

WILLIAM MAGEE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fee of Jeana F. Jackson, District Director, United States Department of Labor.

Traci M. Castille (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fee (No. 6-162054) 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 contrary to law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act for a noise-induced work-related hearing loss. On October 31, 1994, the district director provided employer with formal notice of the claim. On October 11, 1995, employer voluntarily paid claimant \$2,919.10 plus \$161.05 in interest, the full amount of compensation due.

Claimant's attorney thereafter submitted a fee petition seeking approval of attorney's fees for services rendered at the district director level between November 8, 1993 and December 1, 1995, requesting \$1,381.50 for 8.75 hours of legal services at \$150 per hour plus \$69 in expenses. Employer filed objections. In a Compensation Order Award of Attorney's Fee dated February 7, 1996, after considering employer's objections, the district director awarded claimant's counsel a total fee of \$1,093.75, representing 8.75 hours of services at \$125 per hour and \$55 in expenses.

Employer was ordered to pay \$571.25 of the fee and the awarded expenses and claimant was held liable for the remaining \$578.13, representing those fees incurred prior to November 29, 1994, the 30th day following employer's receipt of the district director's formal notice of the claim. Employer appeals the district director's fee award, incorporating the objections it made below into its appellate brief. Claimant has not submitted a response brief.

On appeal, employer contends that although the district director properly recognized that pursuant to 33 U.S.C. §928(a), (c), it could not be held liable for fees incurred prior to November 29, 1994, 30 days from the date it received formal notice of the claim, she erred in calculating the number of hours for which employer is responsible. Employer asserts that as claimant's counsel only performed 4.375 hours of services subsequent to November 29, 1994, its fee liability at the approved hourly rate of \$125 is \$546.87. In addition, employer maintains that the district director erred in holding it liable for the \$55 cost of Dr. Wold's report as this cost was incurred prior to the start of employer's liability on November 29, 1994.

We agree with employer that although the district director properly determined that employer could not be held liable for fees incurred prior to November 29, 1994, *see Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179, 182 (1993) *aff'd mem.*, 12 F.3d 204 (5th Cir. 1993), she erred in calculating the number of hours for which employer was liable. As employer asserts, because 4.375 hours of services were actually rendered by claimant's counsel after November 29, 1994, employer's liability for the fee is \$546.88 rather than the \$571.25 awarded by the district director and claimant is liable for the remaining 4.375 hours claimed. Accordingly, we modify the fee award to correct this mathematical error. In addition, we modify the district director's prior fee award to reflect that the total amount of the fee award is \$1,148.75; the district director's calculation of the total fee award as \$1,093.75 fails to account for her award of \$55 in expenses. *See discussion infra.*¹

While we agree with employer that the district director miscalculated the number of hours for which employer is liable, we reject employer's argument that the district director erred in holding it liable for the cost of Dr. Wold's medical report because it was incurred prior to the date that employer's fee liability commenced under Section 28(a). The prohibition against pre-controversion fees enunciated in *Jones v. Chesapeake and Potomac Telephone Company*, 11 BRBS 7 (1979), *aff'd per curiam*, Nos. 79-1458 *et al.* (D.C. Cir. Feb. 26, 1980), *amended per curiam* (D.C. Cir. Mar. 31, 1980), is based on the language of Section 28(a) and has no applicability to costs which are awarded under Section 28(d), 33 U.S.C. §928(d). *See Luter v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 103, 104 (1986).

Employer's objections to the \$125 hourly rate awarded by the district director is rejected, as it has not shown that the district director abused her discretion in this regard. *See 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).

¹We further note that the \$571.25 for which employer was held liable and the \$578.13 for which claimant was held liable do not, in any event equal the \$1,148.75 fee due; these figures added together equal \$1,149.38.

Employer's contentions which were not raised below will not be addressed for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the district director's Compensation Order Award of Attorney's Fee is modified to reflect that claimant's counsel is entitled to a fee of \$1,148.75, with employer being liable for \$546.88 of the fee, representing the 4.375 hours of services rendered by claimant's counsel subsequent to November 29, 1996 at \$125 per hours plus \$55 in expenses, and claimant being liable for the remaining fee of \$546.87. In all other respects, the district director's fee award is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge