BRB No. 91-2192

HORACE MAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTINENTAL STEVEDORING AND TERMINALS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
FLORIDA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Compensation Order-Award of Attorney's Fees of N. Sandra Kitchin, District Director, United States Department of Labor.

Howard L. Silverstein, Miami, Florida, for the claimant.

Edward W. Levine (Marlow, Connell, Valerius, Abrams, Lowe & Adler), Miami, Florida, for the employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Compensation Order-Award of Attorney's Fees of District Director N. Sandra Kitchin (6-91155) 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 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. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant severely injured his right hand on November 2, 1985 while working as a heavy

laborer for employer. As a result of claimant's counsel's efforts while the case was before the district director, employer[1] apparently agreed to accept liability for temporary total and permanent total disability compensation as well as medical benefits related to the hand injury and claimant's resultant traumatic stress reaction.

Thereafter, claimant's counsel filed a fee petition in which he requested $35,000 for services performed before the district director. Claimant's counsel argued that this amount was justified because as a result of his efforts before the district director, claimant will receive $575,716 over his projected life expectancy, and, in addition, he had accepted claimant's case on a contingency basis.[2] Employer filed objections to the fee petition.

In a Compensation Order dated June 17, 1991, the district director, in accordance with employer's objections, disallowed 6.5 hours of the 48 hours claimed, determined that an hourly rate of $125 was reasonable, and awarded claimant's counsel a total fee of $4,812.50.

Claimant filed a motion for reconsideration of the fee award in which he asserted that while he agreed with the district director's reduction in the itemized services and the determination of the applicable hourly rate, the fee award was nonetheless grossly inadequate because it failed to take into account the more than $575,716 in benefits which claimant will receive as a result of his representation in this case. Employer responded that the $35,000 fee sought was unreasonable, and that there is no requirement under the Act that the amount of the fee award be commensurate with claimant's award of benefits. In a letter dated August 28, 1991, the district director denied claimant's motion for reconsideration, noting that the amount previously approved was reasonably commensurate with the necessary work done. The district director further noted that while nothing in the Act limits attorney's fees to the number of hours worked multiplied by the hourly billing rate, there is also no requirement that the amount of the fee award be commensurate with claimant's award of benefits. This appeal followed.

On appeal, claimant contends that the district director's fee award is clearly erroneous, arbitrary, and unreasonable. Claimant asserts that in making the fee award, the district director failed to even mention the criteria set forth in 20 C.F.R. § 702.132, failed to rationalize or state adequate reasons for the fee awarded, and totally ignored the recovery obtained. Counsel reiterates that he is entitled to the $35,000 he requested in light of the large amount of benefits claimant obtained, asserting that a reasonable fee based partially on the benefits obtained is one way to assure fair treatment of disabled and needy claimants. Employer responds that the $35,000 fee sought is outrageous given that the subject matter of the claim was neither complex or novel, that the amount of benefits obtained is only one of several relevant factors used in assessing a fee, and that the district director

[1]Employer's original insurer, Midland Insurance Company, is insolvent.

[2]Although counsel requested a lump sum payment of $35,000 based on the contingency arrangement, he listed 48 hours of itemized services in his fee petition and in addition asserted that an hourly rate of $150 to $200 would be appropriate in non-contingency cases in the Miami area.

properly determined that there is no requirement that the fee award be commensurate with the benefits obtained. [3]

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). Although the amount of benefits awarded to the claimant is a valid consideration in granting an attorney's fee, *see, e.g., Muscella, supra*, it is only one of the relevant factors considered in awarding an attorney's fee. *See generally Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). An attorney's fee is awarded for time spent and services rendered which are reasonably necessary to the award of benefits. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Claimant's contentions are without merit. Contrary to claimant's counsel's assertions, the district director permissibly rejected the $35,000 fee request in the present case and reasonably evaluated claimant's counsel's itemized fee request under the regulatory criteria set forth in 20 C.F.R. §702.132. To the extent that the $35,000 fee request was based on claimant's counsel's asserted contingency arrangement, it was *per se* unreasonable; contingency fee awards are impermissible under the Act. *See Enright v. St. Louis Ship*, 13 BRBS 573 (1981). *See generally City of Burlington v. Dague*, __ U.S. __, 112 S.Ct. 2638 (1992). In the present case, the district director determined that the requested hourly rate of $150 to $200 was excessive and that an hourly rate of $125 was appropriate considering the quality of the representation, the work performed, the complexity of the case, the benefits awarded, and the risk of loss. The district director further determined that in light of the regulatory factors, certain itemized entries should be disallowed because the work involved was clerical.[4] Thus, claimant's counsel's contention that the fee award failed to account for the benefits obtained is rejected in view of the district director's explicit consideration of this factor in making the reductions. Moreover, as employer correctly asserts, in her decision denying reconsideration, the district director properly recognized that the Act does not require that the amount of the fee award be commensurate with claimant's award of benefits. *Snowden v. Ingalls*

[3]Employer also asserts that claimant's counsel's fee petition does not comport with the requirements of 20 C.F.R. §702.132 because it fails to indicate the professional status of the person performing the itemized services, and that the $150 to $200 hourly rate which claimant's counsel indicated was reasonable is excessive. Inasmuch as employer failed to file a cross-appeal, we decline to address these arguments. *See Briscoe v. American Cyanid Corp.*, 22 BRBS 389, 392 (1989).

[4]The district director disallowed the following entries because she found that the services in question were clerical in nature: 3/28/89; 4/10/89; 4/19/89; 4/20/89; 5/3/89; 5/17/89; 5/24/89; 7/11/89; and 8/14/89. In addition, the district director disallowed 4 hours requested from "1/10/89 to present" for review of the file on a follow-up calendar because time had previously been itemized for such review elsewhere in the fee petition.

Shipbuilding, Inc., 25 BRBS 245 (1991) (Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting on other grounds). The district director may award a lesser fee than that requested, where, as here, an adequate explanation is provided. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280, 288 (1990)(Lawrence, J., concurring and dissenting on other grounds).

As claimant has failed to establish that the attorney's fee actually awarded was not reasonably commensurate with the necessary work performed or was otherwise unreasonable, the fee award made by the district director is affirmed with the following modification. *See Lebel v. Bath Iron Works Corp.*, 3 BRBS 216 (1976), *aff'd*, 544 F.2d 1112, 5 BRBS 90 (1st Cir. 1976). In calculating the amount of the fee award, the district director mistakenly determined that claimant's counsel was entitled to a fee of $4812.50 for 41.50 hours at the hourly rate of $125. The fee award is modified to correct this mathematical error; claimant's counsel is entitled to a fee of $5187.50 in accordance with the findings by the district director.

Accordingly, the Compensation Order-Award of Attorney's Fees of the district director is modified to reflect that claimant's counsel is entitled to a fee of $5,187.50 representing 41.5 hours at an hourly rate of $125, but is, in all other respects, affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge