at an hourly rate of $350 rendered from March 14, 2003, through August 2, 2004. On April 12, 2010, the district director issued a compensation order awarding the full fee requested by claimant's counsel.[2] The district director stated that employer had not filed any objections within the allotted time and that:

> Considering the quality of the representation, the work performed, the complexity of the case, the benefits awarded and the risk of loss, I find the rate of $350 per hour; the work performed; and the time claimed are all reasonable and appropriate.

Comp. Order at 1. Therefore, the district director awarded a fee of $15,575 as requested.

On April 19, 2010, employer filed a motion to set aside the district director's fee award. It argued that claimant's counsel had agreed to have the administrative law judge retain jurisdiction and decide the amount of an attorney's fee and costs for work performed before the Office of Workers' Compensation Programs (OWCP) and that counsel had already been compensated for this work. Claimant's counsel responded, asserting that the administrative law judge specifically stated in his fee order that the parties cannot give permission for him to consider fees for work that was not performed

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[1]In *Boroski v. DynCorp Int'l*, BRB No. 09-0874 (Sept. 16, 2010), the Board vacated the award of Section 8(f) relief and remanded the case to the administrative law judge. The Board noted that employer had preserved for appeal its right to further challenge the administrative law judge findings regarding the work-relatedness of claimant's injury.

[2]On March 13, 2009, counsel filed his fee petition. On March 27, 2009, the claims examiner sent a letter to the parties indicating that the district director would not consider the fee petition until after the administrative law judge filed his supplemental decision awarding an attorney's fee and that employer had 30 days from the date of the letter within which to file its position and comments regarding the work performed before the district director. The administrative law judge issued his decision on March 24, 2010.

before him and that the petition for a fee for the 44.5 hours of work must be submitted to the district director.[3] ALJ Supp. Decision and Order at 11. Therefore, counsel contended he had not received a fee for work performed before the district director.

On April 27, 2010, employer specifically requested that the district director reconsider his April 12, 2010, attorney's fee award. Employer contended it had submitted to the administrative law judge in December 2009 objections to the total fee requested, including objections to the work performed before the district director, and had served the objections on the district director. On September 24, 2010, the district director denied employer's motion for reconsideration. Order Denying Motion at 1-2. The district director stated that employer had had sufficient time to submit objections to the fee request and did not do so; he also stated that the motion for reconsideration was untimely. *Id.* at 2. Therefore, the district director denied employer's motion for reconsideration. Employer appeals the district director's fee award, and claimant responds, urging affirmance.

On appeal, employer contends: (1) the fee award is premature and unenforceable pending the final outcome of the litigation on the merits; (2) the district director improperly denied employer's motion for reconsideration because it was not provided with notice or opportunity to prepare objections prior to the issuance of the fee award; (3) the fee order lacks the requisite analysis and explanation for the Board to evaluate whether the fee award was proper; (4) the number of hours requested by counsel were unnecessary and/or excessive or, alternatively, the district director failed to consider employer's previously-submitted fee objections. Claimant responds, contending that claimant's appeal to the Board is untimely because the district director's fee award became final thirty days after its issuance, and the district director properly determined that employer failed to file a timely motion for reconsideration. Claimant also argues that employer's failure to file timely objections with the district director barred its challenge to his fee award. Employer replied that its request for reconsideration and appeal were timely filed because its April 19, 2010, letter to the district director asking that the fee be set aside constituted a motion for reconsideration under Rule 59 of the Federal Rules of Civil Procedure and that it did not waive its right to object to the fee application because the district director failed to provide it with the required notice and opportunity to file objections.

[3]The administrative law judge correctly stated that he does not have authority to award a fee for work performed before the district director. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Watkins]*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980).

Initially, we address whether employer's appeal to the Board is timely. An appeal to the Board must be filed within 30 days of the date the district director's order was filed by the district director. 33 U.S.C. §921(a); 20 C.F.R. §802.205(a). Section 802.206(a) of the Board's regulations provides that a timely motion for reconsideration of an order shall suspend the running of the time for filing a notice of appeal, Section 802.206(b)(1) provides that a motion for reconsideration is timely when it is filed no later than ten days from the date the order was filed in the district director's office, and Section 802.206(e) provides that if a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed. 20 C.F.R. §802.206(a), (b)(1), (e); *see Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001). In this case, the district director's order awarding an attorney's fee was filed on April 12, 2010, the order denying employer's motion for reconsideration was filed on September 24, 2010, and employer's notice of appeal was filed on October 12, 2010, within 30 days of September 24, 2010. However, claimant asserts that employer's motion for reconsideration of the district director's fee award was untimely; thus, the appeal had to have been filed within 30 days of April 12, 2010, and it was not.

As stated previously, employer's letter requesting reconsideration of the fee award was filed on April 27, 2010; this, as the district director found, is untimely as it was filed more than 10 days after April 12, 2010. 20 C.F.R. §802.206(b)(1). Employer asserts, however, that its motion to set aside the fee award, filed on April 19, 2010, serves as a valid and timely motion for reconsideration. We agree. The motion to set aside the fee award clearly expressed dissatisfaction with the fee award and sought to have it altered or amended. *General Dynamics Corp. v. Hines*, 1 BRBS 3 (1974); Fed. R. Cir. Proc. 59. Administrative proceedings under the Act do not adhere to formal rules of procedure, 33 U.S.C. §923(a), and the substance of a motion should be given priority over its title. Therefore, we conclude that employer's motion to set aside the district director's fee award constitutes a valid and timely motion for reconsideration.[4] *See Midland Coal Co. v. Director, OWCP*, 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998) (court acknowledged that motions for reconsideration are within an agency's discretion and the court has no jurisdiction over "internal appeals of such motions."); *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd mem.*, 303 F.App'x 928 (2d Cir. 2008); *Hines*, 1 BRBS 3. As the motion to set aside the fee constitutes a timely and valid motion for reconsideration, the time to file an appeal was tolled until after the district director denied the motion on September 24, 2010; thus, employer's notice of appeal was timely filed and the appeal is properly before the Board. *Tucker*, 41 BRBS 62; *Hines*, 1 BRBS 3.

[4]The district director did not separately address employer's motion to set aside the fee award.

We turn now to employer's contentions, and we first reject its assertion that the fee award is premature. Although the fee award is not enforceable until all appeals have been exhausted, the district director did not err in awarding a fee prior to the conclusion of the litigation. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). We also reject employer's assertion that it was not given notice or sufficient time to prepare objections to the fee petition prior to the issuance of the district director's fee award. On March 27, 2009, over one year before the fee award was issued, employer received a letter from the claims examiner explaining that employer had 30 days within which to file objections. As employer does not dispute having received a copy of the fee petition or this letter over one year before the district director awarded a fee, its argument that it was denied due process for lack of notice is meritless. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976) (due process requires only that the fee request be served on the employer and that the employer be given a reasonable time to respond); *Green v. Atlantic Container Lines Ltd.*, 2 BRBS 385 (1975); *compare with Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds) (five days is insufficient time to respond); 20 C.F.R. §702.132(a).

Nonetheless, we agree with employer that the fee award must be vacated. In awarding the fee, the district director listed the regulatory criteria of the quality of representation, the type of work performed, the complexity of the case, and the benefits awarded, as well as the risk of loss, as the basis for awarding the full fee requested. 20 C.F.R. §703.132(a). However, the district director did not explain why the fee awarded is reasonable under the regulatory criteria. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002). Indeed, it is the district director's responsibility to review the fee petition to determine whether the fee requested is reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues, and the amount of benefits, and to explain the fee award in terms of these criteria. *Sullivan*, 36 BRBS 127; 20 C.F.R. §702.132(a). This analysis should occur whether or not the employer objected to the fee petition. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Therefore, on remand, the district director must reconsider the fee requested in conformance with the regulation and applicable case law and give a sufficient explanation for his fee award.[5] *Sullivan*, 36 BRBS 127. Additionally, employer asserts that it filed objections to the fee requested for work performed before the district director in December 2009 but that the district director erred in failing to address them. Although the objections were not timely filed with respect to the claims examiner's letter of March 27, 2009, they were filed before the administrative law judge

[5]"Risk of loss" is a factor incorporated into the lodestar and may not be used as a separate factor for awarding or enhancing a fee. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71(CRT) (4th Cir 2009).

issued his fee award, during the time when the district director suspended his consideration of the fee petition. On remand, the district director must address employer's contention that its objections were sufficiently timely and determine whether those objections should be considered prior to his awarding a fee.[6]

Accordingly, the district director's fee award is vacated, and the case is remanded to the district director for 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

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6]Consequently, we shall not address employer's assertions that the hourly rate and/or the hours awarded are excessive.