

BRB No. 13-0581

LANCE MENDEZ)
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 Claimant-Respondent)
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 v.)
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 VT HALTER MARINE, INCORPORATED) DATE ISSUED: June 26, 2014
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 and)
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 AMERICAN LONGSHORE MUTUAL)
 ASSOCIATION, LIMITED)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees on Reconsideration of David A. Duhon, District Director, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney Fees on Reconsideration (Case No. 07-191889) of District Director David A. Duhon 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 attorney's fee award 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. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

The procedural history of this case is gleaned from the parties' briefs, the pleadings filed with the district director and the attachments thereto, the district director's initial Compensation Order Award of Attorney's Fees issued on August 13, 2013 (Compensation Order) and the district director's Compensation Order Award of Attorney's Fees on Reconsideration issued on September 12, 2013 (Order on Reconsideration). Claimant sustained a work-related injury to his back on April 5, 2011, for which employer voluntarily paid temporary total disability benefits for the periods of April 15 to June 9, 2011, June 19 to October 12, 2011, and October 14 to October 27, 2011. *See* Exs. B, B-1, E to Cl. Fee Petition. On October 25, 2011, employer filed a notice of controversion, indicating that payment of temporary total disability benefits was being suspended as of October 28, 2011. *See* Ex. C to Cl. Fee Petition. Thereafter, on November 16, 2011, the district director provided employer with written notice of claimant's claim for compensation for his work-related injury. *See* Order on Reconsideration at 1; Ex. B to Emp. Objection to Fee Petition. In response, employer filed a second notice of controversion dated November 22, 2011. *See* Order on Reconsideration at 1; Ex. D to Cl. Fee Petition.

An informal conference was held on January 27, 2012 regarding disputed issues involving choice of physician, reasonableness of medical care, and the calculation of claimant's average weekly wage. *See* Compensation Order at 4. Following this informal conference, the district director issued recommendations in which he agreed with claimant's average weekly wage calculation but disagreed with claimant's position that Dr. Doster, a general practitioner, was not claimant's choice of physician. *See id.* Subsequently, in response to claimant's request for reconsideration, the district director issued recommendations on February 7, 2012, in which he recommended that claimant be allowed to select a new neurologist or neurosurgeon. *See id.* Employer agreed to both accept the recommended average weekly wage and to authorize claimant's request for approval of treatment with Dr. Ronderos, a neurosurgeon.¹ *See id.* A second informal conference was held on July 19, 2012 to address the parties' disputes regarding the reinstatement of temporary total disability benefits and employer's request to have claimant examined by Dr. Smith, a neurosurgeon, for a second opinion regarding the surgery recommended by Dr. Ronderos. *See id.*; Ex. D to Emp. Objection to Fee Petition. On July 27, 2012, the district director recommended that employer reinstate its payment of temporary total disability benefits to claimant and that claimant undergo an examination by Dr. Smith. *See* Compensation Order at 3-4; Ex. D to Emp. Objection to

¹ On February 8, 2012, employer filed a notice of final payment (LS-208) reflecting that payment had been made to correct the underpayment in the previously paid temporary total disability benefits which had been based on a lower average weekly wage. *See* Ex. F to Cl. Fee Petition.

the Fee Petition. Subsequently, Dr. Smith agreed with Dr. Ronderos's surgical recommendation and employer therefore authorized the surgery which was performed by Dr. Ronderos on December 6, 2012. *See* Compensation Order at 5; Cl. Fee Petition at 4. On December 13, 2012, employer reinstated temporary total disability benefits. *See* Compensation Order at 5; Cl. Fee Petition at 5.

On July 2, 2013, claimant's counsel submitted a fee petition to the district director seeking an attorney's fee of \$17,057.63, representing 55.75 hours of services at a rate of \$300 per hour and \$332.63 in costs. Employer filed objections to counsel's fee request, asserting that an award of attorney's fees is premature until a compensation order is issued and becomes final; employer also objected to the requested hourly rate and to specific entries itemized by claimant's counsel. Claimant's counsel filed a reply and sought an additional \$2,925, representing 9.75 hours of services performed subsequent to the filing of the initial fee petition at \$300 per hour. Employer filed additional objections to claimant's initial and supplemental fee petitions.

In his initial August 13, 2013 Compensation Order, the district director rejected employer's contention that no attorney's fee can be awarded until a final "order" is issued, and he therefore found that claimant's counsel's fee petition is not premature. *See* Compensation Order at 4. The district director found, however, that Section 28(b), 33 U.S.C. §928(b), applies to this case, and he determined that the prerequisites to employer's liability under that subsection were not met; accordingly, he found that employer is not liable for claimant's attorney's fees. *See id.* at 4-5. Claimant filed a motion for reconsideration, and employer filed a cross motion for reconsideration, of this Order. In his Order on Reconsideration, the district director granted claimant's motion for reconsideration, agreeing with claimant's position that Section 28(a), 33 U.S.C. §928(a), rather than Section 28(b), is applicable to this case.² *See* Order on Reconsideration at 1-2. The district director denied employer's cross motion for reconsideration, concluding that a fee award is not premature as a successful prosecution

² The district director stated in this regard that employer stopped voluntary payments of benefits prior to November 16, 2011, when the district director served formal notice of the claim on employer and that employer filed a notice of controversion on November 22, 2011 in response to that formal notice. *See* Order on Reconsideration at 1. Employer, on appeal, does not assign error to the district director's determination on reconsideration that Section 28(a), rather than Section 28(b), is the applicable subsection. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (employer liable under Section 28(a) if it does not pay any benefits in the 30-day period after its receipt of the claim from the district director; payments made before or after the 30-day period do not affect liability under Section 28(a)).

of the claim under Section 28(a) does not require the entry of a formal compensation order awarding benefits. *See id.* at 2. The district director approved the requested hourly rate, made reductions in the time itemized and the expenses claimed, and accordingly awarded claimant's counsel a fee of \$17,990, payable by employer. *See id.* at 2-3.

Employer appeals, contending that the district director's award of an attorney's fee was premature. Claimant responds, urging affirmance. Employer filed a reply brief.

In support of its position that the district director's fee award was premature, employer asserts that there can be no "successful prosecution" under Section 28(a), 33 U.S.C. §928(a), and thus an attorney's fee cannot be assessed against employer pursuant to that subsection of the Act, until such time as a final order or award on the underlying compensation claim has been entered. We do not agree with employer that, on the facts of this case, the district director's fee award was premature. Under the plain language of Section 28(a), an employer is liable for claimant's attorney's fee if it declines to pay any benefits within 30 days after receiving written notice of the claim from the district director, and the claimant's attorney's services thereafter result in a successful prosecution of the claim. 33 U.S.C. §928(a);³ *see Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004); *see also Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116 (CRT) (5th Cir. 2003); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109 (CRT) (5th Cir. 2001). Longstanding Board precedent establishes that, at the district director level, no formal compensation order is required as the basis for a fee award under Section 28(a) where the parties' dispute has been resolved at the informal conference level and the claimant has succeeded in obtaining the benefits sought. *See Clark*, 38 BRBS 67; *Thornton v. Beltway Carpet Serv., Inc.*, 16 BRBS 29 (1983); *Taylor v. Cactus Int'l, Inc.*, 13 BRBS 458 (1981); *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980). Indeed, the

³ Section 28(a), 33 U.S.C. §928(a), provides:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the [district director], Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

Board thoroughly discussed the issue presented here in *Clark*, and rejected the contention that a fee award under Section 28(a) must be predicated on a formal compensation order awarding benefits to the claimant. *Clark*, 38 BRBS 67. The Board has stated in this regard that the parties' acceptance of a recommendation contained in the district director's memorandum of informal conference is considered an "award" of compensation for purposes of establishing a "successful prosecution" within the meaning of Section 28(a). *See Clark*, 38 BRBS at 73; *Taylor*, 13 BRBS at 461; *Baker*, 12 BRBS at 314; *see also* 20 C.F.R. §702.315. Conversely, in a case in which the parties do not accept the district director's recommendation and the dispute is not resolved at the informal level, there has not yet been a "successful prosecution" under Section 28(a). *See, e.g., Taylor*, 13 BRBS at 461.

In this case, the district director awarded claimant's counsel a fee payable by employer for work performed up to the time that claimant's fee petitions were filed and, thus, the fee award reflects claimant's success up to this point.⁴ The district director's finding of a "successful prosecution" under Section 28(a) is supported by claimant's success in securing benefits that had been contested by employer. Specifically, after disputing claimant's average weekly wage calculation, employer accepted the district director's recommendation that the compensation rate be based on claimant's average weekly wage calculation. Further, after objecting to claimant's request for a change in physician, employer agreed to the district director's recommendation to authorize treatment with Dr. Ronderos, thereby resulting in employer's authorization of the surgery performed by Dr. Ronderos. Lastly, employer ultimately accepted the district director's recommendation that claimant's temporary total disability benefits be reinstated. There is no indication in the record that the parties' disputes regarding these issues were not resolved in the course of the informal proceedings before the district director. Therefore, the benefits obtained by claimant with respect to these particular issues can be considered an "award" for purposes of Section 28(a). *See Baker*, 12 BRBS at 314; *see also Clark*, 38 BRBS 67; *cf. Taylor*, 13 BRBS at 461 (where employer did not accept the deputy commissioner's recommendation and requested a hearing on the disputed issues, there was no "award" and, thus, no successful prosecution of the claim under Section 28(a)).

According to statements made in employer's Brief in support of Petition for Review, it appears that a new issue has arisen as to whether employer has established the availability of suitable alternate employment. *See Emp. Petition for Review* at 2. Any present dispute between the parties regarding the issue of suitable alternate employment

⁴ Acceptance of employer's contention would absolve an employer of all liability under Section 28(a) in cases that never proceed to a formal hearing, despite claimant's use of an attorney to obtain benefits in a contested case.

has no bearing on claimant's success with respect to the previously disputed issues for which the district director awarded an attorney's fee. Therefore, under the circumstances presented by this case, the district director properly determined that claimant successfully prosecuted his claim under Section 28(a) and that his attorney accordingly is entitled to a fee payable by employer. *See Clark*, 38 BRBS 67; *Thornton*, 16 BRBS 29; *Baker*, 12 BRBS 309. As employer does not challenge the amount of the district director's fee award, we affirm the award of a fee in the amount of \$17,990, payable to claimant's counsel by employer, pursuant to Section 28(a), 33 U.S.C. §928(a).

Accordingly, the district director's Compensation Order Award of Attorney Fees on Reconsideration is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge