BRB No. 92-1311

PATRICK J. CAVANAUGH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRADY-HAMILTON STEVEDORING COMPANY	)	DATE ISSUED:_____
	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order of Karen P. Goodwin, District Director, United States Department of Labor.

Donald R. Wilson (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for the claimant.

Randolph B. Harris (SAIF Corporation), Portland, Oregon, for the employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order (Case No. 14-50341) of District Director Karen P. Goodwin awarding an attorney's fee to claimant's counsel 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).

On November 19, 1979, while working for employer, claimant sustained an injury to his lower back. Employer voluntarily paid claimant various periods of temporary total and temporary partial disability, and claimant periodically attempted to return to light duty work at the shipyard. After being diagnosed as having a herniated lumbar disk, claimant sought permanent partial disability compensation under the Act pursuant to 33 U.S.C. §908(c)(21). In a Decision and Order

dated September 2, 1982, the administrative law judge determined that claimant sustained a 20 percent loss in his wage-earning capacity and awarded him permanent partial disability compensation under Section 8(c)(21) based upon an average weekly wage of $637.77. The administrative law judge further found that employer was not entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On May 9, 1991, employer sent claimant a letter, informing him that he was to report on May 31, 1991, to Medical Consultants Northwest for an independent medical examination, and that failure to do so could result in employer's initiating proceedings to suspend claimant's disability benefits pursuant to 33 U.S.C. §907(d)(4) (1988).[1] The letter also advised claimant that if he was represented by counsel, he should show the letter to his attorney. On May 13, 1991, claimant contacted his attorney. Claimant subsequently underwent the examination.

Thereafter, claimant's attorney filed a fee petition for work performed in connection with this examination from May 13, 1991 through December 1, 1991, requesting $618.75 for 3 3/8 hours of services.[2] In a letter attached to the fee petition, counsel argued that he was entitled to an attorney's fee payable by employer because employer had notified claimant that it was scheduling him for a medical examination for the purpose of potential modification of his disability benefits pursuant to Section 22 of the Act, 33 U.S.C. §922. In a letter dated January 31, 1992, the district director informed claimant's counsel that she was approving the $618.75 fee request as reasonably commensurate with the necessary work performed with the fee to be paid by employer. Employer thereafter submitted two letters of objection in which it argued that it was not liable for the fee because claimant's examination had not been scheduled for the purpose alleged by claimant's counsel, and that it was merely exercising its right to periodically obtain an examination of its injured workers in order to "clarify" claimant's current medical condition pursuant to company policy, Section 7(d)(4) of the Act, and 20 C.F.R. §§702.406-412. Employer also contended that there was no basis for assessing a fee against it pursuant to Section 28(b) of the Act, 33 U.S.C.§928(b), since no controversy existed which required the services of an attorney. Accordingly, employer requested that the district director either reject the fee request in its entirety or hold claimant liable for the fee.[3]

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[1]Section 7(d)(4) of the Act, 33 U.S.C.§907(d)(4)(1988) provides that an employer may suspend payment of further compensation if its employee unreasonably refuses to submit to an examination by a physician selected by the employer.

[2]Counsel did not list his hourly rate on the fee petition.

[3]Employer affixed an affidavit from its Federal Claims Manager, Craig Kuhns, to the January 31, 1992, letter. In this affidavit, Mr. Kuhns asserted that employer has a company policy of scheduling claimants who have received "significant unscheduled permanent disability awards" for periodic medical examinations, and that the policy was established for the evaluation of claimants' need for ongoing medical care and for information on health conditions affecting "life expectancy" to project future compensation costs. Mr. Kuhns further indicated that the examination scheduled for claimant was done pursuant to the above policy and not, as claimant's counsel suggested, for the purpose of potential Section 22 modification.

By letter dated February 24, 1992, the district director acknowledged employer's January 31, 1992 and February 7, 1992, letters of objection but affirmed her prior finding of fee liability. The district director informed employer that although it had the right to schedule medical examinations periodically to evaluate claimant's current condition and Section 22 modification ultimately was not requested, employer nonetheless is liable for claimant's attorney's fee as Section 22 modification was a potential issue that could affect claimant's compensation and it was reasonable and necessary for claimant's attorney to become involved to protect his interests. In this letter, the district director also stated that if any party requested, she would issue an Order to that effect which could be appealed to the Benefits Review Board.

On March 12, 1992, the district director issued a Compensation Order consistent with her January 31, 1992, and February 24, 1992, findings. In this Order, the district director reiterated that because the scheduling of claimant's medical examination raised the possibility of modification of claimant's disability award, employer is liable for reasonable and necessary attorney services performed relating to the scheduling of the examination.

On appeal, employer argues that the district director erred in holding it liable for claimant's counsel's fee inasmuch as no controversy existed between the parties as to employer's right to obtain an independent medical examination, employer did not controvert claimant's entitlement to compensation or petition for Section 22 modification, and claimant did not receive more compensation than had previously been awarded as a result of his attorney's efforts. Employer contends that if any attorney's fee is due, claimant should be held liable. Claimant responds, urging that the district director's fee award be affirmed.[4]

We affirm the district director's finding that employer is liable for the attorney's fee incurred in connection with claimant's compulsory medical examination. The district director rationally determined that while employer has the right to schedule periodic medical examinations to evaluate claimant's condition, doing so raises the potential issue of modification of claimant's disability award under Section 22. Employer also noted in its initial letter, moreover, that claimant's failure to comply could have serious consequences. On these facts, the district director rationally concluded that employer is liable for the attorney's services incurred in connection with employer's scheduling the medical evaluation.

Accordingly, the Compensation Order of the district director awarding claimant's counsel an attorney's fee payable by employer is affirmed.

SO ORDERED.

[4]Claimant attached a copy of an unpublished Board case, *Ollison v. Port of Portland*, BRB No. 88-1246 (April 24, 1991), to his response brief on appeal. The Board has previously stated that unpublished decisions lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge