

RAY D. HYDE)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: _____
)	
HEALY TIBBITS BUILDERS,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Memo Order - Award of Attorney's Fees of Don M. Sodergren, District Director, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Leonard F. Alcantara and Robert G. Frame (Alcantara & Frame), Honolulu, Hawaii, for self-insured employer.

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

PER CURIAM:

Employer appeals the Memo Order - Award of Attorney's Fees (Nos. 15-37715 and 15-38733) of District Director Don M. Sodergren 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).¹ 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).

¹The Board consolidated employer's appeal of the administrative law judge's award of an attorney's fee (BRB No. 97-731) and employer's appeal of the district director's fee award (BRB No. 96-1358) in an Order dated April 9, 1997. *See* 20 C.F.R. §802.104(a). We now sever employer's appeal of the administrative law judge's award of an attorney's fee from this case. 20 C.F.R. §802.104(b). A separate decision will be issued in BRB No. 97-731. Consequently, we address only employer's appeal of the district director's award of an attorney's fee in this decision.

On July 7, 1993, claimant injured his left knee while working for employer. Employer voluntarily paid claimant temporary total disability benefits from July 8, 1993, to December 8, 1993. Upon claimant's return to work, he reinjured his left knee on March 25, 1994. An informal conference was held before the district director on December 20, 1994, and on December 28, 1994, the district director issued his written recommendation of continuing temporary total disability benefits.

In his Decision and Order Awarding Benefits issued on April 5, 1996, Administrative Law Judge Paul A. Mapes (the administrative law judge) ordered employer to pay claimant temporary total disability benefits from July 21, 1993 through October 19, 1994, except for March 25, 1994, permanent partial disability benefits from October 20, 1994, interest, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, except those charges incurred on March 28, 1994, March 30, 1994, and October 12, 1994.

Claimant's counsel subsequently submitted a fee petition to District Director Don M. Sodergren (the district director) on May 20, 1996, seeking an attorney's fee of \$6,760, representing 38.4 hours at \$150 per hour and 10 hours at \$100 per hour. Employer filed objections to the fee petition to which claimant's counsel replied. After summarily finding that employer's objections lacked merit, the district director awarded claimant's counsel a fee of \$6,100, representing 34 hours at an hourly rate of \$150 and 10 hours at an hourly rate of \$100. The disallowed hours were for work performed while the case was pending before the administrative law judge.

On appeal, employer challenges the district director's fee award. Claimant responds, urging affirmance of the fee award.

Employer initially argues that the district director's award of the hourly rates of \$150 to claimant's counsel, Mr. Friedheim, and \$100 to claimant's counsel's non-lawyer assistant, Mr. Ducey, are excessive.² Employer also argues that the district director erred in awarding fees for services that were excessive, duplicative, or clerical. Without addressing employer's objections, the district director awarded all time requested by claimant's counsel through February 10, 1995, at the rates requested. As the district director did not consider the reasonableness of the hourly rates or the time claimed on the various dates that employer asserts are excessive, duplicative, or clerical in nature, we vacate the district director's award of an attorney's fee and remand this case to the district director for discussion of employer's specific objections.³ If the district director finds that

²Employer asserts that Mr. Friedheim is entitled to an hourly rate of \$100 based on his experience and that Mr. Ducey should receive no more than \$50 per hour as he is a non-lawyer and part-time employee with no apparent paralegal training. We note, however, that the pleadings below indicate that Mr. Ducey formerly served as the district director of the Honolulu office for approximately 24 years.

³Services performed by claimant's counsel that employer claims to be clerical include making travel arrangements and obtaining information and billing records from medical

any of the services claimed by employer are in fact clerical, the district director may not award fees for these services as clerical services are not compensable as they are considered a part of office overhead. *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying on recon.*, 28 BRBS 27 (1994); *Staffile v. ITO, Inc.*, 12 BRBS 895 (1980). The district director also should consider employer's argument that the fee should be reduced due to claimant's lack of success in establishing employer's liability for specified medical services.⁴ See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT)(D.C. Cir. 1992).

Employer next contends, citing to *Todd Shipyards Corp. v. Director, OWCP [Watts]*, 950 F.2d 607, 25 BRBS 65 (CRT)(9th Cir. 1991), that the district director erred in awarding a fee for time requested from July 29, 1994 to December 28, 1994 because the services were performed prior to the issuance of his written recommendations following an informal conference. Contrary to employer's argument, *Watts* is distinguishable from the instant case. In *Watts*, the parties reached an agreement over the amount of compensation due claimant at the informal conference and the only issue remaining concerned the attorney's fee. The court concluded in *Watts* that Section 28(b) of the Act, 33 U.S.C. §928(b), does not authorize the payment of an attorney's fee for services performed by claimant's attorney prior to the issuance of a written recommendation following an informal conference *unless* the record shows that employer refused to accept the written recommendations of the district director following an informal conference and claimant obtains additional benefits through formal proceedings. See *Watts*, 950 F.2d at 607, 25 BRBS at 65 (CRT)(emphasis added). In the instant case, employer paid benefits only through December 1993. In addition, the parties did not agree as to the amount of compensation due claimant at the informal conference and the case went on to a hearing and decision by the administrative law judge, who awarded more compensation to claimant than employer had voluntarily paid. Employer therefore is liable for claimant's attorney's fee for the time in question.

providers.

⁴The administrative law judge denied claimant's request that employer pay for medical expenses in the amount of \$489.48 by Kauai Medical Group as claimant had not requested authorization for this treatment. Decision and Order at 12-13. In awarding his fee, the administrative law judge made a 10 percent reduction across the board in light of this unsuccessful issue. Supplemental Decision and Order at 4-5.

Employer lastly contends that the district director should have granted employer's request for an *in camera* review of claimant's attorney's billing records. We disagree. Although the district director did not specifically address employer's request for the *in camera* review of the billing records, the district director's consideration of employer's specific contentions will adequately protect employer's rights.⁵

Accordingly, the district director's Memo Order - Award of Attorney's Fees is vacated, and this case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁵Employer's argument that claimant's counsel did not timely file his fee petition before the district director lacks merit as the district director did not set a time limitation for filing the fee petition before him in this case. Contrary to employer's remaining argument regarding an award of excessive costs, the district director did not award any costs.