

BRB No. 01-0504

GEORGE W. FERGUSON)
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 Claimant-Respondent)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: FEB 14, 2002
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer)
)
)
 Richard B. Donaldson, Jr.)
)
)
 Petitioner) DECISION and ORDER

Appeal of the Award of Attorney's Fee of B.E. Voultsides, District Director, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant-respondent.

Bryan H. Schempf (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for petitioner.

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

PER CURIAM:

Petitioner¹ appeals the Award of Attorney's Fee (Case No. 5-92090) of District Director B.E. Voultsides rendered on a claim filed pursuant to the provisions of the Longshore and Harbor

¹This appeal is brought by claimant's first attorney, Richard B. Donaldson, Jr., for services rendered on behalf of claimant while this case was pending before the district director. Claimant, following his dismissal of Mr. Donaldson, subsequently retained the services of John H. Klein, who has filed a response brief with the Board on claimant's behalf.

Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).² 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 the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

The facts in this case are gleaned from the parties briefs and attachments. Claimant suffered an injury to his back on March 19, 1994, underwent several surgeries, and returned to light duty work with employer on October 20, 1997. During this period of time, employer apparently accepted liability for this work-incident and paid claimant compensation and medical benefits pursuant to the Act. Employer ceased making compensation payments to claimant upon claimant's return to work in October 1997. On September 14, 1994, claimant retained the services of Attorney Richard B. Donaldson, Jr., who in June 1999 attempted to induce claimant to sign an affidavit agreeing to pay a fee of \$2,400.³ Claimant, who declined to sign the proposed affidavit, subsequently dismissed Mr. Donaldson as his legal representative and contacted the district director questioning the proposed affidavit.

In response to claimant's inquiry, the district director, in a letter to counsel dated October 4, 1999, cited to the requirements necessary to justify a fee award, including explanations of claimant's liability, the complexity of the issues involved, the correlation between the representation and claimant's recovery, and claimant's ability to pay the requested amount. In response, Mr. Donaldson's office wrote the district director stating that claimant received \$62,221 in disability benefits, as well as assistance in receiving medical benefits and job rehabilitation, during his representation by Mr. Donaldson. Attached to this letter was a copy of counsel's fee petition documenting the services allegedly rendered on behalf of claimant. On August 14, 2000, the district director refused to impose liability for a fee on claimant, stating that he was unable to determine if claimant understood his counsel's representation, including its necessity and reasonableness, whether or not there had been a successful prosecution, and claimant's ability to pay the fee. On

²Although the district director titled his order an "Award of Attorney's Fee," he in fact denied the fee requested by claimant's former counsel.

³Although Mr. Donaldson apparently agreed to accept a fee of \$2,400 for services allegedly rendered on claimant's behalf, his documented fee petition indicates a fee of \$2,975, representing 19.75 hours of legal services performed at a rate of \$150 per hour and one-quarter hour of paralegal services performed at a rate of \$50 per hour.

February 1, 2001, the district director issued an Order stating, *inter alia*, that claimant's present counsel questions whether claimant's former counsel successfully prosecuted the case and that the requirements permitting the payment of a fee by claimant had not been met by claimant's former counsel. Accordingly, the district director declined to award a fee to counsel payable by claimant.

On appeal, claimant's former counsel challenges the district director's refusal to hold claimant liable for an attorney fee pursuant to Section 28(c) of the Act, 33 U.S.C. §928(c). Claimant responds, urging affirmance.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. Under Section 28(a) of the Act, 33 U.S.C. §928(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, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Under Section 28(b) of the Act, 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. 33 U.S.C. §928(b). If Section 28(a) or (b) does not apply, an attorney's fee may be made a lien upon the compensation due to claimant pursuant to 33 U.S.C. §928(c). *See generally Boe v. Dept. of the Army/MWR*, 34 BRBS 108 (2000). Under such circumstances, any fee approved must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132(a).

We agree with claimant's former counsel that the district director erred in declining to consider his fee petition listing services allegedly rendered while this case was before the district director. Claimant's former counsel, in conformance with 20 C.F.R. §702.132, has presented the district director with a fee petition itemizing the services which he allegedly rendered on behalf of claimant while this case was pending before the district director. Additionally, contrary to the district director's statement that Mr. Donaldson has not made any attempt to address the issues regarding his entitlement to a fee, claimant's former counsel has responded to the district director's inquiries in multiple correspondences. Specifically, counsel set forth the amount of compensation received by claimant, claimant's present employment status, and the issues which he addressed while representing claimant. Lastly, while the district director chastises Mr. Donaldson for his failure to create a record before an administrative law judge supportive of his position regarding the payment of a fee, the applicable regulations implementing the Act provide for the compilation of an administrative file which would give the district director the requisite information needed for the consideration of counsel's fee petition. Specifically, the regulations require that employer notify the district director of the occurrence of an injury, *see* 20 C.F.R. §702.203 *et seq.*, of the commencement or suspension of compensation payments, *see* 20 C.F.R. §702.234, and of the final payment of compensation to an employee, *see* 20 C.F.R. §702.235-236. Thus, the administrative file in the district director's possession should contain all of the information needed for that official to adequately consider the fee proposed by claimant's former counsel. We therefore vacate the district director's decision, and we remand the case for the district director to consider counsel's fee petition in accordance with Section 28 of the Act, 33 U.S.C. §928, and Section 702.132 of the regulations, 20

C.F.R. §702.132. On remand, the district director must explain why claimant is liable for counsel's fee. If claimant is found to be liable for a fee, the district director must then address whether the requested fee is reasonably commensurate with the necessary work performed, taking into consideration the quality of the representation, the complexity of the issues involved, the amount of benefits received by claimant and claimant's ability to pay the fee. *See generally Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988); 33 U.S.C. §928; 20 C.F.R. §702.132.

Accordingly, the district director's order is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge