BRB No. 02-0706

JOSEPH CACCAMO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERSTATE MAINTENANCE CORPORATION	)	DATE ISSUED: JUN 17, 2003
	)	
and	)	
	)	
THE STATE INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Compensation Order Award of Attorney's Fees (Case No. 02-78793) 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it 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).

Claimant injured his back and right leg during the course of his employment for employer on December 16, 1982. The employer has paid compensation for permanent total disability, 33 U.S.C. §908(a), since April 24, 1987. The parties'

stipulations, signed in August 1987, were formalized in a Compensation Order issued on September 3, 1987. At employer's request, Dr. Gilbert examined claimant on March 28, 2002. Dr. Gilbert opined that claimant could work four hours per day in a sedentary job that did not require sitting for more than an hour at a time. Thereafter, employer sought to have claimant undergo a vocational evaluation. Claimant's counsel objected, and he requested an informal conference with the district director.

In his Memorandum of Informal Conference, the district director noted employer's position that claimant remains entitled to continuing compensation for permanent total disability. The district director found no basis for modification of the Compensation Order, and he stated that benefits for permanent total disability will continue. Employer was reminded that a vocational counselor may not contact claimant directly but must initiate contact via claimant's attorney.

Thereafter, claimant's counsel submitted a fee request to the district director requesting $1,800, representing six hours of attorney services at an hourly rate of $300. Employer objected, contending that the tasks enumerated in the fee petition should have taken no more than three hours, and that, therefore, $900 would be a more reasonable fee. Employer also contended that, since it has continued paying claimant compensation for permanent total disability, it cannot be held liable for claimant's attorney's fee because claimant did not obtain any additional benefits. In his Order, the district director ordered employer to pay claimant's counsel a fee of $1,250. The district director did not state whether he reduced the number of hours or the hourly rate requested, nor did he address employer's contention that it cannot be held liable for claimant's attorney's fee.

On appeal, employer challenges its liability for any fee award. Claimant has not filed a response brief.

We vacate the district director's assessment of claimant's attorney's fee against employer as the award is premature in this case. At the time of the informal conference, it is undisputed that employer continued to pay claimant compensation for permanent total disability pursuant to the 1987 Order and had not yet filed a motion for modification pursuant to Section 22, 33 U.S.C. §922. As the district director stated in his Memorandum of Informal Conference, employer agreed at that time that claimant is entitled to continuing permanent total disability benefits. Employer merely attempted to have claimant meet with a vocational counselor, and the district director's recommendation included only the reminder that employer must make arrangements for such meetings through claimant's attorney. Thus, as claimant has not yet defended his entitlement to permanent total disability benefits, it is premature to hold employer liable for claimant's attorney's fee. *See generally Adkins v. Kentland Elkhorn Coal Corp.*, 109 F.3d 307 (6th Cir. 1997); *Director, OWCP v. Baca*, 927 F.2d 1122 (10th Cir. 1991); *Director, OWCP v. Palmer Coking Coal Co.*, 867 F.2d 552 (9th Cir. 1989); *Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997) (tactical victory does not entitle claimant to an attorney's fee absent

success in terms of obtaining benefits). Subsequent to employer's filing an appeal in this case, however, employer filed a motion for modification with the district director, pursuant to Section 22. If claimant succeeds in retaining entitlement to permanent total disability benefits, employer may be liable for any services necessary for the successful defense of claimant's award, including those at issue herein. Consequently, the district director's fee award of $1,250 to claimant's counsel payable by employer is vacated as it is premature.

Accordingly, the district director's Compensation Order Award of Attorney's Fees is vacated.

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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BETTY JEAN HALL
Administrative Appeals Judge