

JEFF OELSCHLAGER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WESTERN TRANSPORTATION)	DATE ISSUED:
)	
and)	
)	
CONSTITUTION STATE)	
SERVICES)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Compensation Order- Approval of Attorney's Fee Application and Order Denying Reconsideration of Karen P. Staats, District Director, United States Department Of Labor.

David A. Hytowitz (Pozzi, Wilson, & Atchison), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart, and Wagner), Portland, Oregon, for employer/carrier.

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

Claimant appeals the Compensation Order- Approval of Attorney's Fee Application and Order Denying Reconsideration of District Director Karen P. Staats rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et seq.* (the Act). An award of attorney's fees is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock, Inc.*, 12 BRBS 272 (1980).

On November 19, 1992, claimant, a warehouseman, sustained an injury to his right foot. Employer paid temporary total disability and medical benefits. Claimant sought additional compensation and medical benefits under the Act. On June 25, 1996, the second day of the hearing before the administrative law judge, the parties stipulated that

claimant was entitled to permanent partial disability compensation for a 7 percent permanent physical impairment under the schedule based upon an average weekly wage of \$377, that claimant's claim for medical benefits would remain open, and that fees and costs would be paid by the employer/carrier. The parties further agreed that claimant's counsel was to file a fee petition, that employer was to be provided with an opportunity to object, and that the administrative law judge would award a fee for work performed both before himself and the district director, provided that there was no dispute between the parties regarding the amount of the fee. In a June 26, 1996, letter to claimant's counsel, employer's counsel confirmed that it agreed to pay claimant compensation for a 7 percent impairment of his right foot, ongoing medical benefits, and attorney's fees and costs as determined by the administrative law judge. On July 3, 1996, claimant's counsel filed a fee petition in which he requested a total of \$12,356 for 20.25 hours of work before the district director and 42.375 hours of work before the administrative law judge based on an hourly rate of \$175 for work performed prior to January 1, 1995, and \$200 per hour thereafter, plus \$3,948.05 in costs. Employer filed objections, and claimant replied to employer's objections.

On August 2, 1996, the administrative law judge issued a Decision and Order in which he awarded claimant compensation consistent with the stipulations of the parties and awarded claimant's counsel a fee of \$7,853.12, plus \$3,948.05 in costs for work performed him. In his Decision and Order, the administrative law judge further determined that in light of employer's objections, he did not have jurisdiction to award a fee for work performed before the district director and directed counsel to file an application for this fee with the district director.

Thereafter, claimant's counsel submitted a fee petition to the district director, requesting \$4,025, representing 20.125 hours at \$200 per hour for work performed between March 4, 1994, and December 16, 1995, plus \$750 for 3.75 hours at \$200 per hour for work performed following the issuance of the administrative law judge's Decision and Order. Employer filed objections. On September 19, 1996, the district director issued a Compensation Order awarding claimant's counsel a fee of \$4,156.26, representing 23.75 hours at \$175 per hour. Finding that a dispute developed between the parties regarding claimant's entitlement to permanent disability compensation as early as June 6, 1995, the district director found that employer was liable for fees incurred after that date, or \$2,821.88, while claimant was liable for the remaining \$1,334.38 for work performed prior to the first indication of permanency.¹

¹Employer was held liable for the 16.125 hours in services performed after June 6, 1995, while claimant was held liable for 7.625 hours of services performed prior to June 6, 1995. Claimant does not challenge the findings regarding the date of controversy and the number of hours for which each party is responsible.

Claimant thereafter requested reconsideration of the district director's fee award, contending that she erred in holding claimant liable for the fees incurred prior to June 5, 1995, since under the terms of the parties' agreement, employer agreed to pay all fees. Employer responded to claimant's motion, arguing that while the parties had agreed that employer was to pay claimant's counsel a reasonable fee, whatever that turned out to be, employer retained the right to object and did not stipulate that claimant would not be held liable for some portion of the fee. Claimant replied, reiterating that because the parties had agreed that all fees were to be paid by employer subject only to employer's objections regarding the reasonableness and the necessity of the services claimed, the district director erred in holding claimant liable for a portion of the fee.

On October 16, 1996, the district director issued a letter Order denying reconsideration, explaining that with the exception of a June 26, 1996, letter from employer's counsel indicating that employer would pay all fees approved by the administrative law judge, there appeared to be no record of any agreement between the parties regarding fees before the district director. The district director further noted that in its objections to claimant's fee petition filed on September 4, 1996, employer did in fact argue that claimant should bear responsibility for part of the fee.

Claimant appeals the district director's fee award. Claimant's sole argument is that in light of the parties' agreement that employer was responsible for all fees and costs, the district director erred in holding claimant, rather than employer, liable for fees for work performed prior to the time a controversy arose. Employer responds that, pursuant to the parties' agreement, it agreed to pay claimant's counsel a reasonable fee dependant upon the objections sustained and that because one of the objections it made was that it was not liable for fees incurred prior to the date a controversy arose, the district director did not err in holding claimant liable for those fees.² Claimant replies that the district director erred in

²Although employer has attached an affidavit from its counsel in support of the arguments it made in its response brief, claimant correctly asserts in his reply brief that the Board may not consider this evidence as it was not part of the administrative file or the record before the administrative law judge. See generally *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Similarly, employer's argument that claimant should be liable for fees incurred through the August 1995 informal conference will not be addressed, as it is raised in a response brief, rather than in a cross-appeal. See *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

assessing fees in during the period of voluntary temporary disability payments against claimant, depriving him of the benefit of the bargain of the parties' arms-length agreement. Claimant asserts that while employer retained the ability to object to the number of hours and hourly rate claimed, its right to object did not extend to contesting its liability for a part of the fee. Finally, claimant avers that if the terms of the parties' agreement are not clear from the record, the Board should remand for the administrative law judge to construe the terms of the settlement.

We find no merit to claimant's argument that his July 3, 1996, fee petition filed with the administrative law judge and the June 26, 1996, letter from employer's counsel confirming the terms of the parties' agreement conclusively establish that employer agreed to bear responsibility for all fees and costs in addition to the compensation paid to claimant. These documents contain language supporting the district director's conclusion that employer only agreed to pay claimant a reasonable fee subject to its objections. Employer objected to fees for work during the period of voluntary temporary total disability, and the district director sustained this objection. Nothing in the referenced documents limits the scope of employer's objections. The June 26, 1996, letter from employer's counsel confirming the terms of the parties' agreement states that employer agreed to pay claimant's attorney's fees and costs as approved by the administrative law judge. Claimant's counsel's July 3, 1996, letter forwarding his fee petition to the administrative law judge specifically states that employer is responsible for all fees and costs in this matter, subject to employer's objections. In addition, the administrative record and the hearing transcript support the district director's determination that employer did not waive its right to object to the fee petition filed by claimant's counsel in any respect. As employer specifically objected to liability for fees incurred prior to the time a controversy arose, the district director did not err in addressing the objection. Because the record supports the district director's conclusion that the parties did not agree that employer would pay all fees incurred before her office, and claimant does not raise any other issues challenging the district director's award of an attorney's fee, the fee awarded by the district director is affirmed.

Accordingly, the district director's Compensation Order- Approval of Attorney's Fee Application and Order denying reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge