BRB Nos. 93-1164

DAVID V. FRANZEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTERN TRANSPORTATION	)	DATE ISSUED:
	)	
and	)	
	)	
JAMES RIVER CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order-Approval of Attorney's Fee Application of Karen Goodwin, District Director, United States Department of Labor.

David A. Hytowitz (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for the claimant.

Delbert J. Brennemen (Hoffman, Hart & Wagner), 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-Approval of Attorney Fee Application (14-108308) of District Director Karen Goodwin 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).

While working for employer, claimant suffered injuries to his lower back on April 6, 1989, July 16, 1990, and July 19, 1991. Claimant began receiving treatment for his back condition from a chiropractor at the Robinwood Chiropractic Clinic. Although a dispute apparently arose between the parties regarding employer's liability for this treatment, on September 27, 1991, employer ultimately agreed to pay for some medical bills. On October 17, 1991, employer filed a notice of

controversion, asserting that it was only responsible for chiropractic care involving manual manipulation of the spine to correct subluxation. According to employer, since that time no further chiropractic or other medical bills have been submitted or paid. The case did not proceed to a formal hearing. On December 9, 1992, claimant's attorney filed a fee petition with the district director in which he requested $1,181.25, representing 6 and 3/4 hours at $175 per hour. It is unclear from the administrative file whether employer filed objections. In a Compensation Order-Approval of Attorney Fee Application dated January 28, 1993, the district director summarily concluded that claimant's counsel rendered services necessary in the successful prosecution of the compensation case and awarded counsel the entire requested fee.

Employer appeals the fee award, contending that inasmuch as claimant's counsel was not retained until August 1992, more than 10 months after the chiropractic bills had been paid, and no other bills have been paid or are owing, the district director erred in holding employer liable for the fee as counsel obtained no additional compensation and did not successfully prosecute the claim. In the alternative, employer maintains that the fee awarded is excessive in light of the fact that no additional compensation was obtained and that a fee was requested for two individuals to interview the claimant initially, one of whom, TH, was unidentified. Claimant responds that counsel's representation actually commenced on August 8, 1991, and he was instrumental in obtaining the September 27, 1981, payment of medical bills; thus, counsel was successful in prosecuting the claim and employer is liable for a fee. Claimant further responds that time was charged for one individual, Tina Hanson, counsel's legal assistant, to conduct the claimant's initial interview but concedes that this time should have been billed at $45 rather than $175 per hour initially claimed. Claimant has attached an amended fee petition and accompanying affidavit to his appellate brief which reflects this concession and the fact that the services being claimed before the district director were actually performed between August 8, 1991, and June 1, 1992, rather than between August 8, 1992 and June 1, 1992, as was stated in the initial fee petition, attributing the discrepancy to scrivener's error. Employer replies to claimant's response brief, asserting that inasmuch as carrier paid no more than it was legally obligated to pay, and claimant received no greater compensation than he would have received without using an attorney, the district director erred in holding it liable for the fee. In the alternative, however, employer asserts that if it is deemed liable for the fee, the amount of the fee should be limited to the services incurred between August 8, 1991, and September 27, 1991, when the medical bills that were covered were paid in full, asserting that no additional compensation was obtained after that date.

We are unable to resolve the issues presented in this fee appeal in light of the scanty information in the administrative file, counsel's amendments of his fee petition on appeal, and the summary nature of the district director's fee award.[1] We therefore vacate the fee award and remand the case for further consideration of counsel's amended fee petition and any properly filed objections.

Accordingly, the District Director's Compensation Order approving counsel's fee is vacated, and the case is remanded for additional consideration of the fee award 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

[1]The file transmitted to the Board contains only the fee petition filed by claimant and the fee award. If the fee petition was properly served and employer did not timely object to it, then the district director properly entered a summary award. If employer objected to the fee petition, the objections must be considered, and the district director must explain her basis for finding employer liable for the fee and enter an award in compliance with 20 C.F.R. §702.132. Although both parties attach documents supporting their respective positions to their appellate briefs, these documents, if relevant, must be addressed in the first instance by the district director.