

BRB Nos. 90-1838
and 91-1883

CHARLES MUNZING)
)
 Claimant-Petitioner)
)
 v.)
)
 NEW YORK PROTECTIVE COVERING,)
 INCORPORATED) DATE ISSUED: _____)
)
 and)
)
 STATE INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeals of the Compensation Order, Denial of Reconsideration, and Order On Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

Milton Garber and Jordan N. Pederson, Jr., (Baker, Garber, Duffy & Pederson), Hoboken, New Jersey, for the claimant.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Compensation Order and Denial of Reconsideration (2-89187), and the Order On Attorney's Fees (2-92355) of District Director Richard V. Robilotti 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).¹ 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

¹By Order dated August 21, 1990, the Board consolidated claimant's appeal of the district director's August 22, 1990, Order on Attorney's Fees, BRB No. 91-1883, with claimant's prior appeal of the district director's May 30, 1990, Compensation Order and June 29, 1990, Denial of Reconsideration, BRB No. 90-1838.

*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).

of discretion or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured his back while working for employer as a mechanic on August 27, 1985. He filed a claim under the Act for this injury on September 10, 1986. Claimant also filed a claim for an occupational pulmonary condition under the Act on the same date. Employer ultimately agreed to accept liability for the August 27, 1985, back injury. On April 20, 1990, the parties entered into stipulations, agreeing that claimant was entitled to temporary total disability compensation from August 30, 1985, through August 3, 1987, based on a compensation rate of \$450.93 for a total of \$43,350.67. In addition, the parties agreed that claimant was entitled to permanent total disability benefits commencing August 4, 1987, including applicable Section 10(f), 33 U.S.C. §910(f), cost of living adjustments, resulting in \$52,503.42 in back compensation owed to claimant through October 1, 1989. The parties also agreed that thereafter claimant was entitled to a continuing award of \$492 per week subject to future Section 10(f) adjustments. Finally, the parties agreed that claimant was entitled to continuing medical benefits and that employer was entitled to a credit for payments it previously made.

The stipulations of the parties were forwarded to the district director. Claimant's counsel also submitted a fee petition for work performed before the district director in which he requested \$18,937.50 for 75.75 hours of services at an hourly rate of \$250. On May 30, 1990, the district director issued a Compensation Order in which he incorporated the parties' stipulations and awarded benefits consistent with their agreement. In this Order, the district director also summarily concluded that based on the complexity of the case, the capacity in which the representative appeared, and the amount of benefits involved, claimant's counsel was entitled to a fee of \$4,250, payable by claimant as a lien on his compensation.² See 33 U.S.C. §928(c). On June 5, 1990, claimant's counsel filed a motion for reconsideration in which he questioned the district director's substantial reduction in the fee and attempted to clarify his fee request. In this motion, claimant's counsel stated that the fee request included not only those services rendered in connection with the August 27, 1985, back injury, but also fees incurred in connection with the claim for claimant's pulmonary condition under the Act and the New Jersey State Workers' Compensation Act. Claimant's counsel also informed the district director that as a result of extensive negotiations with employer's carrier, the parties had agreed that in view of employer's concession that claimant was entitled to permanent total disability compensation for the August 27, 1985, back injury, claimant would not pursue, and would withdraw, his pulmonary claim under both the Longshore Act and the New Jersey Act. In a letter dated June 29,

1990, the district director denied reconsideration, stating that the fee was reduced because it contained "charges for work done on another claim, on a New Jersey claim, and work which could have been done by a secretary/paralegal."

Thereafter, on July 20, 1990, claimant's counsel filed a separate fee petition with the district

²The Order states that the fee of \$4,250 includes "medical expenses." It is not clear what these expenses are.

director for work performed in connection with the pulmonary disease claim. Claimant's counsel requested \$6,375 representing 25.25 hours at an hourly rate of \$250. By Order dated August 22, 1990, the district director denied the fee request, stating that as claimant's counsel had not succeeded in obtaining benefits for claimant in connection with the pulmonary disease claim, no fee could be awarded.

On appeal, claimant initially challenges the fee award made in the May 30, 1990, Compensation Order and the June 20, 1990, Denial of Reconsideration. Claimant contends that the district director erred in failing to provide an adequate explanation for his substantial reduction in the fee requested from \$18,937.50 to \$4,250. BRB No. 90-1838. Claimant also challenges the district director's determination in his August 22, 1990, Order that claimant is not entitled to an attorney's fee for services rendered in connection with his pulmonary claim. BRB No. 91-1883. Counsel argues that the pulmonary claim was an essential part of claimant's overall disability history and that the services rendered in relation to that claim were necessary to demonstrate all of this history. Counsel further contends that the fact that claimant ultimately obtained no recovery in connection with the pulmonary claim merely reflects the parties' agreement that the permanent total disability award would be based entirely on claimant's back injury. Claimant suggests that one of the reasons carrier agreed to accept liability for permanent total disability in connection with the traumatic injury claim was to have the pulmonary claim dismissed to avoid liability for related medical expenses. Claimant asserts that on the facts presented, it is patently unfair to deny a fee for all services rendered in connection with the pulmonary disease claim.

We agree with claimant that the \$4,250 fee award entered by the district director in the May 30, 1990, Compensation Order cannot be affirmed, as the district director failed to adequately explain the substantial reduction from the \$18,937.50 fee requested. An attorney's fee must be awarded in accordance with Section 28 of the Act and the applicable regulation, 20 C.F.R. §702.132, which provides that any attorney's fee must reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). While a lesser fee than that requested may be awarded where an adequate explanation for the reduction is provided, in the present case, the district director's failure to indicate whether the hourly rate was reduced and to identify and explain why specific itemized entries were allowed or disallowed renders his fee award arbitrary. *See Devine v. Atlantic Container, Inc.*, 23 BRBS 280, 288 (1990) (Lawrence, J., concurring and dissenting on other grounds). Accordingly, the district director's fee award is vacated, and the case is remanded for reconsideration consistent with the requirements of the Act and regulations.³

³On remand, the district director also should consider the issue of fee liability. While a claimant may be held liable for attorney's fees under Section 28(c) if the employer is not found to be liable under Section 28(a) or (b), in this case claimant's counsel was successful, at a minimum, in establishing claimant's right to a continuing award of permanent total disability compensation and his right to future medical benefits. In addition, the award of benefits indicates that voluntary payments were at a lesser rate than that agreed to by the parties. If claimant was successful in

We also agree with claimant that on the facts presented the district director erred in summarily denying a fee for services rendered in connection with his pulmonary disease claim. Although time spent performing work in a collateral action is generally not compensable, *see Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984)(table), a fee may be awarded for such services if counsel shows that the same services and/or their products are necessary to, and are used in prosecution of, the federal workmen's compensation claim. *See Roach v. New York Protective Covering*, 16 BRBS 114 (1984); *Eaddy v. R.C. Herd & Co.*, 13 BRBS 455 (1978). Counsel is entitled to a fee for work which was reasonable at the time it was performed and necessary to the successful prosecution of his permanent total disability claim. If, as claimant suggests, the dismissal of his pulmonary claim was a bargaining chip in the parties' negotiations and ultimate agreement that claimant was entitled to receive permanent total disability compensation for his August 27, 1985, back injury, the services rendered in connection with the pulmonary claim arguably were necessary to the successful prosecution of the claim for permanent total disability. In his August 22, 1990, Order, however, the district director summarily concluded that claimant was not entitled to a fee for any of these services because he did not obtain any benefits in connection with that claim. As the district director did not consider whether these services were reasonable and necessary due to their interrelationship with claimant's successful prosecution of his claim for permanent total disability for his back injury, a theory which was raised before him, we also vacate the August 22, 1990, Order denying a fee for these services and remand for reconsideration of their compensability.

obtaining additional compensation, it would appear that employer should be held liable for this fee pursuant to Section 28(b). *See generally Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). If claimant is deemed liable for an attorney's fee, the fee awarded must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132.

Accordingly, the Compensation Order-Award of Attorney's Fees, Denial of Reconsideration, and Order on Attorney's Fees of the district director are vacated. The case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge