

ROBERT CABRAL)	
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Claimant-Respondent)	
)	
v.)	
)	
HEALY TIBBITTS BUILDERS, INCORPORATED)	DATE ISSUED:
)	
Self-Insured Employer- Petitioner)	DECISION and ORDER

Appeal of the Order of Dismissal and Order Denying Employer's Motion for Reconsideration of James Guill, Administrative Law Judge, United States Department of Labor, and the Compensation Order Award of Attorney Fees and Compensation Order Award of Attorney Fees on Reconsideration of Joyce L. Terry, District Director, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order of Dismissal and Order Denying Employer's Motion for Reconsideration (95-LHC-1763) of Administrative Law Judge James Guill, and the Compensation Order Award of Attorney Fees and Compensation Order Award of Attorney Fees on Reconsideration (Case No. 15-39103) of District Director Joyce L. Terry 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). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). 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).

Claimant's counsel submitted an attorney's fee application to the district director for work performed before the Office of Workers' Compensation Programs (OWCP) between March 20, 1995, and April 18, 1995, requesting a total fee of \$795.¹ In her Compensation Order dated December 6, 1996, the district director awarded counsel an attorney's fee of \$332.50, representing 4.1 hours of work by counsel at an hourly rate of \$150, and 3.8 hours of work by counsel's legal assistant at an hourly rate of \$100. In response to employer's motion, the district director issued a Compensation Order on Reconsideration in which she reduced the awarded fee by \$23 due to a mathematical error.²

Employer subsequently filed an LS-18/Pre-Hearing Statement seeking *de novo* review of the district director's Compensation Orders before the Office of Administrative Law Judges on the grounds that the district director failed to consider its contention that claimant's counsel was not the attorney of record at the OWCP until April 12, 1995, and thus was not entitled to any attorney's fee for work performed prior to that date. In his Order of Dismissal, the administrative law judge rejected employer's request for a hearing, concluding that he does not have subject matter jurisdiction over the district director's attorney's fee award.³ Employer's motion for reconsideration was subsequently denied by the administrative law judge in his Order dated April 2, 1997.

¹Below is a brief synopsis of the procedural history of this case. Claimant, as a result of a back injury sustained while working for employer as a crane operator aboard a crane barge on September 26, 1994, filed claims seeking compensation under both the Jones Act and Longshore Act. With regard to the claim brought under the Jones Act, the United States Court of Appeals for the Ninth Circuit determined that claimant was a land-based worker with only a transitory or sporadic connection to the barge, and thus concluded that claimant was not a seaman entitled to compensation under the Jones Act. *Cabral v. Healy Tibbitts Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997), *petition for cert. pending*, No. 97-1346. Accordingly, the Ninth Circuit affirmed the district court's decision to grant summary judgment in favor of employer. *Id.* With regard to the claim brought under the Longshore Act, Administrative Law Judge Paul A. Mapes, by Decision and Order issued April 5, 1996, determined that claimant is not entitled to disability benefits on the grounds that claimant failed to show that at any relevant time he was unable to perform the duties of a crane operator. Judge Mapes, however, awarded medical benefits and subsequently issued a Supplemental Decision and Order Awarding Attorney's Fees to claimant's counsel for work performed at the Office of Administrative Law Judge level totaling \$3,052.50. Judge Mapes' decisions were not appealed to the Board.

²We correct the district director's error in recalculating the fee owed to claimant's counsel, and thus modify her Compensation Order Award of Attorney Fees on Reconsideration to reflect that counsel is awarded \$309.50, rather than the \$309 stated by the district director.

³The administrative law judge specifically determined that he does not have the authority to review the adequacy of a fee award for services performed before the district director.

On appeal, employer challenges the administrative law judge's Order of Dismissal and subsequent denial of its motion for reconsideration, and the district director's Compensation Orders awarding an attorney's fee. Claimant responds, urging affirmance

Employer argues that the administrative law judge erroneously assumed that employer sought to challenge the adequacy of the contested fee award, when, in actuality, its request for a *de novo* hearing is premised on the district director's failure to address what it considers a legal/factual issue presented below, *i.e.*, whether/how long claimant's counsel was the attorney of record at the OWCP level. Employer asserts that as the district director is relegated to a purely administrative role, she has no authority to make findings of fact and as employer maintains that the dispute involves a question of fact with regard to the fee awarded by the district director, it has an absolute right to a hearing before the administrative law judge. Consequently, employer requests that the administrative law judge's Orders of Dismissal be vacated and the case be remanded for a formal hearing on the relevant issue as to when claimant's counsel became the counsel of record with the OWCP.

Section 28(c) of the Act, 33 U.S.C. §928(c), and 20 C.F.R. §702.132 provide that an attorney seeking a fee shall make application to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed. It is therefore well-settled that each adjudicatory level must set the appropriate award of an attorney's fee for the services performed before it. *See generally Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980); *Owens v. Newport News Shipbuilding & Dry Dock Co.*, 11 BRBS 409 (1979). Moreover, the Board has held that disputes over attorney's fee awards before the district director are typically not within the adjudicatory power of the administrative law judge, and thus are directly appealable to the Board. *See Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205 (1986).

The Board has enunciated three basic principles regarding whether a district director's action should be reviewed by an administrative law judge or by the Board. *Id.* First, review of discretionary acts of the district director must be undertaken by the Board. *Glenn*, 18 BRBS at 205; *see generally Mazzella v. United Terminals, Inc.*, 8 BRBS 755, *aff'd on recon.*, 9 BRBS 191 (1978). Second, the proper route for appeal of the district director's determination of strictly legal issues is directly to the Board. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting); *Glenn*, 18 BRBS at 205; *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614 (1981); *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979). Finally, when a fee dispute involves questions of fact the case must be referred to an administrative law judge. *Glenn*, 18 BRBS at 205; *Mazzella*, 8 BRBS at 755.

Employer in the instant case states that the relevant issue centers on the district director's failure to consider its argument relating to the date counsel became the attorney of record. *See* Employer's Brief in Support of Petition for Review at 2-7. Employer also notes its argument involves a legal/factual determination for which it is entitled to a formal hearing before an administrative law judge. *Id.* Contrary to employer's contentions, it is

not entitled to a formal hearing before an administrative law judge with regard to the district director's alleged error in awarding an attorney's fee for work performed at that level.⁴ 33 U.S.C. §928(c); 20 C.F.R. §702.132; *Revoir*, 12 BRBS at 524; *Owens*, 11 BRBS at 409; see also *Jarrell v. Newport News & Dry Dock Co.*, 19 BRBS 216 (1987); *Glenn*, 18 BRBS at 205. First, the instant case presents, in part, a question over whether the district director properly determined the number of compensable hours, and thus concerns the adequacy of the fee award, which falls within the district director's discretionary authority. In addition, the relevant issue as outlined by employer, *i.e.*, whether the grounds for employer liability under Section 28 are met, involves a legal interpretation.⁵ *Glenn*, 18 BRBS at 205. Consequently, as there are no questions of fact at issue with regard to the district director's attorney's fee award, those awards should have been directly appealed from the district director to the Board. *Jarrell*, 19 BRBS at 216; *Glenn*, 18 BRBS at 205. The administrative law judge's dismissal of employer's request for a hearing on the district director's award of an attorney's fee for services rendered before her in this case is therefore affirmed.

In addition, the Board lacks jurisdiction to review the merits of the district director's Compensation Orders awarding an attorney's fee as employer did not file an appeal to the Board within thirty days of the date that the district director's order on reconsideration was filed on December 24, 1996. See 33 U.S.C. §921(a); 20 C.F.R. §§802.205, 702.350; *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997); see also *Ins. Co. of North America v. Gee*, 702 F.2d 411, 15 BRBS 107 (CRT) (2d Cir. 1983). Although the Board's regulations provide that a notice of appeal filed with another governmental agency or subdivision of the Department of Labor shall be considered filed with the Board as of the date it was received by that entity, where it is in the interest of justice to do so, see 20 C.F.R. §802.207(a)(2), employer's request for a formal hearing before an administrative law judge is not a notice of appeal to the Board. *Porter*, 31 BRBS at 112. Employer's request indicates that it sought further proceedings before the administrative law judge and not appellate review. *Id.* Accordingly, employer's efforts to obtain a formal hearing in this case do not evince an intent to seek Board review of the district director's Compensation Orders.⁶

⁴We further note that employer's reliance upon Sections 702.315 and 702.316, 20 C.F.R. §§702.315,702.316, for the proposition that it has an absolute right to a formal hearing before an administrative law judge upon request, is misplaced since the scope of those provisions concerns the adjudication procedures pertaining to claimant's rights to compensation for disability and/or medical benefits and thus does not concern, as is present in this case, counsel's ability to obtain an attorney's fee award. See 20 C.F.R. §§702.301.

⁵A determination of the actual date claimant's counsel filed formal notice of representation is necessary only if such a filing is relevant to employer's fee liability as a matter of law. See n. 6, *infra*.

⁶Moreover, we note that even if we were to construe employer's request for a formal

hearing as a timely notice of appeal filed before the Board, employer's contentions are nevertheless without merit. An attorney can be compensated for time spent even before claimant appoints him in writing. See *Grimm v. Director, OWCP*, 4 BLR 1-203 (1981); see generally *Liggett v. Crescent City Marine Ways & Drydock Co.*, 31 BRBS 135 (1997)(*en banc*)(Smith and Dolder, JJ., dissenting). The actual date that claimant's counsel files his notice of representation with OWCP has no bearing on the integral issue involved in awarding an attorney's fee, *i.e.*, whether the requested fee is reasonably commensurate with the necessary work done, taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. §702.132. Furthermore, inasmuch as the district director may only award an attorney's fee for work performed by counsel at that administrative level, she has already implicitly considered and rejected employer's contention that counsel is not entitled to any fee for work performed prior to the date that he filed his notice of representation. In addition, the district director explicitly concluded, in her Compensation Order Award of Attorney Fee on Reconsideration, that counsel "has explained his representation in the case." Compensation Order Award of Attorney Fee on Reconsideration dated December 24, 1996, at 1.

Accordingly, the administrative law judge's Order of Dismissal and Order Denying Employer's Motion for Reconsideration, and the district director's Compensation Order Award of Attorney Fees, are affirmed. The district director's Compensation Order Award of Attorney Fees on Reconsideration is modified to reflect that claimant's counsel is awarded a fee of \$309.50. In all other regards, the district director's Compensation Order Award of Attorney Fees on Reconsideration is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge