

BRB Nos. 96-0302
and 96-0458

RONALD BETHEA)
)
 Claimant-Petitioner)
)
 v.)
)
 NORFOLK SHIPBUILDING AND) DATE ISSUED:
 DRY DOCK CORPORATION)
)
 Self-Insured)
)
 Employer-Respondent) DECISION and ORDER

Appeals of the Order Awarding Attorney's Fee of B. E. Voultides, District Director, United States Department of Labor, and the Supplemental Decision and Order Denying Attorney Fees of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Kimberley Herson Timms (Vandevanter, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Awarding Attorney's Fee (5-85683, 5-88699, 5-90671) of District Director B. E. Voultides, and the Supplemental Decision and Order Denying Attorney Fees (93-LHC-3410, 93-LHC-3411, 94-LHC-0800) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on claims filed pursuant to the provisions of the Longshore Harbor and 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 of discretion or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

¹Claimant's appeal of the district director's Order Awarding Attorney's Fee, BRB No. 96-0302, is hereby consolidated with his appeal of the administrative law judge's Supplemental Decision and Order Denying Attorney Fees, BRB No. 96-0458, for purposes of decision. *See* 20 C.F.R. §802.104(a).

Claimant sustained work-related injuries on July 8, 1992, and April 5, 1993. On May 20, 1993, he requested an informal conference regarding his entitlement to temporary total disability compensation from April 6, 1993 through May 13, 1993, and payment of medical bills associated with medical treatment for those injuries. An informal conference was held before the district director on June 16, 1993. In a Memorandum of Informal Conference dated June 25, 1993, the district director indicated that the case was to be held in abeyance pending the receipt of additional information and legal research from claimant's counsel in support of the claim. After claimant's counsel proffered the additional support for his claim, the district director, in a Memorandum of Informal Conference dated July 30, 1993, recommended that employer pay claimant temporary total disability compensation from April 6, 1993 to May 13, 1993, but did not address the compensability of the medical expenses. On August 10, 1993, claimant's counsel wrote to employer, inquiring whether it intended to comply with the district director's recommendation. On September 10, 1993, apparently having received no response, claimant requested a formal hearing before an administrative law judge. On September 14, 1993, the district director referred the case to the Office of Administrative Law Judges.

On September 27, 1993, employer submitted a Notice of Final Payment of Compensation, Form LS-208, which indicated that temporary total disability compensation had been paid consistent with the district director's recommendation. On November 9, 1993, claimant's counsel wrote a letter to employer's counsel, stating that the case before the Office of Administrative Law Judges "probably should be remanded," as it appeared that payment of the requested temporary total disability had been made by employer. The letter also stated that payment of medical bills associated with the July 1992 and April 1993 injuries remained unresolved, and requested that employer state its position with regard to these benefits.

Before any action was taken by an administrative law judge on the pending claims, claimant sustained a third injury on November 19, 1993. Claimant sought medical benefits only for this injury for physical therapy prescribed by Dr. Morales. By letter dated December 8, 1993, claimant's counsel informed the district director that employer had refused to accept liability for these medical expenses and attached a copy of his LS-18, Pre-Hearing Statement. The district director referred this claim to the Office of Administrative Law Judges on December 20, 1993.

On December 27, 1993, employer requested that the claim involving the November 1993 injury be remanded as there had been no informal conference on this claim. Contemporaneously, employer also made a request directly to the district director that an informal conference be held. An informal conference was held on February 2, 1994. In his Memorandum of Informal Conference dated February 3, 1994, the district director found that the issue of liability for claimant's physical therapy did not concern claimant, and stated that if the provider were to pursue the matter with the employer, he would gladly attempt to resolve the matter.

In an Order Dismissing Temporary Total Disability Claim and Remanding Proceedings dated May 4, 1994, the administrative law judge dismissed claimant's claim for temporary total

disability benefits resulting from the July 1992 and April 1993 injuries, finding that this issue was moot as these benefits had been paid. The administrative law judge also remanded the three claims pending before him to the district director for an informal conference regarding employer's liability for medical benefits. Subsequent to the administrative law judge's remand order, in July 1994, employer agreed to pay all outstanding medical bills, thereby obviating the need for an informal conference.

Claimant's counsel thereafter sought an attorney's fee of \$4,945 for work performed before the district director in connection with claimant's claims for temporary total disability compensation and medical benefits arising from the injuries he sustained on July 8, 1992 and April 5, 1993, representing 32.75 hours at \$155 per hour. The district director denied, in total, counsel's request for an attorney's fee. Counsel also sought an attorney's fee of \$5,362.50 for work performed before the Office of Administrative Law Judges in connection with claimant's claims for medical benefits, representing 35.5 hours at \$155 per hour. The administrative law judge also denied an attorney's fee. Claimant appeals both the district director's denial of an attorney's fee, BRB No. 96-0302, and the administrative law judge's denial of a fee, BRB No. 96-0458. Employer responds, urging affirmance of both decisions denying a fee.

The Fee Petition Before the District Director

In denying claimant's counsel a fee, the district director initially determined that claimant had no viable interest in establishing employer's liability for the payment of the medical bills in this case. As claimant had already received the treatment in question, the district director indicated that any dispute which existed was between employer and the health care provider. The district director further found that the fee petition was not properly documented in accordance with the applicable regulation, 20 C.F.R. §702.132, and that claimant failed to fully support, document or explain how employer was liable for payment of a fee under either 33 U.S.C. §928(a) or (b).

On appeal, claimant contends that the fee petition complies with Section 702.132, and that his success in obtaining temporary total disability compensation and medical benefits clearly justifies the request for a fee.

Claimant's arguments have merit. Contrary to the district director's determination, claimant has a viable interest in seeing that his employer is required to pay for the medical treatment previously provided, as claimant must establish entitlement to medical treatment in order for it to be paid for or reimbursed under Section 7, 33 U.S.C. §907, and employer is liable for fees incurred by claimant's counsel if he is successful in establishing employer's liability for medical treatment. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 963, 27 BRBS 14 (CRT)(5th Cir. 1993). If employer was not liable, claimant could be required to pay for these expenses. Thus, as a health care provider's entitlement to medical benefits is wholly derivative of claimant's entitlement to these benefits, the district director erred in determining that this dispute involved only the health care provider and the employer. *See generally Hunt v. Director, OWCP*, 999 F.2d 419, 423, 27 BRBS 84, 90 (CRT)(9th Cir. 1993); *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988),

aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).

The district director also erred in finding that the fee petition submitted by counsel was inadequate. As counsel's fee petition contains a complete statement of the work performed on each date, states the number of hours spent for each particular task, and was based on an hourly billing rate of \$155, the fee petition submitted complies with the regulatory criteria of 20 C.F.R. §702.132(a). *See generally Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988).

We further conclude that, on the facts presented, the district director erred in not holding employer liable for a reasonable attorney's fee under Section 28(a), 33 U.S.C. §928(a). Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). In this case, claimant's counsel sought a fee for services provided before the district director beginning on August 2, 1992, shortly after claimant's July 8, 1992, injury. The file reflects that employer did not agree to pay the temporary total disability benefits claimed until August 5, 1993, and did not complete payment of these benefits until September 27, 1993, shortly after the case had been referred to the Office of Administrative Law Judges. It is also undisputed that employer did not agree to pay any medical benefits in this case until July 1994, after the administrative law judge remanded the case back to the district director on May 4, 1994. Inasmuch as employer did not pay any benefits in this case until at the earliest one month before the referral of case to the administrative law judge and claimant's counsel was ultimately successful in establishing employer's liability for disability and medical benefits which employer had initially refused to pay, employer is liable for claimant's attorney's fee for work performed before the district director pursuant to Section 28(a). *See generally Kinnes v. General Dynamic Corp.*, 25 BRBS 311 (1992). Accordingly, we vacate the district director's Order denying an attorney's fee, and remand the case to allow him to enter an appropriate fee. BRB No. 96-0302.²

The Fee Petition Before the Administrative Law Judge

We also agree with claimant that employer is liable for a reasonable attorney's fee for counsel's services provided before the Office of Administrative Law Judges. Under Section 28(b) of the Act, 33 U.S.C. §928(b), claimant's counsel is entitled to a fee when employer voluntarily pays or tenders benefits, a controversy arises over additional compensation due, and, thereafter, claimant succeeds in obtaining greater compensation than that previously voluntarily paid by employer. *See Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Fairley v. Ingalls Shipbuilding, Inc.* 25 BRBS 61 (1991)(Decision after Remand).

²On remand, claimant's counsel should submit an amended fee petition to the district director, which includes entries for services performed prior to referral to the administrative law judge and subsequent to May 4, 1994, while the case was before the district director on remand in connection with the medical benefit claims. Counsel mistakenly included these entries in the fee petition submitted to the administrative law judge. *See infra* n. 3.

In this case, the administrative law judge summarily denied counsel's fee request, finding that there was no contested issue between the parties while the case was before him from December 1993 to May 1994. Contrary to the administrative law judge's determination, however, the issue of liability for claimant's medical bills associated with each of his injuries was in controversy during this period. Although employer had paid the temporary total disability benefits claimed in September 1993, it did not pay any of claimant's medical bills, prompting his requests for a formal hearing. Employer, however, ultimately agreed to pay the medical bills in July 1994, after the administrative law judge remanded the case for an informal conference on the medical benefits issue. As claimant's counsel was ultimately successful in obtaining these additional benefits which employer had refused to pay, employer is liable for claimant's attorney's fee pursuant to Section 28(b). *See generally Hole v. Miami Shipyards Corp.*, 640 F.2d 360, 13 BRBS 237 (5th Cir. 1981); *Rihner v. Boland Marine & Manufacturing Co.*, 24 BRBS 84 (1990), *aff'd*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995). We, therefore, vacate the administrative law judge's denial of claimant's attorney's fee, and remand the case for him to award a reasonable fee for necessary services.³

³On remand, claimant's counsel should also submit a new fee petition which limits the fee request to those services performed while the case was before the administrative law judge. *See Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The fee petition previously submitted to the administrative law judge contains both entries prior to referral of the case on September 14, 1993, and entries subsequent to May 5, 1994, when the case had been remanded to the district director.

Accordingly, the district director's Order denying an attorney's fee, BRB No. 96-0302, and the administrative law judge's Supplemental Decision and Order Denying Attorney Fees, BRB No. 96-0458, are vacated, and the cases are remanded for consideration of the attorney's fee petitions in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge