BRB No. 91-1182

MINNIE MOORE (Widow of WILLIAM MOORE)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:_____
WESTERN PIPE & STEEL CORPORATION	)	
and	)	
CHUBB PACIFIC INDEMNITY	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Compensation Order Award of Attorney's Fee of Deborah Oppenheim, District Director, United States Department of Labor.

Victoria Edises, (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Roger Levy, (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

BEFORE: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge*.

PER CURIAM:

Claimant's counsel appeals the Compensation Order Award of Attorney's Fees (13-81069) of District Director[1] Deborah Oppenheim 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). An attorney's fee award is discretionary and may only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in

[1]Pursuant to 20 C.F.R. §702.105, the term district director has ben substituted for the term deputy commissioner.

*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).

accordance with the law. See Roach v. New York Protective Covering Co., 16 BRBS 114 (1984); Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

Decedent filed an inter vivos claim in September 1986 for permanent total disability compensation resulting from asbestos exposure he sustained while working as a sheet metal worker for employer from 1940 to 1942. Concurrently, a claim was filed with the State of California Workers' Compensation Appeals Board (WCAB) for asbestos-related injury sustained in the course of decedent's subsequent employment through 1976.[2] Employer denied liability for the longshore claim, and after an informal conference which took place on December 8, 1987, the matter was referred to the Office of Administrative Law Judges for a formal hearing. On February 8, 1988, decedent died, and on June 29, 1988, the case was remanded to the district director to allow his widow, claimant in the current appeal, to file a claim for death benefits under the Act. See 33 U.S.C. §909. In February 1990, claimant's claim before WCAB was settled for $62,500 which included $9,375 in an attorney's fee. In April 1990, employer apparently offered to settle the Longshore case. When claimant refused, the case was once again referred to the Office of Administrative Law Judges for a hearing. Although a hearing was set for October 29, 1990, the parties ultimately agreed to settle the case the day before the scheduled hearing. On November 14, 1990, claimant's attorney submitted the parties' settlement application as well as an attorney's fee petition requesting $22,341.43 for services rendered from September 5, 1986 to November 13, 1990.[3] Employer objected to this fee request. On December 3, 1990, claimant submitted a revised fee petition, requesting $14,236.43 for work performed before the administrative law judge from April 12, 1990 to November 13, 1990, and $8,105 for services performed before the

[2]A civil suit was also filed against various asbestos manufacturers and suppliers.

[3]The initial fee request was for 109.25 hours of attorney work performed by Victoria Edises at $150 per hours, .6 hours of attorney work performed by Ida Kozinets at $125 per hour, 3.9 hours of attorney work performed by Gabriel Beccar-Varela at $125 per hour, .3 hours of law clerk services performed by Anne Burr-Landwehr at $85 per hour, and .7 hours of paralegal services performed by law student Sheila Cress at $85 per hour, and $4,601 in costs. A fee was also requested for the following paralegal services at $50 per hour: .9 hours of work by Jacqueline Douglas, 8.2 hours of work by Garielle Firzmaurice-Kendrick, 2.4 hours of work by Alan Siraco, .5 hours of work by Beryl Feldman, .4 hours of work by Susan Pearlman, .9 hours of work by Norma McGill; .2 hours of work by Marcia Yusavage, and .5 hours of work by Jena McLemore.

district director from September 5, 1986 to April 11, 1990.[4] On December 11, 1990, a Supplemental Petition for Attorney's Fees was submitted to the administrative law judge for services rendered from November 26, 1990 to December 4, 1990 totalling $690. On January 28, 1991, Administrative Law Judge Thomas Schneider issued a Decision and Order approving the parties' settlement and awarding claimant's counsel attorney's fees for services rendered after April 12, 1990, directing counsel to petition the district director for fees incurred prior to this date. On March 3, 1991, District Director Deborah Oppenheim awarded a fee of $4,287.50, reducing both the number of hours and the hourly rates claimed.

On appeal, claimant contends that the district director erred by substantially reducing the requested fee without providing a sufficient explanation. Specifically, claimant argues that the district director erroneously reduced the hourly rate of two attorneys, Gabriel Beccar-Varela and Ida Kozinets, from $125 per hour to $100. In addition, claimant maintains that the district director erroneously reduced the time requested for routine correspondence, document preparation and phone calls by 6.5 hours, wrongfully disallowed 11.45 hours of services as duplicative of services performed before WCAB, and wrongfully disallowed .4 hours requested for the preparation and service of the Notice of Informal Conference by Gabriel Beccar-Varela on August 27, 1987.[5] Finally, claimant asserts that the district director erred in disallowing a fee for services rendered between June 16, 1988 and June 30, 1988, when the case was initially referred to the Office of Administrative Law Judges, and in denying all paralegal and law clerk services as clerical. Employer responds, urging affirmance.

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[4]The fee requested before the district director involved the following: 48.05 hours of work performed by Victoria Edises at the rate of $150 per hour; .60 hours of work performed by Ida Kozinets at the rate of $125 per hour; 3.90 of work performed by Gabriel Beccar-Varela at the rate of $125 per hour. A request for the following paralegal services was also made: .30 hours for work by Anne Burr-Landwehr at $85 per hour; .70 hours for work by Sheila Cress at $85 per hour; .60 hours for work by Beryl Feldman at $50 per hour; 2.40 hours for work by Alan Siraco at $50 per hour; .40 hours of work by Susan Pearlman at $50 per hour; .90 hours of work by Norma McGill at $50 per hour; .20 hours of work by Marcia Yusavage at $50 per hour; and .50 hours of work by Jena McLemore at $50 per hour.

[5]Claimant concedes that the district director properly determined that claimant inadvertently billed twice for .3 hours of services rendered on January 22, 1990.

Initially, we reject claimant's assertion that the district director erred in reducing the hourly rate of Gabriel Beccar-Varela and Ida Kozinets. The district director reduced the hourly rate requested for these attorneys from $125 to $100 based on their relative lack of experience. Inasmuch as the $100 hourly rate awarded is not unreasonable, and claimant's unsupported assertion that a higher hourly rate is warranted is insufficient to prove that the district director abused her discretion in setting the hourly rate, we affirm this reduction in the hourly rate. See Roach, 16 BRBS 114; See generally Mijangos v. Avondale Shipyards Inc., 19 BRBS 15 (1986), rev'd in part on other grounds, 948 F.2d 941 (5th Cir. 1991); LeBatard v. Ingalls Shipbuilding Div., Litton Systems, Inc., 10 BRBS 317 (1979).

Claimant's assertion that the district director erred in allowing only 6.5 hours of the ten hours claimed for review of routine correspondence, telephone discussions, and correspondence with various parties, is similarly without merit. In reducing the time claimed for these services, the district director noted that although .3 or more hours had been charged for each of the entries involved, no more than .1 hours was warranted. As claimant has failed to demonstrate that the district director abused her discretion in determining that the itemized charges claimed for these entries were excessive, we affirm her determination in this regard. See Snowden v. Ingalls 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).

Claimant's assertion that the district director erred in disallowing a fee for the services rendered from June 16, 1988 to June 30, 1988, is also rejected. Although claimant concedes that the case was before the Office of Administrative Law Judges during this period, claimant maintains that the district director erred in failing to award a fee for these services because the administrative law judge specifically indicated in his fee award that he would only consider services rendered after April 12, 1990, and instructed claimant to seek fees and costs incurred prior to that date with the deputy commissioner. Because the district director has no authority to award attorney's fees for work performed before the administrative law judge, and it is undisputed that the services in question were rendered while the case was before the administrative law judge, the district director's denial of a fee for the services rendered from June 16, 1988 to June 30, 1988 is affirmed. See generally Miller v. Prolerized New England Co., 14 BRBS 811 (1981), aff'd, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982); Owens v. Newport News Shipbuilding and Dry Dock Co., 11 BRBS 409, 419 (1979); 20 C.F.R. §702.132(a). Claimant's counsel should submit a fee petition for these services to the administrative law judge, who was apparently unaware that the case had been referred to the Office of

Administrative Law Judges on another occasion prior to the April 12, 1990, referral.

Claimant also argues that the district director erred in deleting 11.45 hours of services which "appear[ed] to be duplicative" of WCAB case work. Services which related solely to the California claim are not compensable under the Longshore Act. See Jenkins v. Maryland Shipbuilding & Dry Dock Co., 6 BRBS 551 (1977). An attorney's fee may be awarded, however, for services performed in a collateral action when the services are necessary to establishing entitlement under the Longshore Act. Eaddy v. R.C. Head & Co., 13 BRBS 455 (1981). Thus, counsel may receive a fee under the Longshore Act for services related to the state claim which were also necessary to the claim under the Longshore Act. When, however, as in this case, counsel has been paid for certain services pursuant to a state act, double recovery is not permitted. An attorney may not be paid twice for the same work even if that work is found necessary to establish entitlement under this Act. Before claimant may receive a fee for services which were performed in conjunction with the state claim, claimant must show that the services being claimed were necessary to establish entitlement under the Act and that claimant's attorney has not previously been compensated for these services under the state act. Roach v. New York Protective Covering Co., 16 BRBS 114, 116 (1984). Inasmuch as the district director did not consider claimant's entitlement to a fee for services performed in conjunction with the state claim under this standard, we vacate her disallowance of the 11.45 hours which she found to be duplicative of services rendered in the state claim and remand the case for reconsideration of this issue. In order for counsel to be compensated for services performed in conjunction with the state action, counsel must submit a copy of the California fee award and demonstrate to the district director on remand that no fee has previously been received for the services being claimed as compensable under the Longshore Act. See Roach, supra. See generally Turner v. New Orleans (Gulfwide) Stevedores, 5 BRBS 464 (1977), rev'd on other grounds, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

We also agree that the district director erred in disallowing all of the services performed by the law clerks and paralegals as clerical. While time spent on traditional clerical duties is not compensable and should be included in the attorney's overhead, see Staffile v. International Terminal Operating Co., 12 BRBS 895 (1980), work performed by law clerks and paralegals which is usually performed by attorneys is compensable and separately billable. Quintana v. Crescent Wharf & Warehouse. Co., 18 BRBS 254 (1986). In disallowing all of the services claimed for the law clerks and paralegals, the district director summarily found that all of the services claimed were secretarial in nature or involved correspondence which was also undertaken by the attorneys. Our review of the fee petition, however, reveals that several of the charges involved were not clerical, i.e., writing letters and reviewing the file, and that the correspondence

generated by the paralegals does not appear to significantly overlap that generated by the attorneys. Because the district director arbitrarily disallowed all law clerk and paralegal services sought without careful consideration of the type of work performed, we vacate her determination that all such services are non-compensable and remand to allow her to reconsider the compensability of these services in light of the particular work involved. See Quintana, supra.

We also agree with claimant that the district director erred in disallowing the .4 hours claimed on August 27, 1987, for the preparation and service of the Notice of Informal Conference by Gabriel Beccar-Varela on the basis that the services performed were clerical. Inasmuch as the preparation and service of the Notice of Informal Conference is clearly the type of work usually performed by an attorney, we reverse the district director's determination that this service is non-compensable and remand for the district director to consider whether the time claimed for this service was reasonable.

Accordingly the district director's Order Awarding Attorney's Fees is affirmed insofar as it relates to the reductions in the applicable hourly rate, time reductions for routine correspondence and phone calls, and the denial of a fee for services rendered while the case was before the administrative law judge. The denial of a fee for the preparation and service of the Notice of Informal Conference on August 27, 1987 is reversed, and the district director is instructed to consider the reasonableness of the time claimed for this service on remand. The district director's disallowances of 11.45 hours of the services claimed as duplicative of work performed before WCAB and the paralegal and law clerk services claimed as non-compensable are vacated, and the case is remanded for further consideration of these issues consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge