

BRB No. 07-113

CARL W. ALLEN )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 AGRIFOS, L.P. ) DATE ISSUED: 06/25/2007  
 )  
 and )  
 )  
 ZURICH AMERICAN INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimant.

Lance S. Ostendorf and David L. Barnett (Ostendorf, Tate, Barnett & Wells, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (2004-LHC-1475) of Administrative Law Judge Clement J. Kennington 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).

The Board rendered a decision on the factual issues of this case in 2006. *Allen v. Agrifos, L.P.*, 40 BRBS 78 (2006). In that decision, the Board affirmed the administrative law judge's decision to admit certain evidence into the record as well as his conclusion that claimant is a maritime employee pursuant to 33 U.S.C. §902(3). *Id.* at 80, 83. Accordingly, the Board affirmed the administrative law judge's award of benefits. *Id.* at 83.

Prior to the issuance of the Board's decision, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. Counsel requested a fee in the amount of \$16,713.75, representing 84.75 hours of work at an hourly rate of \$195 and 2.5 hours of work at an hourly rate of \$75.<sup>1</sup> The administrative law judge denied employer's request to stay the attorney's fee award pending the appeal on the merits of the case. Employer filed no specific objections, but the administrative law judge reduced the fee request by 2.85 hours which he deemed duplicative or clerical. Consequently, he ordered employer to pay claimant's counsel a fee in the amount of \$16,292.25, representing 83.55 hours of work at an hourly rate of \$195.

On November 9, 2006, prior to its receipt of the Board's decision on the merits, employer appealed the administrative law judge's fee award. Employer asserts only that if the award of benefits was in error then it cannot be held liable for an attorney's fee. Claimant responds, urging affirmance.

We reject employer's arguments. The administrative law judge may enter a fee award during the pendency of an appeal; however, the fee is not enforceable until the compensation order becomes final. *See, e.g., McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Moreover, as the Board affirmed the award of benefits, and as employer did not otherwise object to the fee request, we affirm the administrative law judge's fee award.

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<sup>1</sup>The administrative law judge noted that counsel miscalculated the fee request as the hours reported in the petition actually totaled 86.4 hours and there were no entries for work attributable to a paralegal at the lower hourly rate. Supp. Decision at 1 n.1-2.

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge