BRB Nos. 90-1508
and 92-0633

TYRONE BYRD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK & SHIP-BUILDING CORPORATION	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeals of the Supplemental Decision and Order Awarding Attorney's Fees of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor and the Compensation Order-Award of Attorney's Fees of N. Sandra Kitchen, District Director, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Winn Faulk, Mobile Alabama, for self-insured employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees (89-LHC-207) of Administrative Law Judge A. A. Simpson, Jr. and the Compensation Order-Award of Attorney's Fees (6-100416) of District Director N. Sandra Kitchin 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 may only be set aside if shown to be arbitrary, capricious, an abuse of discretion or not in 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).

*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).

Claimant, a retired chipper and caulker, was exposed to injurious levels of noise throughout his employment with employer from 1963 to 1988. On January 6, 1987, claimant filed a claim for

compensation, and the district director provided employer with formal notice of the claim on March 16, 1987. On May 27, 1989, claimant underwent audiometric testing by Jim D. McDill, Ph.D. which revealed a 13.1 percent monaural (left) hearing loss. Three days later, employer served a written "offer of judgment" on claimant, which stated that it offered to have an award of compensation entered against it based on the May 27, 1989 audiogram or, in the alternative, to have the administrative law judge direct an independent medical examination under 33 U.S.C. §907(e), (f). The offer also stated employer understood that interest and an award of a reasonable attorney's fee, subject to employer's rights to notice and an opportunity to be heard, would also be entered against it. Thereafter, on October 17, 1989, Judith B. Huffman, M.S., performed an audiogram which revealed a 13.125 percent monaural (left) hearing loss. The parties subsequently reached agreement to settle the case based on the average of the two audiograms (13.12 percent), and on January 11, 1990, the administrative law judge issued a Decision and Order Awarding Benefits pursuant to the Joint Stipulation of Facts and Conclusions submitted by the parties.

Claimant's counsel thereafter sought an attorney's fee for work performed before the administrative law judge, requesting a total fee of $3,825 for 25.50 hours of services at an hourly rate of $150, plus $35 in expenses. In a supplemental Decision and Order, the administrative law judge reduced the hourly rate to $125, and awarded claimant's counsel a fee of $2,062.50 payable by employer,[1] representing 16.5 hours at $125 per hour.

Claimant's counsel also requested a fee of $1,422.50 representing 9.25 hours of services at an hourly rate of $150 for work performed before the district director. After reducing the hourly rate to $100 and reducing a 1.5 hour entry to $50 per hour, the district director found the remaining hours requested reasonable and awarded claimant's counsel a total fee of $850, $400 of which was to be paid by the employer and $450 of which was to be a lien upon claimant's compensation award.[2] Employer appeals both the administrative law judge's award, No. 90-1508, and the district director's fee award, No. 92-633. Claimant responds, urging affirmance.

With regard to the appeal of administrative law judge's fee award, employer initially contends that the administrative law judge erred in holding it liable for 4.25 hours of the 6.5 hours of services performed by claimant's counsel after it made its initial "offer of judgment" on May 30, 1989. Employer argues that the May 30, 1989, offer was sufficient to preclude an award of attorney's fees for these services because the benefits claimant ultimately obtained were not materially different than those initially tendered. Claimant responds that the administrative law judge acted within his discretion in awarding a fee for these services inasmuch as the alleged offer of judgment was conditional and defective in that it failed to specify a rate of compensation on which the tendered award would be based.

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[1]The administrative law judge noted that he was precluded from considering the 9.5 hours claimed prior to October 13, 1988 for services rendered at the district director's level.

[2]The district director determined that employer was not liable for those services performed prior to the time that employer received formal notice of the claim.

Employer's contention that the administrative law judge erred in holding it liable for the services performed after employer's initial tender of compensation is rejected. This case is not one in which the employee rejected a tender of compensation, litigated the claim and thereafter received no additional compensation. *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119, 122 (1986); 33 U.S.C. §928(b). Rather, after initially controverting the claim, employer made an initial offer of settlement on May 30, 1989.[3] Because this offer did not contain a final resolution of the issues in the case, the administrative law judge did not abuse his discretion in awarding a fee for work performed after that date. As the administrative law judge found, thereafter the parties engaged in negotiations resulting in the complete agreement approved in January 1990. In its initial objections to the administrative law judge, employer contested the services rendered after its initial offer except to the extent that the services performed reflected time reasonably necessary to review the settlement documents and explaining them to the claimant. The hours expended after May 30, 1989, at issue here, involved such services, reflecting claimant's counsel's services in reaching a final settlement of this case. The final agreement specifies entitlement to specific benefits at a stated compensation rate, as well as medical benefits and eight percent interest. On the facts presented, we hold that the administrative law judge did not abuse his discretion in awarding a fee for services after employer's initial offer.

We note, however, that it is apparent from the face of the administrative law judge's Supplemental Decision and Order that a mathematical error was made in awarding the fee. Although the administrative law judge found that claimant was entitled to a fee for 16.25 hours of services at $125 per hour, in entering the fee the administrative law judge inadvertently awarded claimant a fee of $2,062.50 representing 16.5 hours at $125 per hour. In light of the aformentioned error, we modify the administrative law judge's fee award to reflect that claimant is entitled to a fee of $2031.25, representing 16.25 hours at $125 per hour consistent with his factual determinations.

We also reject employer's contention that the district director erred in allowing the .75 hours of services claimed on May 23, 1988 for reviewing the file and preparing an LS-18 form and the one hour claimed on June 6, 1988 for preparation of discovery documents. Employer argues that claimant's fee petition is defective because it is unverified and that the time itemized and the hourly rate sought for the aforementioned services, which were largely clerical, is unreasonable. Employer's argument that the petition is deficient because it is unverified will not be addressed, as it is being raised for the first time on appeal. *See Lobus v. I.T.O. Corp.*, 24 BRBS 137, 141 (1990). Employer's assertion that the fee awarded by the district director is excessive is rejected. The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. *See Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). As the services in question were not clerical in nature, and as employer has failed to establish that the district director abused her discretion in awarding the time requested for these services based on a $100 hourly rate, having specifically

[3]In his Supplemental Decision and Order, the administrative law judge states that the date of the first offer of judgment was June 7, 1989.

considered employer's objections thereto, the district director's fee award is affirmed. *See generally 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); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991).

Accordingly, the Supplemental Decision and Order of the administrative law judge is affirmed in part and modified in part. The Compensation Order of the district director is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge